

How the Offence of Rape has been Overshadowed by Marriage and its Impact on National Growth of Sri Lanka: A Critical Analysis from Legal and Economic Perspectives

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Abstract - Marital rape is no rape in Sri Lanka under Section 363(e) of the Penal Code. Apart from the slightest enlightenment furnished by the Prevention of Domestic Violence Act No. 34 of 2005, there are no significant legal provisions within the Sri Lankan legal framework with reference to marital rape. The main objective of this paper is to highlight the necessity of criminalizing marital rape in Sri Lanka rather than limiting it to a judicial separating mechanism followed by a judge's verdict which is prevailing at present. Apart from the legal perspective, the paper attempts to propose a better way in achieving this criminal reform through the address of marital rape from an economic viewpoint by emphasizing on how the externalities arising from the offense affects the national growth of Sri Lanka. In achieving this purpose, the doctrinal research methodology was employed and such qualitative and quantitative data which were collected by books, journal articles, and reports demonstrated the inadequacy of Sri Lankan legislative provisions on marital rape compared to foreign nations. International comparison research methodology was used for analytical purposes where UN treaties, case laws and legislations from USA and UK were cited. Information acquired through said sources provided that the marital rape victims in Sri Lanka are addressed by judiciary solely on the grounds of domestic violence which had no reference to marital rape which was ought to be the justifiable defence in a legal proceeding. As a result there would be a downgrade in national growth with the augmentation of private and

social costs. With due respect to legal and economic perspectives, the author attempts to draw the diligence of the judiciary and the legal authorities to recognize a rapist as a rapist irrespective of the bond which they share with the victim.

Keywords - Marital rape, Criminalization, National Growth, Social cost

INTRODUCTION

Rape is viewed not merely as a heinous crime against women but also a felony which often impacts the victims' psyche as well. The crime is expressly forbidden in pursuant to section 363 of the Penal Code 1883 (No.2, 1883). However the exact identical crime is held lawful by S.363(e) if perpetrated against his own wife. There have been several customary ideas concerning the development of this clause within the legal history, including Blackstone's Spousal Unity Theory, which argued that husband and wife are deemed to be a single body after marriage of which the husband retains shared control and the privacy theory which claims that the conviction of husbands for spousal rape neglects the dignity and privacy in marriage. However it must be noted that all these concepts are antiquated and the laws relying on these philosophies need to be reassessed.

Since rape against married women is no rape in Sri Lanka, a Sri Lankan woman who is being victimized by marital rape would rarely speak out against her husband without an existing legislation to protect her, particularly in a

culture like Sri Lanka that is filled with a number of patriarchal lenses.

The prevailing modern justification for decriminalizing marital rape is based on the notions of irrevocable marriage consent, difficulty in proof and the likelihood of misuse. But it is to be considered that this vulnerable group who face both physical and mental trauma is more likely to cause a negative impact on the society which ultimately damages the national growth of the country. It is therefore of national importance that this group of women be permitted to access justice by giving solutions to override the said concepts.

RESEARCH METHODOLOGY

Methodology

The paper employed doctrinal research methodology to acquire secondary quantitative data and both primary and secondary qualitative data. Comparative research methodology was employed to gather secondary qualitative data and case laws from USA and UK jurisdictions were mainly utilized for analytical purposes. USA was chosen by the author to manifest the significance of economic and legal position of USA by pointing out that even the country which holds the nominal rank no.1 in year 2019 on its Gross Domestic Product has criminalized marital rape. On the other hand UK law was cited to point out that UK law from which Sri Lanka received many of the traditional justifications for not criminalizing marital rape has now developed its legal jurisprudence to a position where marital rape is no longer an exemption to rape.

Methods

Qualitative primary data were collected by UN treaties, the Constitution, Penal Code No.2 of 1883, Domestic Violence Act No.35 of 2005 of Sri Lanka, Sexual Offenses Act 2003 of United Kingdom and case laws of Sri Lanka, USA, and UK. Qualitative secondary data were collected by books and journal articles while quantitative secondary data were collected by pre done surveys and reports.

