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**MARITAL RAPE–
NON CRIMINALISED CRIME IN INDIA**

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ABSTRACT

The Indian Penal Code, 1860 contains obsolete provisions that fail to address the sexual offenses which are being committed today. The law in India does not criminalize marital rape that is a crime committed by a husband of raping his wife. The reasons for not criminalizing this heinous crime range from protecting the sanctity of the marriage institution to the already existing remedies in the penal laws. There is a need for a special law on marital rape in India. Even women are enriched with similar rights as that of men, but the rights of woman are being violated. This paper talks about criminalizing marital rape in India and must be recognized by the law. It tries to bring about the various facets of the existing penal laws. A balancing view concerning the current scenario and the loopholes of the law are explained in it. An attempt is also made at pointing out the way forward about this law. Along with these, various opinions and judicial pronouncements are put forth. It also proposes amendments to criminal law as well as to civil laws, regarding divorce in the country.

Keywords: marital rape, criminalization, penal laws, rights, marriage institution, amendments.

INTRODUCTION

Rape is defined as unlawful intercourse by a man against a woman by force, threat, coercion or by any unlawful means. Rape means the assault of woman against her will or without her consent or her consent obtained by unlawful means¹. Rape is one of the most brutal forms of violence of a woman's privacy and dignity. It is legally defined under section 375 of the Indian Penal Code, 1860. In the case of *Rafiq v. State of U.P.*², Justice Krishna Iyer observed that a "murderer kills the body but a rapist kills the soul". Marriage is considered as a sacred institution in Indian society. But it carries with it various crimes such as dowry, domestic violence, sexual assault, and other forms of household brutality. Marital rape is one such brutality. Marital rape refers to rape committed when the offender is the victim's spouse³. Though marital rape is the most common and horrendous form of machoism, it is hidden behind the curtain of marriage. Marital rape refers to unwanted intercourse by the husband with his wife using force, threat of force, physical violence, assault, or when the victim is not in a position to give the consent. There is no provision

¹ Bhupinder Sharma V. State of Himachal Pradesh, (2003) 8 SCC 551.

² (1980) 4 SCC 262: 1980 Supreme Court Cases 947.

³ In this paper the victim is the wife and the offender are the husband.

in the Indian legislation to treat marital rape as a crime. Woman who are a victim of marital rape and wants to raise their voice against it are denied state protection as section 375 of the Indian Penal Code has a general marital rape exception⁴. Only two groups of married women are covered under the rape legislation of India – those being under the age group of 15 years⁵ and those who are separated from their husbands⁶. In India, marital rape exists de facto (in fact) but no de jure (by law).

OBJECTIVES

- To focus on the present position of marital rape in India.
- To study the laws related to marital rape in India.
- To study the judicial precedents related to marital rape.
- To suggest some reforms (if any) in the existing penal laws.

PRINCIPLE UNDER INTERNATIONAL LAW

The Convention on the Elimination of All Forms of Discrimination Against Woman was adopted by the United Nations General Assembly. In its preamble, the Convention states that extensive discrimination against women continues to exist, and such discrimination "violates the principles of equality of rights and respect for human dignity". Under Article 1 of the convention, the term "*discrimination against women*" shall mean *any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status*⁷. India has ratified the convention. But the exception 2 of section 375 of the IPC permits violence against women on the basis of their marital status and thereby violating Article 1 of the convention.

⁴ Exception to Sec 375 of IPC- sexual intercourse by a man with his wife, the wife not being under fifteen years of age, is not rape.

⁵ The exception to Section 375 of the Indian Penal Code, 1860.

⁶ Under Section 376 B of IPC it is stated that sexual intercourse with one's wife without her consent under a decree of judicial separation is punishable (2 to 7 years of imprisonment).

⁷ Convention on the Elimination of All Forms of Discrimination against Women New York, 18 December 1979.

POSITION IN INDIA

The common law states that a man cannot rape a woman because the woman by consenting to the marriage has given herself to the man. The foundation of the exemption in section 375 could be drawn from statements made by Chief Justice Sir Matthew Hale, in the 17th century in England. According to Hale "*The husband cannot be guilty of a rape committed by him upon his lawful wife, for by their mutual matrimonial consent and contract, the wife has given herself in kind to the husband, which she cannot retract*". This established the notion that once married, a woman does not have the right to refuse sex with her husband. But later in England, this exception was abolished completely in 1991 in the case of R. v. R⁸ in which it was held that the rule that a husband could not be held guilty of raping his wife as she is considered as a chattel of her husband, which no longer represented the position of a wife in present-day society, should no longer be applied. Similarly, various developed countries such as Australia, Brazil, Canada, Malaysia, New Zealand, Bhutan and many more have recognized marital rape as an offense and criminalized the same. But India is a country where marital rape is yet to be recognized, least criminalized. However, the Justice J. S. Verma Committee in its report on Amendments on Criminal law, proposed the scrapping of the marital rape exception irrespective of the wife's age. But a Parliamentary Standing Committee on Home Affairs in its 167th law report held that if marital rape law was brought under the law as an offense, the entire family system would be under great stress.

The Indian laws recognize rape as a heinous crime and offense if it is committed by a man who is stranger but at the same time, if it is committed by a husband of the victim, there is no remedy provided to the victim. The enactments regarding marital rape as an offense is either non-existent or in hands of judiciary (or) legislature. But ironically both chose to remain silent on this issue. The words of former Chief Justice of India, Dipak Mishra on marital rape were "I don't think that marital rape should be regarded as an offense in India, because it will create absolute anarchy in families and our country is sustaining itself because of the family platform which upholds the family values". By this, the bleak picture of marital rape in India is clearly evident.

