

Examining The Impact Of Restorative Justice On ‘Marital Rape’ In India: A Human Rights Approach

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Abstract

Justice cannot be measured and explained in terms. It depends on the perception of a person. The new dimension of justice which seems to restore the justice before any matter will be brought to the criminal justice system is known as theory of restorative justice. The aim and objective of the theory is to compensate the victim and to do community service. But the researcher in this study would like to explore the impact of the theory of restorative justice with respect to “Marital Rape”. Marital Rape is a grey area under Indian Law and implies sexual intercourse done by husband with his own spouse without her consent and it can also be termed as physical or domestic violence against spouse. Section 375(6) Indian Penal Code (IPC) states that a man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman with or without her consent, when she is under sixteen years of age. An exception to Section 375 in the IPC does not find a man guilty who has sexual intercourse with his 15-year-old wife. The crime is to be proven beyond all reasonable doubts is the milestone of the criminal justice system. “Marital Rape “is still considered a taboo in the society as it is not easy to prove, and can it be proved on “preponderance of probabilities.” Whether females are ready to stand against their husbands, if answer would be yes then what would be the implications and limitation of restorative justice in this scenario? Whether a female can be transformed through the restorative justice as rape survivor instead of rape victim? These are the broad questions which the paper seems to examine with special reference to Human Rights perspective.

Keywords: Justice, Restorative Justice, Rape, Marital Rape, Human Rights

INTRODUCTION

In the name of justice, fairness, deterrence and safety, the Indian criminal justice system, like most criminal justice systems, concentrates on establishing the perpetrator's guilt and punishing the offender. When offenders commit a crime, the moral equilibrium is reset under the modern criminal justice paradigm by punishing them, frequently through incarceration or fines. In many nations the dissatisfaction with the formal judicial system, as well as a renewed interest in conserving and enhancing custody law and traditional justice practices, have led to calls for alternative remedies to crime and social

disturbance. Many of these alternatives allow the people involved, as well as the surrounding community, to take part in resolving conflict and dealing with its effects. Restorative justice is a relatively new movement in the fields of victimology and criminology. Recognizing that crime harms both people and society, it asks that justice be delivered and that the parties be permitted to participate in the process. As a consequence, restorative justice efforts allow the victim, offender, and impacted community members to be closely involved in the criminal response. They become significant in the criminal justice system, with governmental and legal specialists serving as facilitators of a

system aimed at offender responsibility, victim restitution, and full victim, offender, and community involvement. Restorative justice is difficult to define since it is more of a philosophical framework or way of thinking about crime and conflict than a specific model or legal system. It extends beyond how we think about crime and conflict to how we think about ourselves as a society, how we respond to crime, and how we re-establish the balance after a crime has occurred.

The term "restorative justice" refers to a comprehensive system operating within the confines of a regular legal framework to expedite the resolution of legal disputes with the goal of achieving societal peace and order as well as minimising grievances in processual justice. As a result, it is a secondary strategy for dispelling the social belief in 'injustice' to the victim, offender, and community. The following provinces are entwined in restorative justice processes:

- i. the survivors'/victims' desire for justice;
- ii. the responsiveness of the existing system of justice to the identified needs;
- iii. the possibility of removing the aberrations caused in the interpersonal relationship between the survivor/victim and offender through such restorative process;
- iv. community perception of such reparation process; and
- v. impact on the reformatory process of justice.

ABOUT MARITAL RAPE

Rape must be viewed as the most severe kind of sexual violence against women, the culmination of a long history of sexual violence that has decimated women's human rights. Rape is a problem that affects both men and women, and it is caused by sexist conventions and attitudes. It is a social and political issue that originates from male-female power imbalances. Rape is a hostile and violent act that infringes on a victim's right to self-determination. Rape, according to the

majority of judicial systems, does not go beyond the constraints of a patriarchal value system, that it symbolises outdated concepts of chastity, virginity, and marital connections, and that it amplifies female sexuality's dread. The legal definition of rape in most countries is limited to non-consensual or forced vaginal penetrations, and it exempts a select category of males - husbands from charges of rape against their wives.

