



The Necessity for Criminalizing Marital Rape in Sri Lanka

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Abstract

Marriage is a partnership of equals contrary to the traditional definition of it being a union in which the wife is supposed to be a subservient slave of the husband. In marriage, both man and woman require mutual respect and recognition as 'equals'. The notion of equality of men and women in marriage is engraved in international human rights instruments such as the UDHR, ICCPR and CEDAW. Marital rape happens because, denies the equality of spouses and thereby hindering the sexually abused lives of the spouses. Thus, to eliminate this miserable fate faced by the spouses, there must be an urgent need to remove the marital exemption for rape. Theoretical analysis of the research is conducted through qualitative data assembled through library and online sources. This research focuses on assessing the laws related to criminalizing marital rape in Sri Lanka, with an aim to review the social, legal, and moral impact of marital rape and its scandalous and controversial nature and to highlight the huge gaps and loopholes existing in the legal literature. In doing so, it is intended to focus on social, cultural, and moral barriers within society that enable this offence being swept under cultural carpet. The paper also discusses how the insane attitude of condoning marital rape could be legally addressed. Under the doctrinal approach to this research data gleaned from Statutes, Acts, Legislations, case laws, journal articles, textbooks, research papers, assessments, past case studies, reports with respect to the subject matter and related electronic data bases in reaching its conclusion. In conclusion, the researcher intends to recommend that if legislators consider rape as an offence committed against physical integrity of an individual and in turn against the whole of humanity, criminalizing marital rape and imposing suitable punishment is nothing but a social need from which the State

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cannot easily escape today.

Keywords: *Marital rape, women's rights, equality of spouses, sexual autonomy, criminalizing, physical integrity.*

Introduction

“The total statutory abolition of the marital rape exemption is the first necessary step in teaching societies that dehumanized treatment of women will not be tolerated and that the marital rape is not a husband’s privilege but rather a violent act and injustice that must be criminalized.”¹

This path-breaking and progressive judgement of the High Court of Gujarat reveals that the time has now arrived to remove the old fiction of the spousal or marital exemption for rape from the statutory book.

As recognized in modern times, marriage is a partnership of equals contrary to its traditional definition of a union in which the wife is considered as a subservient role player for the husband. Shedding light on the concept of “equal partnership in marriage”,² Kanodia and Ray (2016) emphasizes that marriage is a sanction where both man and woman gain some rights, responsibilities and duties towards each other and it requires mutual respect and recognition as “equals” in the relationship. In a broader sense, the notion of equality of men and women in marriage is etched in international treaties such as the The Universal Declaration of Human Rights (UDHR)³, The International Covenant on Civil and

1 ‘Marital Rape Is Not A Husband’s Privilege But A Violent Act An Injustice That Must Be Criminalized’ (Live Law 2018) <<http://www.livelaw.in/marital-rape-not-husbands-privilege-violent-act-injustice-must-criminalized-gujarat-hc-read-judgment/>>accessed 20.08.2022.

2 Ray, R & S Kanodia, ‘Why Penalize Marital Rape’ [2016] IOSR Journal of Humanities and Social Science 49, 49

3 The Universal Declaration of Human Rights – UDHR was adopted by the United Nations General Assembly in Paris on 10th of December 1948 (General Assembly resolution 217 A)

Political Rights (ICCPR)⁴ and The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Article 16(1) of the UDHR states that “men and women are entitled to equal rights in terms of marriage and during marriage”. Article 23(4) of the ICCPR too emphasises the same recognition. Article 16(1) of the CEDAW prescribes that “States parties shall take appropriate steps to ensure equality of rights and responsibilities of spouses during the marriage”. Hence, in that equality allows both spouses to make decisions about their sexual and reproductive lives without violating each other’s human rights and sexual autonomy.

For a long period in the human history, marriage has meant the unreservedly “consented to sex”⁵ and thus, the husband cannot be held guilty of raping his wife. Diana Russell (1990) opines that this is an extension of making the wives of their husbands to have unwanted sex, whenever the husbands wish, even with impunity.

