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Need For Recognition of Martial Rape as Crime in India

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ABSTRACT

Rape is an offence against women, violation her dignity and self-respect and when it occurs within the four walls of matrimonial home, it reduces the women to the status of an object used merely for sexual pleasure. There is an immediate need for the distinct law on marital/ spousal rape in India, should be at par with the accepted international norms on these issues.

Rape within marriage is a concept that agonizes the wife to the very bottom. The dread of having to face it and still have to suffer silently through it is an unbearable thought that affects the mental condition of the women. This self enforced silence has a very damaging effect on the emotional, psychological and mental stability of women. However, this silence is not exactly self enforced. The lack of law and abundant social stigma against the act of marital rape is one of the primary reasons that the evil of marital is still hidden behind the hollowed marriage.

The women has being given the right to fight for the protection when the violators are outside entities, but the perpetrator of her body integrity is her own husband, who she married with all the pomp and show, such protection is withdraw by the legislation.

Both pillars of humanity i.e men and women have equal importance and role in creation and development of the humanity but the women are bound to face several humiliation in the society. Despite various safe guard and protection, available at the global as well as at national level, before birth till last breath, women are discriminated. The offence against women are endless as sexual harassment, dowry death, domestic violence, female genital mutilation and so on. Among other problems ‘marital rape’ is very crucial as it is not recognised, till date, in our Indian legal system as a crime, which need immediate attention of the legislation. Even after 70 years of Independence, the women in our country are still not truly free and independent and continue to live under the realm of darkness and fear. It is indeed a harsh reality of India. In the matter of concern, that while on the hand the country is celebrating some glorious decision in the legal arena from the Hon’ble Supreme Court of India like Adhaar Card case and Tripal Talaq creating new milestone for the Judiciary, on the other hand, to the general disappointment, the central government has given its view against criminalizing marital

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rape, saying doing so would destabilized the institution of marriage. When marital rape bill was introduced in India to criminalized, it was repudiate by the Parliament, according to some of the Parliamentarians, marriage is a sacred institution and touching it will lead to breakage of marriage. They are view that India should be proud of its culture because “nation has low divorce rate”. statement has been issued against criminalized marital rape with acknowledging the fact that most marriages in India survive because women silently endure violence and abuse within such relationships. The culture of silence, tolerance, adjustment, compromise among women is disseminate to save and respect the honour and value of the Indian family overlooking the facts that incest, violence, suicide, murder is the price women pay. On the other hand, there is men’s group which is lobbying fiercely to highlight the fact that law against domestic violence has been misused by women and therefore should be diluted. They further spread that the enactment of penal law against marital rape will be misused by the women. According to such argument a women, who is no docile, subservient or complaint and complaint about the continues abuse within the conjugal relationship is an anti family warrior breaking the sacred bonds while converting bedroom to a war-field. They ignore the fact that most cases of emotional violence, sexual abuse, physical assault, mental trauma, all takes place within this “sanctified” territory because women are powerless and vulnerable and have been socialized to be tractable, obedient and subservient. It concludes that this needs to be examined in the larger perspective.

Keywords: Martial Rape, Sexual abuse, legislation, Women, violence, India, criminalized

I. INTRODUCTION

The idea of martial rape has always under a limelight when it comes to the situation of India. The laws in India have extensive worked on rape, sexual assault, sexual abuse but have turned a dead eye to the concept of marital rape. Not that marital rape doesn't exist in India, or its existence is close to negligible, but the central government apparently claim it would break the values of family system and act like a strong hit against the institution of marriage. It also made claim that husband will be harassed if so, is given a statutory position. Marital rape is generally regarded as the act of initiation sexual intercourse with one's wife without giving consent to do so. In many countries marital rape has been criminalized and thus, it holds some legal consequences and statutory position as rape to any other individual.

The word ‘Rape’ has been derived from the term ‘*rapio*’, which means ‘to seize’. Rape is therefore, forcible, seizure, or the ravishment of the women without her consent. Rape can be viewed as an act of violence of the private person of a women, an outrage by all means. It is

the ultimate violation of the self of a woman. The Supreme Court of India has aptly described it as ‘deathless shame and the gravest crime against human dignity.’² Rape is not merely a physical assault, but is destructive of the whole world persona of the victim.

