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Female Sexuality and Marriage laws in India

Poulami Das^a Darshana Mech^b Utsav Mandal^c

^aWest Bengal National University of Juridical Sciences, Kolkata, India ^bWest Bengal National University of Juridical Sciences, Kolkata, India ^cWest Bengal National University of Juridical Sciences, Kolkata, India

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The following paper deals with various notions of female sexuality and marriage laws in India. The authors begin with the introduction where various aspects of female sexuality are discussed and issues dealing with the sexuality of women. How women lose their bodily autonomy in marriage and are expected to conduct in accordance with established cultural standards, was also dealt with. Then the authors moved forward to the historical aspect of female sexuality in Hindu society. How the role of women is usually limited to motherhood, childbearing, and childbirth. The present scenario sees next to no change. The same expectations imposed on women in the ancient Hindu society are still prevalent today which are even still visible in various legislations, laws, and governmental activities. In this paper, the authors attempt to view female sexuality through the lens of various marriage laws in India. In the conclusion, the paper aims to sum up the entire concept of patriarchy and how it is having a dominant control over female sexuality even in recent times.

Keywords: *sexuality, patriarchy, marriage.*

INTRODUCTION

On closely examining the history of moral policing in India, one would notice that one of the most frequent areas of contention is sexuality. The blatant control of the sexuality of women can be found to be the most prevalent. Women are not only constantly pressured to adhere to

the expectations of their families but also the society and the community. The female body is disciplined and socialized in families. The woman's body becomes a location for societal control when traditional notions of womanhood are bluntly replicated via gender constraints. Women's bodies have been used as symbols for nation, family, and community ever since the dawn of time. The articulation of complicated and contentious inter-relationships between bodies of women on one side and the society or family on the other demonstrates a territorial claim. Bodies of women are often regarded as symbols of honor.

The female body is viewed as being a material thing that is susceptible to societal control and manipulation by the patriarchal dialectic approach. This patriarchal viewpoint, which is prominent in inflexible patriarchal organizations such as the family, poses a danger to women's sexual health and autonomy by denying them the ability to exercise control over their own bodies. In such a situation, the family becomes a site for the oppression of women instead of being a safe space where the sexuality and independence of women are safeguarded. Women lose a significant amount of their bodily rights in marriage. This is due to the cultural norms set in place to regulate the conduct of women in their marriage. Women are constantly policed for their behavior and chastised if they do not act in accordance with cultural expectations. The bitter truth is that this same moral policing is not applicable to the male gender due to the nature of Indian society being patriarchal. In this article, we aim to explore and address the issues prevalent in Indian society which deal with the sexuality of women through the lens of marriage laws.

THE HISTORICAL ASPECT OF FEMALE SEXUALITY

It is important to highlight that patriarchal setup and female oppression have existed throughout history; the question is how severe this oppression was. The western-influenced understanding of sexuality views sex as being governed by our respective sexes and reproductive systems. There exists an accepted nature and image of sexuality which is ideally being married, able-bodied, marriage between two heterosexual people, in which there is a set role and expected behavior from both the partners, which are generally established by their biological sex. The male sexuality is believed to be more violent and frequently untamed and

whereas on the other hand, are considered to be more inferior in nature in the same interpretation, but the irony is that women are the ones blamed for the male sexuality.

The role of women in Hinduism is well established and inextricably linked to the virtually eternal aim of childbearing and childbirth. In Hinduism, the flow of the circle of life or samsara is sustained through the union of women and men.¹ However, the brahmins regard women as filthy due to menstruation and the loss of blood during childbirth, and therefore interaction with women is frowned upon by them as this is believed to be utterly contrary to the goal of Spiritual integrity and purity of priests. The fertility of women, on the other hand, is celebrated and revered, but this spiritual significance is only limited to their honour as mothers. The expected conduct from women set in ancient Hindu writings such as the Ramayana, the Puranas, and the Mahabharata, through the depiction of female characters, still continue to serve as a model for the women of the Indian society even today.

The capability of women to be mothers was revered in Hindu society throughout the early Vedic period.² The sexuality of women was heavily emphasized upon, and in turn, this implied that the most critical responsibility of women was to give birth to children.³ Sexuality is correlated to and regarded as being the means of maintaining the cycle of life as the portal through which ancestors reenter life. While sex outside of marriage was not permitted or condoned, having a child in wedlock offered societal protection to both the mother and the child. These traditional orthodox values have been reinvigorated in the present Indian society, with a significant focus on the woman as a mother in spheres of law, state programs, and politics. It has reemerged as a cultural role for women in society, wholly disconnected from the primary religious function it served in the ancient historic traditional view.