CURRENT SOCIAL BACKGROUND ON MARITAL RAPE AND ECONOMY OF SRI LANKA

Sri Lanka which is located in South Asia is comprised of a variety of cultural beliefs. Thus these cultural beliefs inevitably stand as barriers in achieving the rule of law. As a result, the legal framework of Sri Lanka is brimmed with a bunch of loopholes. Sexual harassment and marital rape falls under this category where cultural beliefs are in favour of the men. Consequently the data acquired by surveys (Fig.1) assess an elevation of rape incidents where most of the victims are not know.

TABLE 4.1 PERCENTAGE OF MEN REPORTING PERPETRATION OF RAPE AGAINST FEMALE PARTNERS AND NON-PARTNERS, BY TYPE AND SITE*

SITE	PARTNER RAPE (%)	NO. OF EVER-PARTNERED MEN	NON-PARTNER RAPE (%)	GANG RAPE (%)	ANY RAPE OF A PARTNER OR NON-PARTNER (%)		NO. OF MEN SURVEYED
					EVER	PAST YEAR	
BANGLADESH TOTAL	15.1	830	4.4	1.9	14.1	2.7	1143
BANGLADESH URBAN	10.4	742	4.1	1.4	9.5	0.5	1252
CAMBODIA NATIONAL	20.8	1474	8.3	5.2	20.4	11.3	1812
CHINA URBAN/URBAN	19.4	970	8.1	2.2	22.2	9.3	998
INDONESIA TOTAL	17.9	769	5.8	1.5	19.5	6.7	815
INDONESIA URBAN	24.1	820	8.5	2.0	26.2	10.6	868
INDONESIA PAPER	43.8	858	23.4	6.8	48.6	17.7	893
PAPUA NEW GUINEA HOGANVILLE	59.1	741	40.7	14.0	62.4	25.2	864
SRI LANKA NATIONAL	15.5	1176	6.2	1.6	14.5	4.9	1533
TOTAL FOR COMBINED MALE SAMPLE	24.3	8380	10.9	3.9	24.1	9.2	10178

Fig.1 - Percentage of men reporting perpetration of rape against female partners and non-partners, by type and site (Fulu *et al.*, 2013, p.31)

A bulk of rape cases in Sri Lanka are detected in remote regions where females are uneducated, unemployed, and poverty-stricken. Girls under these circumstances enter into marriage arrangements as soon as they hit their puberty and are not conscious of the society at all. They spend the remainder of their lives under the control of their spouses and they get harassed if they unconsent for sexual intercourse and such harassments are encountered as marital rape. However in the context of Sri Lanka 'sex' on its own being a taboo matter of subject, rape enclosed in a marital relationship is deemed to be an extremely privacy related topic. As a result, all the abused women usually duck out from getting exposed to legal and social

environments. There are a variety of causes which discourage those women from confronting this issue including anxiety, embarrassment, family rejection, fear of losing kids, hostile attitudes and potential abuse by the police.

The consequences in a court room is no different. The emotional anguish which a rape survivor undergoes through repeated cross-examination proceedings at courts is unbelievable. A woman compelled to provide details on how her husband raped her would be subjected to various discomforts by lawyers at the trial. Therefore, considering the current state of affairs, the women choose not to voice themselves against marital rape.

On the other hand as long as the economy of Sri Lanka is concerned, over the past three years, the growth rates of Sri Lanka have begun to decline. The rate was 3.4% in 2017, reportedly the biggest downfall in 16 years and a dropdown of 3.2% was reported in 2018 (Central Bank of Sri Lanka, 2019, p.4). It is clear that the economy of the country is rather decelerating than accelerating and thus the legislative branch of the country should perform their fair share in order to abet the economy.

How the criminalizing of marital rape could assist the upliftment of the country's overall national growth will be discussed by this paper under the economic viewpoint.

I. LEGAL VIEWPOINT ON MARITAL RAPE

In contrast of the traditional theories on marriage which showcase the features of domination, the modern theory of companionship indicates that the exercise of equality throughout the marriage contributes for a better marital satisfaction (Wilcox & Nock, 2006). Many recent landmark judgements all over the world have got influenced by this modern theory and as a result many laws have been implemented both nationally and internationally.