Martial rape is particularly complicated because the complex, personal nature of marital relationship makes it hard for the victim to even see herself as a victim, let alone reporting the offending act to the authorities, which is why marital rape is one of the highest under reported violent crime. Even the women who do consider themselves as a victim are disinclined to approach the authorities because they are financially depend upon their husband, and reporting the matter could be very result in withdrawal of financial support leaving them their children without shelter and food.

The Indian law did not consider it as a crime against the women, one that destroyed her freedom, rather it conceived rape element for protecting a man’s property from the sexual aggression of the other man. Therefore, the act of marital rape is not recognised as a crime against women in India and considered as a husband’s property.

There has been number of legislation and bills passed in India in regard to sexual violence against women in her own house like domestic violence, dowry death, cruelty and many more. However, the biggest and most important shameful wrong done by husband within a marriage, where husband forces himself upon his wife thinking that it’s his right to have intercourse with his wife without her consent ‘marital rape’ has failed to gain recognition as a offence in the eyes of the legislation.

Women who are raped by their husband are likely to be raped many times. They did not only experience vaginal rape but also oral and anal rape. Husbands often forced their wives when they are asleep or use coercion, verbal threat, physical violence and even use weapons to force their wives into have non-consensual intercourse with them. Marital rape is a serious problem that millions of women are facing today and have to suffer abuse on day-to-day basis. It is difficult to collect exact data and report about rape and violence against women within the marriage, because women are afraid to report incidents, as women raped by their husband may hesitate to report because of family reputation, fear of their abuser, inability to leave the relationship, safeguard their children future, or the fact that there is no proper law in force for protecting the victim of marital rape.

Today, Marital Rape has been challenging in more than 100 countries but, unfortunately India

² Bodhisattwa Gautam v. Subhra Chakraborty AIR 1996 SC 922

is one of the 36 countries where marital rape is still not criminalized.

Even though many amendments and bills have been passed in criminal law for the protection of the women, the non-criminalization of marital rape in India undermines the dignity and human right of women.

II. MARTIAL RAPE - AN EXCEPTION TO RAPE

An intercourse between husband and his wife without the consent of his wife obtained by force or threat where the woman is unable to give consent is said to be considered as marital rape. Consider as the violence of degeneracy by her husband amounting to physical and sexual violence. The statistics have clearly stated that, in every 6 hours a young married women has been beaten, tortured and burned to death and even commit suicide because of mental and emotional abuse from her husband.

The exception ³ section 375 mention that non-consensual sexual intercourse by a man with his own wife, if she is over fifteen years old, does not amount to rape.⁴ It thus keeps outside the ambit of a rape a coercive and non-consensual sexual intercourse by a husband with his wife above fifteen years of age and therefore allow a husband to exercise with impunity, his martial right of non-consensual or undesired intercourse with his wife.

It is believed that the husband derogation for marital rape is premised on the sexual intercourse. Her husband has the right to have sex with his wife, whether she is willing or not, and she is under pressure to surrender to his will and desire. It also aims at the preservation of family institution by ruling out the possibility of false, contrived and motivated complaint of rape by wife against her husband and the realistic procedural difficulties that might arise in such a legal proceeding.

However, sexual intercourse with a wife, whose marriage with him is void as he has already and had a living wife and who has aware of the fact of the first marriage amount to rape.

Further non consensual sexual intercourse in term of the acts that is mentioned in ⁵ section 375 (a) to (d), by a person with his own wife who is under a order of separation or otherwise, living separately is made an offence under the Indian Penal Code.⁶ The punishment provided for the non consensual sexual intercourse with his own wife when she is below fifteen year of age, which by virtue of exception to section 375 amount to rape is very mild.

³ Section 375 (Indian Penal Code), 1860

⁴ KI Vibhute, "Rape Within Marriage " in India: Revised, vol 27, P. 167

⁵ Section 375 (a) to (d) IPC, 1860

⁶ Bishnu Dayal v. State of Bihar AIR 1981 SC 39

No court is authorized to take cognizance of the offence of sexual intercourse by husband upon his *prima facie* satisfaction of the facts that which constitutes the offence upon a complaint having been filed or made by the wife against the husband.