Even though the marriage is a holy promise taken in front of God, especially in some Christian and Hindu marriage ceremonies, which are often seen as a sacred bond, to cherish the body of the spouse; yet it remains another expression of horror and dominance over a woman by a man. Nonetheless, the legal status of marriage along with matrimonial consent alludes the idea that the wife has given up herself into her husband and thereafter she cannot retract. Thus, the implied consent within the marriage contract creates a loophole, whereby husbands can easily escape from any sexual offences committed against their spouses. In other words, between the spouses there cannot be any rape and it is a legal impossibility. But unfortunately, marital rape is often misinterpreted, as a spontaneous outcome of passion, or worse as love, or rather an uncontrollable emotion; yet, by which, it cannot be equally denied

4 International Covenant on Civil and Political Rights (ICCPR) (1966)

5 Rev.Dr. Susan Brook Thistlethwaite, ‘Yes, Marital Rape Happens, and It Is Terrible’ (HUFFPOST (blog) 2015) <https://www.huffingtonpost.com/rev-dr-susan-brooks-thistlethwaite/yes-marital-rape-happens_b_7891192.html> accessed 17.08.2022.

that women undergo sexual violations when sex is demanded by their violent and abusive husbands.

Although, marital rape is the act of sexual intercourse by one spouse without the consent of the other, generally, it turns out to be a frequent form of domestic violence and grave sexual abuse against women. To constitute “rape”, the essential fault element of the offence, i.e. the absence of consent must be necessarily considered. In that sense, when a woman is being subject to rape within the marriage against her will and without her consent, it is perplexing why still there is no attempt, made to legislate criminalizing the marital rape in Sri Lanka.

No fuss over the statement that a victim of marital rape can be either a woman or a man. However, irrespective of the form of gender, still many jurisdictions and lawmakers are reluctant to criminalize it and accept marital rape as a punishable offence committed against the human body and dignity. Apart from the lackadaisical legal approach to the issue, society itself has viewed marital rape as the fate of the woman, once she entered the wedlock. Unlike in the past, now the society goes through radical changes and thus, rape is not just an ordinary crime but, in certain situations, a crime against humanity, and as such none can be exempted from the offence just because there is a marriage subsisting between the parties.

It is quite apparent that marital rape takes place because of the old-fashioned blind-theory, which denies sexual equality of the spouses. Specially still in the countries like India. (In recent years, there have been several high-profile cases that have brought the issue of marital rape to the forefront in India. Some of the outstanding cases

are: *Independent Thought vs Union of India (2017)*, *RIT Foundation vs Union of India (2019)*)⁶. Thus, to eliminate this miserable fate faced by the spouses, meaningful steps must be taken to remove the marital exemption for rape from legal liability of the perpetrator. Although the marital exemption for rape is not a feasible procedure to be carried out easily in the Eastern world, there are some other jurisdictions where marital rape is considered as an offence. To name a few, all fifty American states, three Australian states, New Zealand, Canada, France, Sweden, Denmark, Norway, Soviet Union, Poland, and Czechoslovakia. Interestingly, even Nepal, in 2006, declared marital rape as an illegal act and treated it as a criminal offence, while half of the countries in the Asian continent are still reluctant to take steps to remove the irrational exemption for marital rape. In this line, Sri Lanka is also not an exception in showing sluggish attitude in adopting what it is legally obliged to do in this area.

With the aim to steer the idea that marital rape should be criminalized and included the statutory book in Sri Lanka, as a rigorously punishable, serious, mortifying, and displeasing sexual assault against a person.

Application of Criminal Law in Sri Lanka

The scope of criminal law in Sri Lanka, the Penal Code, which was enacted as Ordinance No. 2 of 1883, contains the country's most significant penal laws regarding criminal liabilities and punishments for offences committed within the country. Nevertheless, the provisions of Sri Lanka's Penal Code for the most part it reflect the attitude of old-English law principles, mainly because the British ruled the island as a colony for one and a half century. For example,

⁶ 'Marital Rape Is Not A Husband's Privilege But A Violent Act And An Injustice That Must Be Criminalized: Gujarat HC' (Livelaw News Network 2018) <https://www.livelaw.in/marital-rape-not-husbands-privilege-violent-act-injustice-must-criminalized-gujarat-hc-read-judgment/?infinite-scroll=1> accessed 05.11.2022

“the effect of the statutory codification of English common law principle that a woman by entering into a marriage contract, gives irrevocable consent to sexual intercourse at all times,”⁷ is reflected through the exception provided by section 363 of the Sri Lanka’s Penal Code.

