

AMBIGUITIES IN RAPE STATUTES: A PERSPECTIVE

Ali Waris Rao^{1*}

ABSTRACT

This paper explores the ambivalence in the Indian criminal statute. I have begun my paper by defining the notion of rape that differentiates between rapes that takes place within and outside the matrimonial relationship and have also briefly explained the elements that are necessary to constitute rape. This article examines the concept of marital rape, which is a license for a man to commit rape upon his lawful wife and the patriarchal mindset of the Indian society. I additionally delve into the Protection of Women against the Domestic Violence Act, 2005 (PWDVA) wherein which the law does not condemn marital rape as a crime, but limits it to an act of domestic violence alone, so that the woman can seek judicial separation from her husband, but cannot have her partner arrested for the evil act committed against her by force simply because it is a civil wrong. If we reflect upon the present position, I suggest that an offence of rape, whether marital or otherwise must be given a stricter punishment instead of reducing the crime to a civil wrong.

The present report deals with loopholes in the Indian criminal law. But, before dwelling on the pertinent issue of the equivocation in criminal law, we need to know what elements are necessary to constitute rape. Firstly, sexual intercourse needs to have occurred between a male and a female; where the male is not her husband and secondly, it is committed much against her will by force. Lack of consent is an imperative element in rape. But this does not mean that a person can induce or may make physical contact with a minor or with an intoxicated woman who actually consented. Such consent would amount to no consent. At present, rape is feared by women more than any other crime (Gordon & Riger, 1989). The said act is viewed by women as a serious and brutal offence of individualized violation. Various researchers have also argued that the fear of rape is a crucial factor in women's heightened fears of other crimes and have also called this possibly the "shadow of sexual assault" (Ferraro, 1995). Furthermore, realization about this social problem has been constructed through struggles between the groups which have requisite powers to establish their arguments as truth. As Foucault states, "it is in this discourse that knowledge and power are joined together"².

The Indian Penal Code differentiates between rape that takes place in a marriage and outside marriage. Under the said code, sexual intercourse without consent is strictly prohibited. However, there lies an exception to the offence of rape in relation to unconsented sexual intercourse by a husband upon his lawful wife. The Justice Verma

^{1*} 1st Year L.L.B student, Jindal Global Law School, O.P. Jindal Global University, Former Research Assistant to Professor Severyna Magill.

² See Foucault, Michel (1990), The History of Sexuality, Vol 1.

Committee recommended that an exception to marital rape should be removed. In my opinion, a marriage should not be considered as an irrevocable consent to sexual acts. Thus, with respect to an inquiry about whether the complainant agreed to sexual activity, the alliance between the accused and the victim should not be relevant. The exceptions for marital rape can be traced in the statements made by Sir Mathew Hale, Chief Justice of England in the seventeenth century. He wrote: "*The husband cannot be held guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife hath given herself in kind unto the husband, whom she cannot retract*"³.

The revolution started with women activists in America raising their voices in the 1970s for elimination of marital rape exemption clause and extension of guarantee of equal protection to women⁴. In various traditions, rape is seen less as a felony against a particular woman than as an offence against the leader of the clan or household. In most cases, the rape of a virgin was considered a more serious crime than of a non-virgin, even of a wife or a widow⁵. In seventeenth century France, even wedlock without parental consent was classified as rape⁶. The penalty for rape was mostly a fine, payable to the victim's father or the husband whose commodities were impaired⁷.

In India, which is still possessed by the mirage of patriarchy, the legal system looks to be more regressive⁸. I am unable to understand the rationale behind such distinctive standards of punishment for rapists outside marriage and nuptial rapists. This inequality stimulates an endless amount of question that needs to be answered with top priority -- Does marriage give a man the right to force his wife to have sexual intercourse against her will, simply because she consented to stay with him? Does the wife consent to have taken a risk by the very factum of marriage? It must be noted that there is a difference between consent and submission. All consent involves a submission, but the converse does not follow. Furthermore, consent of a minor girl is no consent and an accused that co-habits with a minor girl is guilty of rape even though he does so with her consent⁹. A woman has an absolute right to provide consent or disagree with anything that infringes her privacy. The Supreme Court in **Vishakha v. State of Rajasthan**¹⁰ had observed that the right to be protected from sexual harassment and assault is guaranteed by our Constitution.

³ See Hale, Mathew (1736), History of the Pleas of the Crown, Vol 1.

⁴ See Rath, Priyanka, Marital Rape and the Indian Legal Scenario, Indian Law Journal.

⁵ See Jiloha, R. (2013), Legal Issues in Mental Health Perspective, Indian Journal of Psychiatry.

⁶ See Sedney, M. (2006), Rape (Crime), Grolier Multimedia Encyclopaedia, Scholastic Library Publishing House, Available at: <http://gme.grolier.com>.

⁷ See Barnes TD. (1981), Constantine and Eusebius, Harvard University Press, pp. 220.

⁸ See Devika S. and Mohan T. (1991), Patriarchal Phantoms and Neutral Facades, Vol 3.

⁹ See Dalgobind v. State, 59 Cr. L.J. 1211.

¹⁰ AIR 1997 SC 3011.

The Committee on the Elimination of Discrimination against Women (**CEDAW**) had urged the country to broaden the definition of rape in the IPC to reflect upon the realities of sexual harassment and assault faced by women and to remove the general exception of marital rape from the definition of rape¹¹.