Marital rape is a grey area that is yet to be defined by legislation. It is a sexual encounter between a husband and his own wife, which occurs without her consent, and it is also known as physical or domestic abuse against the spouse. The wife's 'consent' is based on colonial criminal law. The House of Lords expanded the scope of criminal responsibility in *R. v. R.* by declaring that a husband might be charged as the primary culprit in his wife's rape. The husband's protection under the notion of marital exemption appears to have been erased by this ruling. This exception was granted based on the notion that women were considered as chattels. As a natural consequence of their marriage, she was assumed to have given her approval to her husband. This is an outdated perspective on marriage. In the United Kingdom, the concept of marital rape has shifted dramatically, and it has now been designated a crime. In India a male is deemed to commit "rape" if he has sexual intercourse with a woman, with or without her agreement, when she is under the age of sixteen as per Section 375(6) of the Indian Penal Code (IPC). The exception-2 to S. 375 IPC stipulates that sexual intercourse by a man with his or her wife who is not under the age of 15 does not find a man guilty. Although there are other laws that protect minors, such as The Protection of Children from Sexual Offences (POCSO) Act of 2012, which defines "children" as anybody under the age of 18. It specifies that "penetrative sexual assault" and "aggressive penetrative sexual assault" against children under the age of 18 constitutes rape. One such piece of legislation is the Protection of Women from Domestic Violence Act of 2005, which seeks to punish husbands who sexually abuse their wives (whether minor

or adult). There is a grave human rights violation because there is a distinction between married and unmarried girls. All of the above-mentioned legislations provide protection to an unmarried girl under the age of 18, but it does not provide protection to a married girl against sexual acts perpetrated by her husband (Marital Rape). The age of consent for sexual intercourse by a female was increased from 16 to 17 years following the 2013 Criminal Laws Amendment Act (2013), but it remains 15 years old for a married girl. The distinction made between married and unmarried girl is violative of Fundamental Rights of citizens enshrined under Article 14, 15 and 21 of the Indian Constitution.

As of now only fifty-two countries have laws that recognize marital rape as a crime. Marital rape is not recognized as a crime by law or culture in many places around the world, including India. Even though countries recognize rape as a crime with consequences, they exempt the victim and perpetrator from the law's application if the victim and perpetrator are married. This is commonly referred to as the marital rape exception clause.' There are four key explanations made throughout different jurisdictions for not criminalizing marital rape. Due to improvements in gender equality, the first two explanations are no longer valid in today's society. The initial reason was based on the wife's perception of herself as a servant to her husband. Women were treated as chattel by their husbands, which meant they had no rights in the marriage. In such a situation, it would be impossible to imagine a husband raping his wife because the husband was the wife's master and had access to her body. The unity idea existed alongside this justification. This thought was based on the idea that after marriage, a woman's identity fused with her husband's. Therefore, law did not give the married woman a personality independent of her husband.

MARITAL RAPE: A HUMAN RIGHTS PERSPECTIVE

The inability of states to criminalize sexual assault in marriage violates the due diligence standard and violates international human rights norms, according to a study of international law

and human rights norms. The fact that large gaps in legislation still exist around the world, providing legal impunity for males who sexually abuse their intimate partners, demonstrates the global scope of human rights law reform that has to be done in this area. The Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) all guarantee these human rights (CEDAW). Failure to make marital rape a crime is thus a violation of the due diligence norm when it comes to violence against women. In addition to CEDAW, India's failure to recognize marital rape as a crime violates international human rights documents such as the International Covenant on Civil and Political Rights (ICCPR) and the Universal Declaration of Human Rights (UDHR).

The IPC given definition of rape discriminates against married women, and consequently violates Article 26 of the International Covenant on Civil and Political Rights.

The Apex court concluded in *Bodhisattwa Gautam v. Subhra Chakraborty* that rape is a crime against humanity and a violation of Article 21 of the Constitution's right to life, and that rape victims should be compensated. Chairman, Railway Board v. Chandrima Das is a landmark ruling in which the Supreme Court declared that rape is not only a violation of a person's ordinary rights, but also a violation of basic rights. Rape is a crime against not only a woman's personality, but also society as a whole. It is a violation of the victims' most prized right to life, which includes the right to live in dignity as defined in Article 21, as well as a violation of basic human rights.

In the case of *State of Maharashtra v. Madhukar Narayan*, the Supreme Court determined that every woman has a right to her sexual privacy, and that no one has the ability to infringe on that right at any moment. The Supreme Court, in the momentous case of *Vishakha v. State of Rajasthan*, stated that right to privacy has been

extended to working environments as well. In a similar spirit, we might infer that even inside a marriage, there is a right to privacy in sexual relations.

The right to privacy was proclaimed a basic right by the Indian Supreme Court in the case of Justice K.S. Puttaswamy and Anr. v. Union of India and Ors. This judgement has far-reaching implications for a number of laws, including those prohibiting homosexuality and permitting marital rape. The idea of marital exemption to rape, it is said that it infringes the rights of married woman's right to privacy by pushing her into a sexual relationship against her will. In light of the duties imposed on India by CEDAW, as well as the steady shift in the interpretation of human liberties as established in the Indian Constitution, it is high time for India to criminalize marital rape.

In the case Independent Thought v. Union of India, a two judge Bench of Supreme Court held that sexual intercourse with minor (below 18 years) wife is rape. Public Interest Litigation was filed that has challenged the validity of exception 2 to section 375.