III. MARITAL RAPE AND LAWS IN INDIA

Though India have advanced in every possible field, martial rape is not considered as crime in India. If we clearly look into the judicial aspects of India, it states that ‘sexual intercourse by a man with his own wife, the wife not being under 15 years of age, is not rape.’⁷ Section 376 provides punishment for rape. According to this section rapist should be punished with imprisonment of either for a term not less than 7 years which may extent to life or for a term extending up to 10 years and shall also be liable to fine or both. Despite amendments, law commissions and new legislation, one of the most serious and humiliating acts is not an offence in India. Looking at the option a woman has to protect herself in a marriage, excepting that legislation have been either non existence or obscure and everything just depend on the order by courts.

The final interpretation of section 375 of the Indian Penal Code, which emerge after deliberation in the selected committee is a clear form of⁸ clause 359. Section 375⁹, the provision of the rape in IPC has echoing very archaic sentiments, mentioned as is exception “sexual intercourse by man with is own wife, the wife not being under 15 years of age, is not rape.

In case¹⁰ *Saretha vs. T. Venkata Subbajah*, it was held that right and duties in a marriage, is like dissolution and creation and no in term of private contract between men and women. The right to privacy is not lost by martial Association, thus there is no punishment for martial rape and remedies lies with her.

⁷ Section 375 (Indian Penal Code), 1860

⁸ Clause 359 of the Macaulay Draft Penal Code

⁹ The section 375 of the Indian Penal Code (45 of 1860) reads: —A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions: — First.— Against her will. Second.—Without her consent. Third.— With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt. Fourthly.—With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married. Fifth.— With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent. Sixth.— With or without her consent, when she is under sixteen years of age. Explanation Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. Exception. —Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.

¹⁰ AIR 1983 AP 356

IV. CONSTITUTION OF INDIA VIZ -A-VIZ MARITAL EXCEPTION TO RAPE

The constitution of our country is a text that reflects the soul and heart of the nation. The Indian constitution control and organize power, ensure human right, balances the competing claims of social and individuals interests, mirrors the culture and expressions of the country and operates as a vehicles for national progress and unity.

Now it will seen as how the doctrine of martial exemption to rape fails to meet the standard of conformity with the provisions of Article 14 and 21 of the Constitution of India.

Violation of Article 14 of the Indian Constitution

Article 14 of the Indian Constitution states that the state shall not deny to any person equality before the law or the equal protection of the law within the territory.¹¹ Although constitution guarantee equality to all the citizens of India, but Indian criminal law discriminates against female victim who have been raped by their own husbands.

At the time when IPC was drafted in the 1860's, a married women was not considered an independent legal entity, rather she was considered as property of husband.¹² As a result she did not possess any right guaranteed to her as an independent legal person. Exemption which exempts actions perpetrated by husband against their wives from being considered as of rape is largely influenced by and derived from doctrine of merging that women identity with that of her husband.

Equal protection of the law

Article 14 guarantees fundamental right to equality before law and equal protection of laws to ever citizens. Article 14 does not state that for every individual to be treated equally in every circumstances but requires that equal within the society are not treated unequally and that the unequal of the society are not treated equally.

Thus any law make classification which is unnecessary to the purpose of the legislation is deemed to be outside the framework of the constitution.

Section 375 of the IPC criminalizes the offence of rape and protect the women against forceful intercourse against her will and without her consent, however ironically section 375 of the IPC makes a classification in terms of an exemption that does not regard a forceful sexual intercourse within marriage as rape. Married women, exactly like men and unmarried women need protection of the law in their private sphere. While the rest of the section 375 of the IPC

¹¹ Constitution Article 14

¹² To Have and To Hold: The Martial Rape Exemption and Fourteenth Amendment, (1986)

is interested in protecting the right of the victim from the crime if rape, such a right is withdrawn on marriage and the focus of the law shift to protecting the perpetrator of the crime of rape.