A. Case Laws

The importance of discussing the legal issue came into consideration along with the declaration by Lane CJ in the case *R v R* in which he said that it is the right time for the law to consider a rapist as a rapist irrespective of the relationship he shares with the victim [*R v R* (1991) UKHL 12]. Moreover it is important to understand that marital rape cannot act as an exception to equality and justice. In *People v Liberta* (1984) it was held that married women hold the right over their bodies same as of unmarried women.

Marital rape is an illegal offence in all states of the USA, which is considered as the most powerful country in the world. Amendments on criminalizing marital rape in the United States were enforced in mid-1970s. The first case in the United States that challenged marital rape was *Oregon v. Rideout* in 1978 (Jackson, 2015). Husband was offended for assaulting his own wife whereas they were living together. Since the state changed its law in 1977 to rule out marital rape immunity, the husband was discharged completely of raping his wife. However as a result of the increasing number of marital rape in the USA, the government in 1993 amended the marital rape as a crime in all 50 states. Along with the acknowledgement of marital rape as a crime by many developed states, the significance of criminalizing marital rape in Sri Lanka has arisen.

Manohari Pelaketiya v. Ministry of Education (2016) case held that, continuous threat and abuse against women could compel them towards both psychological and physical traumas. Although the judgments of Sri Lankan law have well recognized that the substantive enforcement of the human rights of women is important, this aim would not be accomplished with no existing penal laws to criminalize all types of rape against women regardless of the relationship shared with the offender.

B. International Law

When it comes to treaty law, A.16(1) of UDHR provides that, “men and women are entitled to equal rights as to marriage and during the marriage” (Universal Declaration of Human Rights, 1948) and it is been replicated by A.24(3) of ICCPR (International Covenant of Civil and Political Rights, 1966). A.1 of CEDAW states that “discrimination against women shall mean any exclusion made on the basis of sex, irrespective of their marital status” (Convention on the Elimination of All Forms of Discrimination against Women, 1979) while A.2 provides that state parties should disapprove all forms of discrimination against women by taking appropriate policy measure without any delay. A.16(1)(c) of CEDAW promotes equality of rights throughout the marriage.

CEDAW in its concluding observation on the 8th periodic report to Sri Lanka (2017) provided a recommendation to criminalize marital rape in the absence of consent. As a result, discussions were brought up to criminalize marital rape in 2017 by then Minister of Justice and Foreign Employment, Mrs. Talatha Atukorale. But unfortunately no concrete steps were implemented and the justice got diminished by getting limited to a mere discussion.

However as a member of CEDAW, Sri Lanka has indicated its mutual intention to cooperate with the Convention and, as such, ratification should be viewed as an obligation to meet the duties of the State to take effective steps that are consistent with the duties of the Treaty.

Moreover United Nations’ Sustainable Development Goal 05 ensures to accomplish gender equality by 2050 (since it is unable to be accomplished by 2030).

C. Domestic Law

Currently marital rape is not a crime in Sri Lanka. Under the common law it is illegal only when the judiciary declares a legal separation. The Prevention of Domestic Violence Act No. 34 of 2005 furnishes a slight enlightenment in protecting women who get abused by the husbands. But these cases do not get recognized

as ‘marital rape’ and as a result the issues are attempted to be settled through counselling.

There are constitutional guarantees established by the Sri Lankan Constitution under the notion of equality under which the concept of marital law could be discussed. Accordingly A.11 provides for the fundamental right of freedom from torture (*Constitution of Sri Lanka 1978*, s.11), A.12(1) protects all human beings before the law and are considered equal (*Constitution of Sri Lanka 1978*, s.12) and A.27(1)(a) guarantees to accomplish full comprehension of fundamental rights.

Regardless of the existing constitutional guarantees, there is a resistance of the legislators to criminalize marital rape as a penal crime, under all cases and it was demonstrated by the Report of the Leader of the Opposition Commission on the Prevention of Violence against Women and Girl Child, 2014 which stated that when Sri Lanka tabled the Penal Code Amendment in 1995, marital rape was mentioned by excluding the caveat on judicial separation, yet as a result of the Parliament's strong disapproval the clause turned out getting disregarded. (Commission on the Prevention of Violence against Women and the Girl, 2014, p.32).