PRESENT SCENARIO AND CORRELATION

There exists an expectation of some change in the ideas of the sexuality of women in Indian society with the passage of time. The sad truth is that there appears to be next to no change in

¹ *"In samsara, childbearing was essential to rotate the wheel of life"* (Pattanaik, 2000, p. 44, 1)

² Gatwood, 1985, p. 31

³ *"In samsara, childbearing was essential to rotate the wheel of life"* (Pattanaik, 2000, p. 97, 1)

this aspect. The conduct expected from a woman in ancient Hindu society has hardly seen any change in the current society we are living in. The strain on a woman is even more in a marriage due to the patriarchal society. Due to the nature of Indian society being patriarchal and patrilineal, women lose control of their own bodies as there exist certain expectations of sexual engagement and procreation. The way to gain honour for married women is by abiding by these cultural norms.

The transformation from maidenhood to the life of a married woman is often very hard on women both mentally and physically. Even as perceptions about this social institution are undergoing a shift, the fundamental relevance of heterosexuality and marriage in India cannot be overstated. Irrespective of her caste, class, or religion, or belief, an Indian woman's sociocultural narrative dictates matrimony, sexual activity, and motherhood, yet disparities in these variables shape inequalities in the expression of women of this requirement.⁴ Childbearing and childbirth are still given the same importance and are considered as a way to gain respect and power in a marriage. It is not only viewed as a means to strengthen a woman's relationship with her spouse but also as a means to increase her standing in a joint family.⁵

SEXUALITY THROUGH THE LENS OF MARRIAGE LAWS IN INDIA

The state must provide enough protection and care for child rights, particularly for the rights of girls, through law. There are several marriage laws in India dealing with the fate of females.⁶

1. Child Marriage: The subject of many legal controversies

A girl child's monetary expense is regarded as a burden on her family, and many countries' conventional strategy has been to marry them off as soon as feasible. The prevalent notion in

⁴ 'Embodying identity through heterosexual sexuality- newly married adolescent women in India' (*Taylor & Francis Online*, 8 November 2010)

<<https://www.tandfonline.com/doi/ref/10.1080/13691050110095856?scroll=top>> accessed 01 December 2021

⁵ *Ibid*

⁶ *Ibid*

cultures where the practice is widespread is that marrying off a girl child will shield her from unwanted male attention or any sort of sexual assault, therefore preserving her virginity. However, many young brides are subjected to sexual assault by their spouses behind locked doors, which often results in painful and forced sexual intercourse, many sexual health disorders, and teenage pregnancies. There is also a vague argument given, which is that the earlier a girl child is married off, the smaller the dowry cost. She seldom ever sees her parents. In spite of the fact that dowry is illegal, this practice continues. Although there are several laws in India dealing with child marriages, their implementation is still in question. Child marriage is not allowed under the Prohibition of Child Marriage Act (PCMA) of 2006.⁷ Child Marriage - This law aims to prohibit underage marriages from being solemnized. Marriages between minors under the age of 18 for a girl and under the age of 21 for a boy are likewise prohibited.⁸ The PCMA, on the other hand, makes no mention of sexual interactions in child marriages. However, in a sense, it admits the presence of sexual connections inside child marriages since it has legitimized children produced from child marriages.

Since the introduction of the Age of Consent Act in 1891,⁹ the age of marriage has been the topic of several legal disputes in India. The age of consent for sex was raised from 10 to 12 years under this rule; however, it did not directly touch the age of marriage.¹⁰ The Child Marriage Restraint Act of 1929 addressed this by lowering the minimum age of marriage for females to 14 years and for boys to 18 years.¹¹ The age limitations were later raised to 18 and 21 years old,¹² and the law has renamed the Prohibition of Child Marriage Act in 2006.¹³ The Child Marriage Restraint Act of 1929, also known as the Sarda Act was enacted as a result of prolonged pressure from social reform organisations and concerned people who fought against the negative repercussions of child marriage.¹⁴ Because the Act prohibits complaints after one year of marriage, the offence was also infrequently recorded. This Act, on the other

⁷ Prohibition of Child Marriage Act (PCMA) 2006

⁸ *Ibid*

⁹ Age of Consent Act 1891

¹⁰ *Ibid*

¹¹ *Ibid*

¹² Prohibition of Child Marriage Act 2006

¹³ *Ibid*

¹⁴ Child Marriage Restraint Act 1929

hand, failed for a variety of reasons.¹⁵ The appalling number of successful prosecutions and police officers needing a warrant or an order from a court to apprehend perpetrators were among them. Most of the flaws of the previous Act were legally resolved with the introduction of the PCMA in 2006, although the sociological and cultural practise of child marriage endures.