Right to life and personal liberty

Right to life and personal liberty is mentioned in Article 21 of the Indian constitution.¹³ Article 21 although couched in negative language confers on all persons the fundamental right of life and personal liberty. In the case of¹⁴ *Maneka Gandhi vs. Union of India* it has become all the sources of all the forms of rights aimed at protection of human life and liberty. The meaning of 'life', has thus expanded in the case of *Munn vs. Illinois*¹⁵ where it was held that life means 'something more than mere animal existence' which further discussed by the Supreme Court in the case of *Mukti Morcha vs. Union of India*¹⁶

Right to live with human dignity

The concept of right to live with human dignity is mentioned in Article 21 of the Constitution, the bare necessities of life such as adequate nutrition, clothing and shelter over the head, freely moving about and mixing and mingling with human fellow being.¹⁷ The supreme court held that offence of rape violates the right to life and the right to live with human dignity of the victim of the crime of rape.¹⁸ The supreme court held that rape is not an offence against individual but it is a crime against the entire society. Rape is not just a sexual offence but an act of aggression aimed at lowering and insulting the women.¹⁹

Right to sexual privacy

Right to privacy is not mentioned in the Indian Constitution, but in a number of cases Supreme Court has recognized that right to privacy is constitutionally and important to protect under Article 21. The right to privacy includes the right to be left alone. Any form of sexual abuse or violence infringes the right to privacy.

The supreme in the case of *State of Maharashtra vs. Madhkar Narayan*²⁰ has held that every woman was entitled to sexual privacy and it was not open to any and every person to violate her privacy as and when he wishes or pleased to do so. In the case of *Vishakha vs. State of*

¹³ Article 21 of Indian Constitution

¹⁴ AIR 1978 SC 597

¹⁵ 94 U.A. 113 (1877)

¹⁶ AIR 1984 SC 802 811

¹⁷ Francis Corallie Muine vs. Union territory of Delhi, AIR 1981 SC 802

¹⁸ The chairman, Railway Board vs. Chandrima Das, AIR 2000 SC 988

¹⁹ Bodhisattwa Gautam vs. Subhra Chakraborty AIR 1196 SC 922

²⁰ AIR 1991 SC 207

Rajasthan²¹ the court extended this right to privacy to work place.

V. ROLE OF JUDICIARY IN INDIA

The need for new law on sexual assault was felt. The earlier law that prevailed did not define and reflect the various kind of sexual assault. In Sakshi vs. Union of India²² the supreme court has recognized the inadequacies regarding the new legislation relating to rape.

After passing the law amendment bill, 2013 rape was defined as the most horrific events that parliament by an amendment tried to widen the aspect of rape and the perception by making oral act as amounting to rape.

The Domestic Violence Act, 2005 has provided various civil remedies various provisions such as cruelty and other matters are dealt under. There are many victims under marital rape scenario is being increased but the legislation is ignorant to criminalized such an offence.

The judicial decision of Queen Empress vs. Haree Mythee.²³, it was held that the wife over the age of 15, then the rape does not apply in that situation.

In the case of Sree Kumar vs. Peraly Karun²⁴, it was held that wife does not live separately with the husband under the judicial separation and being subjected to sexual intercourse without her will the act does not amount to rape.

As per the constitution of India, every law which is passed must be in conformation wit the principles and ideas which are enshrined in the constitution.

VI. CONCLUSION

The Indian law has failed to provide protection to women in marital rape. As women are still treated as property of husband and he has all the right to exploit her and no remedies has been provided to the women. Though husband violence against his wife may entitled a wife to bring action for criminal assault. Non criminalization of marital rape is the major concern in the Indian legal system. In order protect the women, the judiciary should take initiatives to safeguard them. Marries women should be taken proper care and they should not be subjected to sexual assault assault and violence. Hence this sector has a very narrow view in dealing with sexual violence and as such there is no legal provision which protects the married women.

²¹ AIR 1997 SC 3011

²² AIR 2004 SC 3566, 2004(2) ALD Cri 504

²³ (1890) 18 Cal 49

²⁴ 1999 (2) ALT

VII. REFERENCE

- Sarthak Makkar, Marital rape a non criminalized crime in India, Harvard Human Right Journal, <https://harvardhrj.com/2019/01/marital-rape-a-non-criminalized-crime-in-india>
- Subodh Asthana, The viewpoint on criminalization of Martial Rape In India, (June 10, 2019), <https://blog.ipleaders.in/marital-rape-criminalised-india>
- Aishwarya Mishra, Law on Martial Rape, (April 13, 2018), <https://www.mondaq.com/india/crime/691482/law-on-marital-rape-a-much-needed-reform-in-our-legal-system>