D. Understanding the Reality

In opposition to what the majority tend to believe, existing law in Sri Lanka which safeguard husbands who rape their spouses is not a portion of Sri Lankan culture. In fact it was imported from British law at the time when Sri Lanka was a colony of Great Britain. A former British Chief Justice, Sir Matthew Hale in 1736 by publishing a treatise namely, *History of the Pleas of the Crown*, stated, the spouse of a wife cannot himself be blameworthy of an actual rape upon his wife, on consequences of the marital assent which she has given, and which she cannot withdraw (Hasday, 2000). The British colonies received independence a few years later but yet continued to cherish this slightest bit of male privilege within their own legal statues for centuries.

Unfortunately Sri Lanka being a country among them is still faithfully sustaining this colonial fixation while Britain (Sexual Offenses Act 2003) and many former colonies have realized that the marriage should not act as an ingredient which a woman will have to sign her body away to the husband. Therefore from the legal point of view, Sri Lankan law makers should not get disrupted by the cultural myths in between the procedure of criminalizing marital rape. Additionally with respect to A.27(15) of the Constitution, Sri Lanka holds a state obligation to ensure the protection of women from marital rape during marriage by implementing laws.

II. CRITICISM ON THE JUSTIFICATIONS WHICH EXCEPT MARITAL RAPE FROM THE OFFENSE OF RAPE

A. Irrevocable Consent

It is quite interesting how Lord Hale has presented his claim with no valid logic, jurisprudence, case law, or legal justification. He stated that the wife instinctively gives her legal identity to the husband when she gets married and it enables for all sexual actions that would not be able to be withheld at a further stage due to any other cause. He implemented the principle of "implied consent" to be irrevocable throughout the union, which begins when the woman consents to begin the matrimonial relationship, and persists until the matrimonial agreement ends by way of a divorce. This confirms that once a girl enters into a matrimonial relationship, she eventually loses her freedom to deny sex at a particular instance with her spouse and since sex has been expanded as a marriage related obligation of a woman, her human right to bodily autonomy and right to consent hereby remains questionable. In *R v R* Lord Keith at House of Lords declared that the notion of Hale cannot be applied strictly in the modern context at all the circumstances.

This theory is incompatible with the concept of consent interpreted in other types of laws.

There is no permission granted by law in order to permit another to cause a bodily injury to herself. Therefore there is no solid foundation to protect the notion of irrevocable consent in marriage. A woman should have the right to dissent for sexual intercourse when she's sick, pregnant or when the husband is intoxicated.

B. Blackstone's Marital Unity Theory

The English law concept of Marital Unity Theory and the Roman Dutch law concept of marital power where the wife was considered a minor within the matrimonial home remained valid until mid-19's and started to diminish along with the introduction of Married Women's Property Rights Acts in many jurisdictions.

In the context of Sri Lanka this concept remains contrary to the fundamental right, A.12 of the Constitution.

C. Lack of significance compared to non-marital rape

Marital rape is disregarded from criminalizing on the belief that it is not an extreme offense compared to non-marital rape and is not prevalent. But the results of a study done by WHO on Sexual Violence reveals that rape by an intimate partner is neither endemic to any specific area of the world nor it is uncommon (World Health Organization, 2011, p.1).

Another survey implemented in Sri Lanka shows a value of 15.5% of men having reported on raping their wives (Fig.1). Thus the situation should not be disregarded by law believing it to be insignificant.

D. Privacy in Marriage

The prevention of intrusion into the sacred union of marriage by legislation is a poor argument since under the modern day family law, divorces are already being handled by civil courts. Additionally the intervention by law is not harmful to relationships where non-consensual intercourse result in causing a harm, because the law has a legitimate concern in coping with sexual assault as the lawful

guardian of the fundamental right to life. Thus it is absolutely rationale for the law to interfere in coping with marital rape.

E. Difficulty in Proof

Initially, a felony should not be dismissed on the basis that it would be tough to verify. Secondly, marital rape is not hard to ascertain. Establishing rape is often premised on circumstantial evidence. And if the crime is perpetrated according to the prevailing perception, yet it is often hard to prove since in most instances the woman is being raped by an individual whom she probably knows and if a female is a survivor of marital rape it implies that there is a historical record on sexual abuse which in fact could be verified using forensic evidences.