Following are the major five observations in this case:

1. "Supreme Court said the exception in the rape law was contrary to the philosophy of other statutes and violated the bodily integrity of a girl child. The two-judge bench also expressed concern over the prevalent practice of child marriage in India and said social justice laws were not implemented with the spirit with which they have been enacted by Parliament."
2. "The Supreme Court clarified that it has not dealt with the issue of marital rape as it was not raised by respective parties."
3. "Justice Gupta wrote a separate but concurrent verdict. He said the age of marriage was 18 in all laws and the exception given in the rape law under the IPC is capricious, arbitrary and violates the rights of a girl child".
4. "SC also said the exception violated Article 14, 15 and 21 of the Constitution."
5. "To prevent child marriage across the country, SC asked Centre and states to take proactive steps. It also voiced concerns over thousands of minor girls being married in mass wedding ceremonies on the occasion of Akshaya Tritiya." The two-judge bench of the Apex court stated that "we are left with absolutely no other option but to harmonize the system of laws relating to children and require exception 2 to section 375 of IPC to now be meaning read as it is only though this that the intent of the social justice to married girl child and the constitutional vision of the framers can be preserved and protected".

Thus, "marital rape" is a breach of the basic concepts on which our whole legal system is built, and such an exemption damages women's right to dignity and encourages society to perpetrate a crime against women that is unaccountable in and of itself, based on the preceding deliberations.

EXAMINING THE EFFICACY OF RESTORATIVE JUSTICE ON MARITAL RAPE

In India, the restorative approach is used by gram panchayats in communities as an informal system to promote reconciliation and relationship development. Apart from that, Alternative Dispute Resolution Mechanism (ADR) methods such as mediation, conciliation, arbitration, negotiation, and Lok Adalat are being given increasing attention these days. They are all aiming for a 'win-win' settlement through an informal arrangement, avoiding the time-consuming and complex legal processes. Offenders must show real regret and apologies in order for restorative justice to work. It aids in the offender's personal rehabilitation and redemption, resulting in the development of self-respect. It aims to accomplish this goal by "a humiliating process in which the individual

(typically a young person) is faced by victims, family members (primarily parents or grandparents), community elders, professional mediators, and often criminal justice system representatives" (uniformed police officers in many cases). In cases of matrimonial offences, such as divorce, dowry harassment etc., the parties may be given the opportunity to meet in the presence of a mediator and learn about one other's perspectives. If the theory of restorative justice would be applied to the cases of "Marital Rape" which is a grey area and there are many factors play a role in how difficult it is for many women to heal from marital rape. The problems are complex. The first is that the rapist is a close friend, like other forms of acquaintance rape and healing can be a long and tough process. Because the survivor may not identify that she has been sexually violated, she may believe that her fears, revulsion, melancholy, or fury indicate that she is insane or damaged. Because the perpetrator was formerly trusted and loved, the victim is likely to have bitter feelings of betrayal and shattered trust, and she may believe she can't trust herself to know who is safe and who isn't. Because rape constitutes a breach in an important relationship, victims and survivors of marital rape frequently experience sadness and loss. The victim may still love her abuser and be torn and perplexed as a result of this. She may suffer a severe loss of self-esteem and feel worthless as a result of someone she "loved" doing something so heinous to her. There are plenty of arguments in support of making Marital Rape as an offence, reason being 'Consent' at the time of marriage doesn't mean female agrees for the infliction of any sort of violence against her and moreover a male cannot be left free to take advantage of the absence of any legal provision on Marital Rape. Implication of restorative justice would be a gross violation of her human right to live with dignity. Forcing a woman to live with her perpetrator against her wishes would be against her Right to Privacy as well.

CONCLUDING OBSERVATIONS

Marital rape is a serious crime against women and her dignity. Victims experience a wide range of emotional and behavioral responses, some of which are quite severe. It was also evident that being raped by one's husband has far more serious effects than being "just" battered. It shatters your trust and faith in someone and goes against the sanctity of the institution of Marriage. Raped and battered women exhibited more intense reactions than battered women who had not been raped in every comparison. At the International level and as per the Constitution of India, Right to Privacy and Right to Live with Dignity is considered as Human and Fundamental right of everyone that includes females as well. So, it is high time that there should be thought about an amendment in the IPC to include Marital Rape within the framework of Rape. Aim and objective of restorative justice is wise as it brings harmony and gives one more chance to the wrong doer to reform. But application of the restorative justice against rape/Marital Rape victims would be a violation of their fundamental and human rights.

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- [9] Article 14 of the Constitution of India Equality before law “The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.”
- [10] Article 15 of the Constitution Of India, “Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them (2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to (a) access to shops, public restaurants, hotels and palaces of public entertainment; or (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public (3) Nothing in this article shall prevent the State from making any special provision for women and children (4) Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.”
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