

A STUDY OF MARITAL RAPE LAWS IN DIFFERENT COUNTRIES

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Introduction

Marital rape is usually defined as non-consensual/ forced sexual intercourse by the victim's spouse. To put it simply it is rape by the person to whom you are married. Some countries have criminalised marital rape while others still refuse to do so on the blinded belief that such a thing is in fact an impossibility and would be a blot on the sacred institution of marriage. This paper is an attempt to highlight the need for criminalization of marital rape especially in the third world countries, it would do so by researching briefly on the countries that have implemented marital rape law.

Background

Rape is also known as non-consensual sex, the emphasis being on the word 'consent'. If there is consent between the parties involved then that act cannot be turned as rape. And that is where the whole problem lies because consent can be forced especially in case of marital rape, this is because even in today's world there are certain sections of the society that believe that in a marriage a woman is subordinate to man, it is presumed that she has consented to have sex, her opinions do not matter, she is treated like his personal slave.

Prior to 1970's the idea of marital rape was considered to be preposterous if not totally impossible but this notion gradually began to change due to the second wave of feminism which laid emphasis on the right of a woman to self-determination (control) of all matters relating to her body. Most countries have criminalized marital rape from the late 20th century onwards; very few legal systems allowed for the prosecution of rape within marriage before the 1970s⁴⁹³. Criminalization has occurred through various ways, including removal of statutory exemptions from the definitions

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⁴⁹³ marital rape, available at https://en.wikipedia.org/wiki/Marital_rape last seen on 30th August 2015

of rape, judicial decisions, explicit legislative reference in statutory law preventing the use of marriage as a defense, or creating of a specific offense of marital rape.⁴⁹⁴

With the development of the concept of human rights, in December 1993, the United Nations High Commissioner for Human Rights published the Declaration on the Elimination of Violence Against Women which recognises marital rape as a human rights violation⁴⁹⁵. But not all member of the UN member States recognise this declaration.

Marital rape may be prosecuted in at least 104 States according to the UN General Secretary, in 2006. Of these, 32 have made marital rape a specific criminal offence, while the remaining 74 do not exempt marital rape from general rape provisions⁴⁹⁶. 4 states have criminalized marital rape for judicially separated spouses only.

The countries that this paper would be focusing on are England and USA along with one of the recent countries to have criminalised marital rape which is South Korea.

Countries That Have Criminalised Marital Rape

- ENGLAND

Historically, under British common law, husbands were exempted from prosecution for raping their wives based on the understanding that marriage meant implied consent to sex⁴⁹⁷.

In addition to Hale's rationale that marriage implied perpetual, un-retractable consent to sex, other rationales for the common law marital rape exemption were based on notions that at marriage a woman becomes the property/chattel of her husband, and that when two people marry, they become one, rendering marital rape impossible because a husband is incapable of raping himself⁴⁹⁸.

⁴⁹⁴ *Ibid*

⁴⁹⁵ Talk: Marital Rape/ Countries, available at https://en.wikipedia.org/wiki/Talk%3AMarital_rape%2FCountry_lists last seen on 30th August 2015

⁴⁹⁶ *Ibid*

⁴⁹⁷ Rape, marriage and rights by Sasha Hart, available at <https://www.opendemocracy.net/5050/sasha-hart/rape-marriage-and-rights>, last seen on 30th August 2015

⁴⁹⁸ *Ibid*

The turning point for marital rape law in England was on 23rd October 1991 (which until then believed that wife rape was not an offence, since there was an implied consent present). On this day in a unanimous judgment, five Law Lords declared that a husbands immunity from a charge of his wife's rape formed no part of English Law.⁴⁹⁹

The Lords went on to say that times have changed and the modern society sees marriage as a union between two equal partners, therefore the old notion of woman being a property of man is preposterous. This judgement was welcomed by the Judiciary as well as by various commentators .

Even though this was a landmark Judgement , there were certain issues relating to this subject such as, whether marital rape should be considered as a separate offence from stranger rape? Some believed that in case of marital rape the perpetrator should be punished on a different scale than stranger rape. the reason for this being that women who were raped by their partners were less likely to reach out for help and therefore needed as much assurance as the law could provide them that they would in fact get justice.

- USA

In USA prior to the 20th century the concept of marital rape exemption was followed. This concept basically means that by entering into a marital contract, a woman has tacitly consented to have sexual intercourse with her spouse anytime he wants it.

It dates back to 18th century common law, and was articulated by English jurist Matthew Hale as follows: "The husband cannot be guilty of rape . . . for by their mutual matrimonial consent and contract, the wife [has] given up herself in this kind unto her husband, which she cannot retract."