Although forensic evidences might not be credible, the physical examination shall not be used as a basis to decriminalize the crime as there are many other mechanisms to assert it including testimonies of witnesses' digital evidences etc. and such mechanisms should be included in the Evidence Ordinance.

F. Probability of Misuse

One of the major justification that goes parallel with the previous justification (difficulty in proof) on not initiating marital rape as an offense is by relying on the contention that women might use the law to accuse the husband based on egocentric motives. Although the case law has provided a relatively fair rationale on this, the legislation is intended to recognize misleading allegations and therefore such notions are not able to be conjectured until laws surrounding marital rape are enforced. Moreover the malicious prosecution could be proved by the defendant in a case of misuse by the plaintiff.

III. ECONOMIC VIEWPOINT

A. Coase Theorem

The theory of Coase is a legal economic theory that clearly claims that if the transaction cost is nil, there would be an efficient distribution of

capital, irrespective of the original allocation of entitlements, as long as the entitlements are well specified (Medena 2009). Assumption of the transaction cost as nil also has important consequences on law. Regardless of the original distribution of entitlement and regardless of the law regulating the usage of capital, the parties must bargain with no cost for the maximally efficient resource distribution (Cole & Grossman 2011).

Coase tackles with a variety of key issues including the efficient sharing of land rights, property within the negotiating parties, the question of shared social cost and externalities. According to the theory, a minimum of two parties are required for production of an external cost, i.e. a person to create it and the other to bear it.

On the application of the theory to the case of marital rape, the first is that the woman has the right to her private property, which is her body, and the second is that the husband has the marital right to have intimate intercourse with his wife. There is a question of concern at this moment of time when the woman does not agree to sexual intercourse. Following the principle of Coase, the author attempts to allow the participation of the two parties by seeking to guarantee the most effective division of rights. The outcomes of such participations differ according to the existing laws on marital rape.

- In a country where marital rape is illegal

Initially the property privilege at this point rests within the wife by overriding the marital right of the husband. Accordingly if the husband seeks intercourse without the permission of his wife by exceeding his marital right, he'll be offended by the felony of marital rape. The husband hereby endures a heavy cost by getting imprisoned and by having to compensate the spouse. On the other hand if he outdo his right yet with the consent of his wife the cost will be comparatively lower than the former. The author therefore validly concludes that the

coercion implies a greater burden for the husband relative to not committing marital rape. Thus the exercise of marital rape is not economically efficient under this legal framework.

- In a country where marital rape is legal

At this point, neither party has an overriding privilege on the exercise of their rights over the other. On the belief that the husband holds the right over his wife's property and if he asserts his marital right to intercourse despite the wife's approval, it is extremely probable and inevitable that she may incur a range of private expenses that would potentially harm her private property. Additionally the psychological trauma and loss of feeling of protection on getting assaulted by a close companion would often result in an unbridgeable harm and a social cost. The crime of marital rape thus results in a large social cost causing a reduction in the overall national growth.

When we equate the expense incurred by the woman to the husband's expense of not having the opportunity to satiate his desire, the author may soundly conclude that the wife's cost will be greater. The least cost alternative will thus in not letting the wife being raped, i.e. by criminalizing marital rape. Consequently, regardless of the regulatory context and the original distribution of individual rights, author observes that the marital rape is not cost effective. Marital rape therefore should be criminalized in Sri Lanka for that cause.

B. Cost Analysis

The economic cost of marital rape is of two types, i.e. private and social cost. Private costs are the expenses that only impact on an individual with no interference of the society. Social cost is the overall cost of the society, i.e. the combination of all the private costs and external costs.

The burden of the husband's assault in the first place will have to be borne by the woman and therefore the cost is private. It has no direct implications on the society but might impact the

society depending on the circumstances. However a variety of externalities could occur specifically in a country like Sri Lanka where the law does not criminalize marital rape and which most of those externalities happen to be negative costs rather than benefits. For instance, the wife's sense of anxiety will make her feel gloomy resulting a pressure towards her to kill herself or to cause a detrimental harm on her kids. Thus the private costs in combination with externalities contribute to create a collective social cost, which has a profound impact on the entire community.