One can also say that the patriarchal mindset of the Indian society continues to play a dominant role for the legislators while enacting a particular statute. The protection of Women against the Domestic violence Act, 2005 (**PWDVA**) does not stigmatize marital rape as a crime, but limits it to an act of domestic violence alone, so that the woman can seek judicial separation from her husband, but cannot have her partner arrested for the wrongful act committed against her by force simply because it is a civil wrong¹². I am of the opinion that rape in any form is a heinous crime against the whole nation by large and it is desirable that the accused should be given a stricter punishment instead of reducing the crime to a civil wrong.

The Law Commission in its 84th report has stated that a woman who is raped often lives through two crises, namely -- rape and the subsequent trial¹³. It seriously hampers her morale and destroys her sense of certainty. According to the report, "*Consent is the antithesis of rape*"¹⁴. Nonetheless, with respect to marriage the consent of a married woman is a glorified sham. Various scholars are of the view that marital rape survivors suffer a longer term psychological consequence than rape committed by strangers. Occasionally, it may lead to an elongated physical and mental abuse, a deep-rooted sense of treachery of belief rather than the act itself; however the research is not certain¹⁵. The Supreme Court in **Bodhisattwa Gautam v. Subhra Chakra barty**¹⁶ had held that rape is a crime against the basic tenets of human rights and a violation of the victim's right to life enshrined in Article 21 of the Constitution. Also, the Supreme Court in **Deelip Singh v. State of Bihar** had observed that will and consent are often knit together and an act done against the will of the person can be said to be an act done without consent, the IPC has categorized these two expressions under different heads in order to make it as comprehensive as possible¹⁷.

The crime of rape can be classified basically into two types, namely¹⁸; the rape in which the victim and the rapist are unknown to each other i.e., they are strangers [Table- (i)].

¹¹ See Articles 22, 24, 29 and 11(1), Convention on Elimination of all forms of Discrimination against Women (CEDAW).

¹² See G. Ankeeta and C. Shivika, The Politics of Consent in Marital Rape (2014): An Evaluation of the Chauvinistic and Patriarchal Values Echoing in the Criminal Amendment Act, 2013, International Journal of Research and Analysis, Vol 2.

¹³ See Law Commission of India, 84th Report on Rape and Allied Offences (1980), available at: <http://lawcommissionofindia.nic.in/51-100/Report84.pdf> [Hereinafter referred to as LCR 1980].

¹⁴ LCR 1980, supra note 13.

¹⁵ See Hazra Ayan and Jain Devanshu (2013), Marital Rape: A Legalised Sin, Indian Journal of Applied Research, Vol 3.

¹⁶ AIR 1996 SCC 490 (1).

¹⁷ AIR 2005 SC 203.

¹⁸ See Estrich, Susan (1987), Real Rape, Harvard University Press.

Secondly, there is what has come to be known as 'date' or 'acquaintance rape', which involves at least some degree of familiarity between the victim and the accused [Table given below-(ii) till (vi)].

TABLE¹⁹

(i) Strangers	8%
(ii) Victim's current Partner	45%
(iii) Acquaintances	16%
(iv) Ex- partners	11%
(v) Dates	11%
(vi) Others	10%

In our country the situation is much worse. In the year 2011, the Deccan Herald revealed that for every rape case reported 68 go unreported and the ratio of reported and unreported cases of sexual harassment is approximately 1 to 10,000²⁰.

As a general proposition of law, the court requires sufficient and convincing evidence before determining the guilt of the accused and convicting him for the offence²¹. The court must as a matter of judiciousness, except when the circumstances permit make it safe to dispose with it, get all the evidence corroborated before holding the accused liable for the crime. Most importantly, let's not forget that until the court holds a person liable for the crime, the accused is presumed to be innocent. It is quite possible that in some cases the court ends up dealing with the innocent victim on one side and an innocent accused on the other, and the interest of neither can be compromised. The statute ought to, therefore, ensure that justice prevails at all times.

Furthermore, rape statutes should be gender neutral and should recognise both men and women as victims as well as accused²². Statutes must be framed to capture the true nature and grimness of the harm. Researchers have also argued that recent studies reveal vagueness in the deterrent effect of capital punishment. Capital punishment, which is usually seen as an effective restraint on a range of crimes, studies suggest that there is very little data to imply that capital punishment is an efficient deterrent for these types of crimes.²³ Consequently, a more imperative approach is required to allocate resources to improve the laws and procedures overriding gender violence and rape statutes in India²⁴.

¹⁹ See Gaur, K.D. (2013), *Criminal Law: Cases and Materials*, LexisNexis, Seventh Edition.

²⁰ See Kapoor, Naina (2002), *Criminal Justice Reform: What's in it for Women?* Vol 30.

²¹ AIR 1983 SC 753.

²² See Rumney N.S., Philip (2007), *In Defence of Gender Neutrality within Rape*, *Seattle Journal for Social Justice*, Vol 6.

²³ See Mandery J., Evan (2005), *Criminal Justice Illuminated, Capital Punishment: A Balanced Examination*, Jones and Barlette Publishers.

²⁴ See Misra and Bronitt (2014), *Reforming Sexual Offences in India: Lessons in Human Rights and Comparative Law*, *Griffith Asia Quarterly*, Vol 2.