Another significant piece of legislation in the history of child rights is the Protection of Children from Sexual Offences Act (POCSO) of 2012, which was also passed in India.¹⁶ It was designed to protect children from sexual harassment and other forms of sexual abuse. During the trial of such offences, the Act further emphasises the use of child-friendly measures.¹⁷ In reality, it provides harsh penalties for sexual offences involving children under the age of 18. The Indian Penal Code, 1860¹⁸, on the other hand, does not consider sexual intercourse between a man and his wife beyond the age of 15 to be rape.¹⁹ Sexual intercourse or sexual actions by a man with his own wife, who is not under the age of fifteen, is not rape, according to Exception 2 of Section 375 IPC.²⁰ Therefore, it means that a husband can have non-consensual sexual relations with his wife if the age of the girl is between the ages of 15 and 18. This will not lead him prosecuted under the IPC since she is her husband's wife.²¹

To address this inconsistency, the Criminal Law (Amendment) Act of 2013²² added section 42 A to the POCSO Act.²³ Gender equality,²⁴ as well as health benefits, are the key arguments in favour of postponing the age of marriage for females beyond the current 18 years.²⁵ The issue of gender equality can be addressed by lowering the age of marriage for boys,²⁶ but this does not appear to be a progressive solution.²⁷ The health benefit is thought to arise because females who have adolescent pregnancies are at higher risk than those who are over 20, although the

¹⁵ *Ibid*

¹⁶ Protection of Children from Sexual Offences Act 2012

¹⁷ *Ibid*

¹⁸ Indian Penal Code 1860

¹⁹ *Ibid*

²⁰ Indian Penal Code 1860, s 375 exception 2

²¹ *Ibid*

²² Criminal Law (Amendment) Act 2013

²³ Protection of Children from Sexual Offences Act 2012, s 42A

²⁴ *Ibid*

²⁵ Amendment Act 2013 (n 22)

²⁶ *Ibid*

²⁷ Protection (n 23)

hazards are greatest between the ages of 15 and 16, and the risk difference between, say, 19 and 22 years is less in comparison.²⁸

2. How does patriarchy controls sexuality within marriage?

First, let's review the legal framework surrounding marital rape. Marital rape was not considered a crime unless it took place during a court separation before 2013. In this case, the offence was punished with a two-year term rather than the mandatory seven-year penalty for rape. Following a 2013 amendment, marital rape against a woman above the age of 15 is only punishable if the couples are living apart, whether or not under an order by the court. Marital rape is punishable even if the couple is cohabiting in case if the wife is under the age of 15.

The maximum punishment for marital rape was 2 years back in 2013. It has now been extended from 2 to 7 years. This escalation in punishment is still less than the penalty for non-marital rape, which can vary from 7 years to life imprisonment. For a court to take notice of a complaint by a wife over the age of 15, a different procedure is required: the court must be convinced that a prima facie case exists before cognizance may be taken. There are several campaigns against marital rape that aim to fully criminalize it, eliminate all distinctions in respect to marital rape, and put the punishment on par with non-marital rape by elevating it to a period of 7 years to life imprisonment. It is because a woman's physical integrity and sexual consent are equally important within and outside of marriage, an offence cannot be sanctioned or punished differently based on the victim's marital status with the accused.²⁹

CRITICAL APPRAISAL/LOOPHOLES

In the latest days, there has been an increase in the number of sexual assaults. A new legal paradigm for dealing with sexual violence has been established as a result of extensive legislative change. Elections have been held to see who can best offer women's security. Strident requests for the death penalty, media attention, and exemplary governmental intervention in high-profile instances have come to define the exceptionalism that has come to

²⁸ *Ibid*

²⁹ *Ibid*

surround sexual assault. Recurring anger and requests for censorship of sexual expression, as well as the prohibition of books, films, art, and entertainment shows in the interest of Indian women's honor, culture, and safety from obscenity and indecency, have gone generally uncontested. Sexual assault is no longer a taboo issue; it is discussed in elections, national media, and public conversation, and it affects a wide range of people. Sexuality, sexual rights, and sexual abuse are all intertwined, and this paper investigates how our techniques and framing of sexual violence have influenced healthy sexuality in the contemporary setting. It aims to critically reflect on how our dependence on criminal law and a sound bite-driven media has reduced places for debate, though uncertainty and conscious articulation of sexual assault. It tries to investigate strategies of communicating and responding that do not jeopardize good sexuality or restrict our ability to defend and embrace sexual rights.