Prior to the Amendment Act No. 22 of 1995, as per the exception under Section 363 of the Penal Code of Sri Lanka, “sexual intercourse by a man with his own wife, the wife not being under twelve years of age, is not rape.” However, this was amended in 1995 when the English law itself rejected the common law principle of the exclusive rights of the husband over the wife. Due to strong lobbying from pressure groups against penalizing marital rape in its entirety, the 1995 Amendment was narrowed down only to outlaw marital rape between judicially separated spouses. On the other hand, since the marital rape is recognized as a serious and common form of domestic violence, in Sri Lankan context, the legal framework that protects women from their abusive husbands is the Domestic Violence Prevention Act No.34 of 2005 (PDVA). But the main concern regarding the PDVA is it only allows protection for the victims of the offences contained in Chapter XVI of the Penal Code, whereby in all circumstances brushed off filing cases related to marital rape. This is another restrictive approach of the statutory law, where it excludes the application of marital rape offence. Marital rape is considered as to be a form of domestic violence and sexual abuse, so defined as the act of sexual intercourse by one spouse without the consent of the other. In this domestic violence and marital rape is taken a women centric approach and treated the woman as a victim according to the interpretation of rape in the Penal Code, as an act committed by a ‘man’ and ‘penetration is sufficient to constitute the sexual intercourse necessary to the

7 ‘Re-visiting Our Right to Choice’ (Sunday Times 2018) <https://www.huffingtonpost.com/rev-dr-susan-brooks-thistlethwaite/yes-marital-rape-happens_b_7891192.html> accessed 02.08.2022.

offense of rape' (Section 363).

In addition, Women's Charter of Sri Lanka (1993) is another basic policy framework that lays out women rights. Section 16 of the Charter states that "the State shall take all measures to prevent the phenomenon of violence against women in the work place, in the family, as well as in custody, in particular manifestation of it as rape, incest, sexual harassment and physical and mental abuse, torture and cruel, inhumane or degrading treatment."⁸ In reality, according to the key findings of the Department of Census and Statistics of Sri Lanka, 17% of ever-married women in Sri Lanka between the age 15-49 suffered from domestic violence by their intimate partner. Thus, it is quite evident that though there are many domestic violence prevention policies and international conventions, which Sri Lanka has signed and ratified but violation of women's rights within the marriage has not been addressed accordingly.

Why Sri Lanka needs to adopt marital rape as a crime?

In a way, in countries like Sri Lanka sex is viewed as a forbidden subject and hence, rape within the marriage becomes a uniquely domestic and private matter, where even the legislation itself interprets it as an "excessive interference with the marital relationship."⁹ Given that many women in Sri Lanka undergo the harsh, disgraceful, and indecent sexual assaults that amount to marital rape; yet, the victims remain silent or rather hide their suffering due to the patriarchal and stereotyped social norms that are prevalent in the society.

Further, neither the legislation nor the judiciary, or not even the society dare to come forward to take up the issue and marshal the

⁸ Section 16, "Women's Charter of Sri Lanka,"1993

⁹ Deya Bhattacharya, 'Marital Rape Legitimized by Law, Protected by Courts' (firstpost.com)<<https://www.firstpost.com/long-reads/marital-rape-legitimised-by-law-protected-by-courts-3401002.html>> accessed 02.08.2022

necessary support for criminalizing marital rape in the country. In consideration of the consequences of marital rape, it is in the interest of the entire society that such legislation becomes an urgent need of the day.

Women being subject to sex slavery within a marriage, in its entirety, violates the basic and fundamental human rights of the victims. According to Article 1 of the UDHR, “all human beings are born free and equal in dignity and rights.”¹⁰ However, consequences of marital rape severely undermine the universally accepted common standard of human rights of women. Moreover, the offence seriously violates Articles 5 and 12 of the UDHR as well. In that sense, since the provisions of the UDHR are considered a part of customary international law there cannot be any excuse for Sri Lanka to hide behind a cultural mask to avoid addressing the pressing need for such legislation criminalizing marital rape.

In 2017 itself, 294 cases were reported where women over 16 years of age have been raped. Other than that, 616 cases have been reported regarding grave sexual abuse. Nonetheless, many cases go unreported when women become victims of grave sexual violence .

Impact of Criminalizing Marital Rape

Sri Lanka stands itself as a victim of a social phenomenon where it succumbs to outdated social practices and beliefs and fails to pass the relevant legislation to protect the rights of married women within the household. Hence, even though, the Constitution of Sri Lanka recognizes the freedom from torture, cruel, inhumane, or degrading treatment by the Article 11, no attempt has been made so far to abolish the marital exemption for rape, which involves horrendous cruel treatment in the hands of the wedded partner. Hence, it is even more relevant to discuss the significance of criminalizing marital rape and its impact on the Sri Lankan society.