Even after 200 years, the American lawmakers were not ready to remove marital rape exemption, as shown by the Model Penal Code⁵⁰⁰. Drafted in the 1950s, the code states that:

⁴⁹⁹ Wife rape in UK, Kate Painter, Institute Of Criminology, available at http://www.crim.cam.ac.uk/people/academic_research/kate_painter/wiferape.pdf ,last seen on 30th August 2015

⁵⁰⁰ Spousal Rape Laws Continue to Evolve, Caroline Johnston Polisi, WeNews commentator, Wednesday, July 1, 2009, available at <http://womensenews.org/story/rape/090701/spousal-rape-laws-continue-evolve> , last seen on 30th August 2015

"Marriage . . . while not amounting to a legal waiver of the woman's right to say 'no,' does imply a kind of generalized consent that distinguishes some versions of the crime of rape from parallel behaviour by a husband. . . . Retaining the spousal exclusion avoids this unwarranted intrusion of the penal law into the life of the family."

States embraced the Mode Penal Code's endorsement of the marital rape exemption. In North Carolina, for example, until 1993, the penal code's definition of rape noted that a person could not be convicted of the crime of rape "if the victim is the person's legal spouse at the time of the commission of the alleged rape."

Nebraska was the first state to abolish marital rape, but the turning point was the New York case of *People Vs. Liberta* where it was finally decided that there was no reason for differentiating between marital rape and non-marital rape. The court noted that "a marriage license should not be viewed as a license to forcibly rape [the defendant's] wife with impunity" and struck the marital exemption from the statute in question for violation of the state and federal Constitution⁵⁰¹.

Currently all 50 states criminalize spousal rape, but remnants of the marital rape exemption are still present in many states' laws⁵⁰². Most states, like California, for example, define spousal rape as a separate offense than stranger rape⁵⁰³.

- SOUTH KOREA

One of the recent countries to criminalize marital rape is South Korea. Earlier in the 1970's the Supreme court had upheld the view that there could not be marital rape between a husband and wife, but this thought process has changed over the past four decades. The lower and higher court have recently criminalised sex without wife's consent.

⁵⁰¹ Ibid

⁵⁰² Supra note 7

⁵⁰³ Supra note 7

Korean society had so far stood behind a concept of a spouse's conjugal rights to sexual intercourse with each other⁵⁰⁴. Some people feel that it is not justified on the part of the state to meddle in the intimate-sexual life of married couples⁵⁰⁵. They also argue that the court will have difficulties in proving the rape if the defense claims consent⁵⁰⁶. It is difficult to conclude which sex is rape and which sex is not in a married couple as their sex is recurring⁵⁰⁷.

The biggest issue in the judgment of the Supreme Court of Korea was whether wives would be considered among the "women" protected under existing rape-related criminal law. Proponents of excluding spouses from the definition argued that the "rape" aspect was the main emphasis. The problem was that according to Korean dictionaries, the word for rape ("ganggan") is defined specifically as a forcible form of non-marital intercourse ("ganeum")⁵⁰⁸. Logically, this would mean that wives are not to be considered victims of the crime.

But the Supreme Court interpreted the meaning of "ganeum" as referring to sexual intercourse in general and therefore by such interpretation wives would be included among the women protected by rape laws⁵⁰⁹.

"The term 'women' ['bunyeo' in Korean] refers to all females, whether they are adults or minors, married or unmarried," the court said in its majority opinion⁵¹⁰.

All thirteen judges agreed that sexual acts that took place under duress or threat of violence should be punished, including between married couples⁵¹¹.

Conclusion

In conclusion this research paper strives to highlight again and again that the failure to criminalize marital rape is just a way of encouraging violence towards women that is not only legally but socially acceptable. It is almost like saying that marriage comes with the license to rape which

⁵⁰⁴ marital rape, criminalization creates wide spread repercussions, available at http://www.koreatimes.co.kr/www/news/opinion/2011/09/137_95489.html last seen on 30th August 2015

⁵⁰⁵ Ibid

⁵⁰⁶ Supra note 12

⁵⁰⁷ Supra note 12

⁵⁰⁸ In landmark case SC rules marital rape as criminal act by Kim Won Chul , staff reporter, available at http://english.hani.co.kr/arti/english_edition/e_national/587926.html last seen on 30th August 2015

⁵⁰⁹ Ibid

⁵¹⁰ Supra note 16

⁵¹¹ Supra note 16

further weakens the already vulnerable position that women have in the society. In today's modern society not considering marital rape as a crime is a proof that we may have developed in terms of technology but our thought process remains as narrow minded and conservative as ever by treating women as a property of their husbands.

Giving the protection of rape laws only to those women who have been raped by someone other than their husbands is a clear violation of human rights as it denies marital rape victims the full and equal protection that they are entitled. What is even more troubling is the fact that many countries have still not explicitly criminalized marital rape, even though the global statistics clearly reveal that women in intimate relationships are usually the one who suffer the worst kind of physical violence.

While criminalizing marital rape may/ may not guarantee lower rates of violence against women. But that in no way is an excuse for the State to not carry out its duty of ensuring that women are protected legally from this travesty. The explicit criminalization of marital rape is a critical and major step towards promoting women's rights and safety within marital relationships.