The **United Nations Convention on the Elimination of All Forms of Discrimination Against Women**,³⁰ to which India is a party, has suggested in its resolution that marital rape be criminalized, since it because it is a flagrant breach of the values of equality.³¹ But according to the **Indian Penal Code of 1860**, there is implicit permission for sexual intercourse in a marriage, which cannot be denied.³² Rape is defined as penetration without informed consent under Section 375 of the Indian Penal Code.³³ Exception 2 to the same rule, on the other hand, discriminates against married women by denying them equal protection against rape and sexual harassment. This categorization directly contradicts the reasonable classification standard enshrined in Article 14³⁴ of the Constitution.³⁵

As a consequence, Exception 2 violates Article 21 since it fails to protect wives from forced sexual actions imposed by their husbands, which have a negative impact on their physical and mental health, as well as their right to live with dignity. In many cases like **State of Karnataka v Krishnappa**,³⁶ **The Chairman, Railway Board v Chandrima Das**,³⁷ it was concluded that

³⁰ United Nations Convention on the Elimination of All Forms of Discrimination Against Women

³¹ *Ibid*

³² Indian Penal Code of 1860

³³ *Ibid*

³⁴ Constitution of India, art 14

³⁵ Constitution of India, art 21

³⁶ *State of Karnataka v Krishnappa* (2000) 4 SCC 75

rape is a breach of ethical axioms of individual rights³⁸ and an unauthorized encroachment into a woman's natural right³⁹ to solitude and chastity,⁴⁰ as granted under Article 21.⁴¹

In **Puttaswamy v Union of India**⁴² and **The State of Maharashtra v Madhukar Narayan**⁴³ established that sexual privacy is a basic right of all individuals⁴⁴ and that forced sexual acts are a blatant violation of this right.⁴⁵ These prior decisions fail to distinguish between the rights of wedded and single women,⁴⁶ and there is no contrary decision demonstrating that a marriage connection abridges an individual's reasonable expectation of privacy.⁴⁷ As a reason, the Supreme Court considers all women's sexual rights, single or married, as a fundamental right, which is blatantly contradicted by the non-criminalization of marital rape.⁴⁸

The **Gujarat High Court found in 2018** that a husband's non-consensual intercourse was not rape. **The Delhi High Court** ruled the same year that both women and men had the freedom to say "no," and that matrimony did not assume permission. In contrast, one would expect that the Supreme Court would have provided greater clarification and delved into the filthy cesspool of sexism by providing women with legal protection. Over decades, the Supreme Court has turned a blind eye and failed miserably to defend women's rights. The executive and legislature have behaved similarly to the courts. More than 100 nations have made marital rape a crime. However, India stands out among the approximately 32 nations where marital rape is not criminalized and deemed illegal. Some of the distinguished members of this remarkable league are Pakistan, Bangladesh, Afghanistan, Botswana, Iran, Nigeria, and Libya. Our legal rules brought down from the British, are set in stone, despite the fact that the English

³⁷ *The Chairman, Railway Board v Chandrima Das* (2000) 2 SCC 465

³⁸ *State of Karnataka* (n 36)

³⁹ *Ibid*

⁴⁰ *The Chairman, Railway Board* (n 37)

⁴¹ *Ibid*

⁴² *KS Puttaswamy v Union of India* (2017) 10 SCC 1

⁴³ *The State of Maharashtra v Madhukar Narayan* AIR 1991 SC 207

⁴⁴ *Ibid*

⁴⁵ *KS Puttaswamy* (n 42)

⁴⁶ *Ibid*

⁴⁷ *The State of Maharashtra* (n 43)

⁴⁸ *Ibid*

investigated and prosecuted marital rape in 1991. An absurdity that has long been overshadowed by the big Indian patriarchal culture.

CONCLUSION

Male power and female subjugation have always been associated with sexuality. We've attempted to demonstrate how sexual attitudes are fluid and change over time as part of a power network that influences our lives on a personal level. While sexuality theories have frequently served the interests of the strong, our examples illustrate how women have fought and struggled to redefine sexuality, to take control over their bodies, and recognize their inherent strengths, both individually and collectively, throughout history. Judges treat marital sexuality in a variety of ways. While some judges consider sex in marriage to be the norm, others regard it for its health benefits, and still, others see it as having a formal legal role. Despite the rare expressions of fear about sexual desire causing civilizational crises, most judges have a fairly favourable attitude toward sex, believing that it is vital for the quest for conjugal pleasure. Child marriage has an influence on a female child's reproductive health as well as their basic rights to freedom and existence. In situations of child marriage, both mother and newborn mortality rates are high. The fundamental issue of child sexual abuse is harmful and inhibits society from safeguarding its children. Even these days, patriarchy prevails in female sexuality. The patriarchy's most common techniques entail controlling or attempting to control women and girls. Shaming is at the root of many of these strategies of control when it comes to women's sexual choices and history. Simultaneously, arguing that withholding sex with a spouse constitutes "cruelty" and has legal ramifications acknowledges that sexuality is a site of power, particularly in a relationship of emotional and financial reliance like marriage, and that power does not necessarily manifest itself in sheer force.