¹⁰ Article 1, Universal Declaration of Human Rights

In general, numerous physical, psychological, and reproductive issues; but marital rape has far more negative consequences than that of general rape, *per se*. Marasinghe (2012) contended that, “sexual crimes are the most horrendous of all crimes committed against women.”¹¹ In that sense, if marital rape is criminalized many women would be free from torture, dreadful, and fearsome matrimonial sexual assaults that they undergo inside their houses, Such criminalization protects women from the violation of their bodily integrity, freedom and genuine discretion. The mere fact of marital rape happening among the spouses doesn’t mitigate its harm. Being assaulted and battered by the spouse, who is usually considered as the embodiment of trust, affection and care creates feelings of betrayal, disillusionment, and isolation in the woman.

Moreover, criminalization of marital rape saves the children in households from the psychological effects of witnessing violence among the parents, witnessing such violence influences negative mentality in the children. If the children become routine witnesses of such gross violence, it is more likely that they grow hatred towards their parents and thus they learn negative habits from their social environment. A lot of rural and semi-urban schools in Sri Lanka have children coming from such backgrounds where they only see, hear, and grab negative energies from their family surroundings. The ultimate consequence is such children are prone to consuming illegal drugs, alcohol and engaging in activities that are contrary to accepted social norms. Thus, to prevent victimization of innocent lives, criminalizing marital rape is vital as a moral and healthy aspect.

In addition, research indicates that marital rape causes severe and long-lasting effects in women. Injuries to private organs, lacerations, fatigue, soreness, and torn muscles, bruising and

¹¹ C Marasinghe, Sri Lanka law directory on protection of women and girl children (1st, Ministry of Child Development and Women’s Affairs, Sri Lanka, Colombo, Nugegoda 2012)

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vomiting are some physical threats obvious in marital rape. Assault and battering may result in broken bones, black eyes, bloody noses and even knife wounds in grave cases. In supporting this view, a report done by the WHO (2002) reveals that, “women who once abused by their intimate partners, suffer more depression, anxiety, and phobias than non-abused women.”¹² Further, the same research reveals that long term sexual violence within the marriage during the pregnancy has serious impacts that can be linked to increasing the risks of miscarriage, stillbirth, premature labor and birth, fetus injury, and low birth weight that can be a major cause of infant death in the developing world. Thus, it is indubitably apparent that when women constantly undergo a difficult time in protecting themselves from having unwanted pregnancy and sex against their will caused by sexual violence within the marriage, it results in negative consequences not only for the woman but even for the developing fetus. Further, this situation violates the fundamental right of both the woman and the unborn child “to life, liberty, and the security of person.”¹³ Even the judiciary recognized at some point that, “the continuous threats and abuses could also make a person unwell both physically and mentally.”¹⁴

Furthermore, accomplishing equality between women and men and eliminating all forms of discrimination against women are fundamental human rights and the United Nations values. Criminalizing marital rape allows sexual rights and authority to the female party to provide validity to their discretion as to give or not to give consent to sexual intercourse. Thus, the woman gets an integral part to play in the institution of marriage. The

12 Étienne G. Krug, ‘World Report on Violence and Health, report, World Health Organization,’ (who.int 2018) <www.who.int/violence_injury_prevention/violence/world_report/en/full_en.pdf> accessed 22.08.2022.

13 “Article 3,” Universal Declaration of Human Rights.

14 I Udani, ‘CONTESTING THE CONSENT: AN ANALYSIS OF THE LAW RELATING TO MARITAL RAPE EXCEPTION IN SRI LANKA’ [2017] International Journal of Business, Economics and Law 125, 133.

cultural assumptions such as marriages are harmonious because husbands and wives agree always are based on fictional bias. In a chauvinistic society, the mental picture all men have about the ideal woman is that of a woman who fulfills the role of a wife and a mother with a subservient mindset. Now the time has changed, and the ideal woman is no longer traditional and conservative. Both the male and the female counterparts in marriage deserve equality without discrimination for either party. Thus, by pointing out the vitality of the role played by a woman in the institution of marriage she can be empowered and assured that she on par with the male counterpart.

It is a long-standing perceptive norm that has existed in our society that the affairs of the marital home must be kept private. There is even a Sinhala proverb which says '*gedara gini eliyata dhanna epa*', meaning 'if there is fire at home do not put it outside'. Social tolerance to marital rape and fear of social taboo hinders the rape victims from stepping out and being vociferous. Hence, still a conservative society in which the family members try to hide matters among married couples, thereby allowing the spouses to suffer silently within their marriage. Additional pressure is added on the woman from family members and friends to remain with the abusing perpetrator. Especially, in bad conditions of economy in some countries, some abused women are afraid to report violence within marriage because they rely financially dependent on their husbands for maintenance. Fear and humiliation also play a role in stopping women from reporting to the authority's violence committed by their husbands. Until people recognize the harm of spousal rape caused to a woman, they will not see the immediate need to address the issue. Publicity itself is not a solution to the problem, but it could bring the issue into the spotlight and generate public discussion. The lack of discussion and understanding about marital violence harms Sri Lankan women by preventing

them from seeking help from community members. So, to cease stigmatization and ostracism of women who openly talk about their husbands' violence there is a need to educate people as to the gravity of the issue of marital rape.