- PMC = Private Marginal Cost
- XMC = External Marginal Cost
- SMC = Social Marginal Cost
- PMD = Private Marginal Benefit
- SMD = Social Marginal Benefit
- S = Supply
- D = Demand

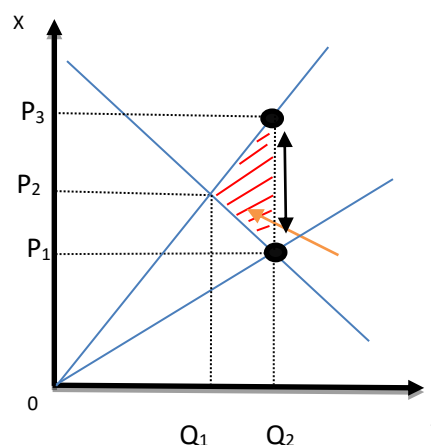


Fig.2
 Graph on marginal social cost of marital rape

As shown in the figure above, if the private cost is solely regarded, the expense generated would be minimal (a). Yet along with the augmentation of such privately owned cost by the victimized wife, negative externalities are been created (XMC). When such negative externalities get combined with the private

cost, the social cost increases ($a + XMC = b$) and as a result the overall social welfare decreases by having a negative impact on the national growth of the country.

But if we place a law at the exact similar setting, the negative externalities will not generate any impact, since the laws contribute towards the positive externalities. Owing to the criminal offense of marital rape, the husband will be rigid in exercising his deeds, while the wife would feel secured. As a result a happy family background will be created by reducing the overall cost at the end.

CONCLUSION

Regardless of marital rape being not recognized as a crime, Sri Lankan women put up with the ongoing issue which is most frequently unreported. Due to the lack of legal provisions these victims tend to experience various post-trauma symptoms that encounter many types of extreme abuse by creating a private cost. Along with the generation of negative externalities by marital rape, a social cost is produced (private cost + negative externalities) that economically affects the whole community by having a negative impact on the national growth. Notwithstanding this economic viewpoint, many traditional and modern theories obstruct the path towards criminalizing marital rape. The author concludes the theories to be invalid since there is no law which permits a person to cause bodily injuries to a woman. For that reason, the United Nations has declared the importance of the practical realization and understanding of women's rights. Nonetheless the practical realization of women rights become an unachievable goal if no laws exist against all forms of harassments and violence faced by women despite of the relationship she shares with the to its Optional protocol 1, to ICCPR and to UDHR holds a responsibility to fulfil and protect the international women human rights embodied in the treaties. The positive outcomes on criminalizing marital rape could be cited from economically developed countries such as USA and UK. Finally by

considering the severe implications of the crime, the author concludes marital rape as a gross breach of fundamental human rights guaranteed by the supreme law of the country and it should be avoided by the establishment of an economically efficient law which preserves the victims' rights and privileges in order to increase the national growth of the country by way of a holistic approach.

RECOMMENDATIONS

The following recommendations are formulated by the author depending on the findings and conclusion.

A method needs to be implemented to collect statistical data on marital rape cases and the authority collecting such data should analyze the private costs and the social cost causing thereby separately for the law making bodies to understand the significance of introducing a law to criminalize marital rape.

Amendments to the penal code shall be brought out by criminalizing marital rape under any circumstance whether they are living together and not separated or the victim is under a de facto separation.

Burden of proof in Sri Lanka with reference to marital rape should be beyond reasonable doubt unless the victim can provide evidences such as digital evidences i.e. CCTV footage, independent eyewitnesses, forensic evidences, vicious history of husband and previously reported sexual crimes by husband etc. Accordingly the Evidence Ordinance needs to be amended.

Government guidance should be provided for institutions to implement social practices in order to change the attitudes of the society related to marital rape. Additionally gender sensitive pedagogy practices for law makers, law students, lawyers and judges should be provided.

Victims should be authorized to enter the litigation process by supplying necessary legal aids along with the fulfillment of medical

requirements and counseling services and whilst the litigation procedure the dignity and anonymity of the victim should be safeguarded in order to encourage the victimized parties to make a voice by breaking the current social norms on marital rape.

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