As there are two sides of every coin, establishing marital rape as a punishable offence in Sri Lanka is not free from negative impact as well.

The birth of the concept of “the vindictive wife” is one such crucial negative impact. A vindictive wife may seek revenge from her husband maliciously¹⁵. The woman is portrayed not as a victim of violence and abuse but as someone who gained power through her control over her body. It is possible that a woman might accuse her husband on false grounds and make false allegations against her husband. Introducing marital rape as a crime to Sri Lanka has a possibility of creating vengeful wives as well as husbands. This may lead to dramatic situations and fabrication of evidence purposely. Sri Lanka, being a patriarchal society pays attention to masculine privilege. In such a society, the fear of vindictive wife will play a dominant role in opposing criminalization of marital rape.

Further, breakdown of marriages impacts on children of such marriages negatively and it affects their well-being as well. If marital rape is criminalized, and if a spouse is convicted of the crime, children of such a union will lose the mother or the father. Thus, innocent lives must suffer the consequences of losing one of their parents.

Additionally, one practical difficulty in criminalizing marital rape is when the wife must face cross examination, the defense counsel

15 'A vindictive spouse may play dirty during divorce' (fawelllaw.com 2020) <<https://www.fawelllaw.com/blog/2020/01/a-vindictive-spouse-may-play-dirty-during-divorce-2/>>accessed 12.08.2022

would constantly question her on the implied consent because the perpetrator is her husband. It will be difficult for the prosecution to prove the non-existence of consent when it comes to the husband-and-wife relationship in a conservative society. Moreover, the prosecutorial system and the court system in the country are subjected to long delays such as 8-10 years when it comes to sexual violence cases. In such a scenario, in a case of marital rape, it might compel the prosecution to make the children as witnesses and as a result, their future would be made hopeless and scarred. Thus, it cannot be ruled out that criminalizing marital rape can lead to the destruction of the family unit and might result in frustration of the entire family.

However, though there are significant negative impacts that might occur in criminalizing marital rape, it should be, in fact, necessary to adopt such a law to deal with it in Sri Lanka. The motive for this is twofold. Firstly, the rights of a woman and her consent should not, at any stage, be ignored. Next, perhaps by adopting marital rape as a punishable offence, the traditional notion of patriarchy that exists in a family unit can be negated and more recognition and respect can be given to a woman. In this respect, there are certain factors that should be taken into consideration in criminalizing marital rape in Sri Lanka.

Conclusion

The foregoing analysis of the legal framework of Sri Lanka pertaining to rape and the marital exemption for rape proves that it does not provide adequate protection to the victim and assure the fundamental rights and freedoms of the victim that she is legally entitled to. Hence, the stand maintained by this paper clearly supports the view that to make marital rape a crime is imperative to go, in all circumstances, beyond the outdated and conservative judicial and legislative principles followed in this country.

A downside is the fact that even though the Penal Code prescribes violence as a criminal act, the Prevention of Domestic Violence Act does not criminalize the beating of one's spouse; it only protects the victim by way of a Protection Order. No punishment is given to the perpetrator unless he violates the order, in which case he can be subjected to a one-year jail term or a small fine which doesn't act as much of a deterrent today. The fact that the Protection Order is valid for only a year is yet another weakness of the Act. In doing so, marital rape must be included explicitly in both the Penal Code and as well as in the Domestic Violence Act. In addition, supplementary mechanisms must be accompanied by substantial legal reforms in order to balance the interests of both parties, such as "presumption of innocence must be valued, anonymity must be maintained during the litigation process, corroborative evidence such as forensic and medical evidence digital evidence, and the history of previous violent attempts of the husband can be used efficiently. Other than that, the verdict, or the sentence regarding marital rape must be considered in such a way that it deters any kind of sexual crime against women in all circumstances whether within marriage or outside.

The ultimate purpose of criminalizing marital rape should provide, "the right to access to justice for all rape victims, irrespective of their marital status or their relationship with the perpetrator." Therefore, it is high time for the patriarchal beliefs of the society to be eradicated and take steps to criminalize marital rape in the interest of all its members.