⁸ (1991) 4 ALL ER 481.

On 11th October 2017, Supreme court, in the case of Independent thought v. Union of India⁹ held that sexual intercourse with a girl below 18 years of age is rape whether she is married or not. It stated that the exception to rape law was arbitrary and violative of the constitution. However, the court did not criminalize forced sex with a wife who is above 18 years of age¹⁰. Later in 2019, a plea was filed in the Delhi High Court to seek direction to the centre to frame guidelines for registration of FIR for marital rape and laws for making it as a ground for divorce. It was filed by advocate Anuja Kapur. Kapur said that marital rape was no less an offense than murder, rape, culpable homicide. But this plea was dismissed by Delhi High Court stating the court cannot direct framing of laws as it was under the domain of legislature. At present marital rape is not a ground for divorce under the Hindu Marriage Act, 1955; the Muslim Personal Law (Shariat) Application Act, 1937; and the Special Marriage Act, 1954. The law protects the woman subjected to marital rape by charging her husband with a minor offense of cruelty, the punishment of which goes to three years in jail or fine or both. In worse cases, the wife can seek restraining order or protection under the domestic violation act in its best possible way.

CRITICAL ANALYSIS

The exception to the section 375 of the Indian Penal Code regarding marital rape makes the woman the property of her husband. Even after the verdict ruled out in the case of Independent Thought v. Union of India¹¹, there is no amendment made in the exception of section 375. The age of majority for all legal purposes is 18 years but for the offense of marital rape it is 15 years. Due to this there is a conflict between the exception and the provisions of Protection of children from Sexual Offences (POSCO), 2012. However, in justification to this age bracket, it is stated that the concept of age of puberty among Muslims for the age of marriage comes into picture. The reason why marital rape cannot be criminalized is because of the position of women in the Indian society. The various reasons why marital rape cannot be criminalized are as follows:

⁹ (2017) 10 SCC 800: (2018) 1 SCC (Cri) 13.

¹⁰ Exception 2 to Section 375 of the IPC, allows a husband to have sexual intercourse with his wife who is above 18 years of age even if she doesn't consent for it and it will not be considered as rape.

¹¹ See *Supra* Note no. 9.

- a. A more orthodox view that marriage is a sacred institution and criminalizing marital rape would destabilize the society.
- b. It should not be criminalized because a huge number of fraudulent cases may be filed against husbands.
- c. The women don't talk about violence suffered by them due to the societal pressure. Many women don't even know that can they raise their voice against their husbands for such an offense. They don't know that their consent matters for sexual activity. This is the reason that most of the marital rape cases are not even reported.

This exemption violates Article 14 of the constitution¹² as the victim is not provided protection under the ambit of the law. Instead, they are given protection under the Domestic Violation Act, 2005 which does not cover this as an offense. Marital rape violates article 21¹³ of the constitution, because the wife doesn't enjoy the personal liberty in this case as she is considered as an asset of the husband and her consent, will do not matter. Protection of the dignity of the woman is a fundamental duty under the constitution¹⁴ but it seems that marital rape doesn't come under the definition of the dignity of woman.

CONCLUSION

Therefore, it can be concluded that marital rape is a process of intimidation and assertion of power by men over a woman. It is not treated as an offense in India due to the orthodox mindset of the Indian society which considers woman as the property of the husband. Marital rape cannot be made a criminal offense in India because of the high illiteracy rate and extreme religious beliefs. This prima facie exception violates Article 14 and 21 of the Indian Constitution and hence should be struck down. Gone are those days where a wife is considered as the chattel of a husband. Today woman have their own identity which should be respected. Non-criminalization of marital rape is the major concern in the Indian legal system. It cannot be denied that in a country like India bringing about a change in the legal system per say laws is an easy task and when the case is such

¹² 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.

¹³ Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to the procedure established by law.

¹⁴ To promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women, article 51 A-(e).

sensitive which deals with marital rape to be treated as an offense, the work becomes much more difficult as it involves a lot of risk in terms of societal pressure, riots, could lead to fraudulent cases against husbands. But what about the women who are actually facing and suffering due to this offense and are unable to raise their voice due to shallow laws in the country. The existing penal laws don't define and reflect the various kinds of sexual assault. Thus, the legislature and the judiciary should work together to protect the woman against such heinous crime. This will eventually lead to the betterment and welfare of the society. Rape is rape whether is committed within the marriage or outside the marriage. There is also the need for substantial changes in the law on sexual offenses such as making them gender-neutral and eliminating the inequalities. In order to protect the women, the judiciary and the legislature should take initiatives to safeguard them such as:

- a. Marital rape should be considered as an offense under the Indian Penal Code, 1860.
- b. The punishment for marital rape should be the same as prescribed for rape under section 376 of the IPC¹⁵ or even stricter.
- c. Corresponding changes should be made in the matrimonial laws of the country such as the Hindu Marriage Act, 1955; the Special Marriages Act, 1954; and various other acts prevailing in the society.
- d. A provision for filing a FIR against the offender should be created.
- e. The wife should be given an option of getting a decree of divorce if the charge of marital rape is proved against the husband.
- f. The exception 2 of section 375 of IPC should be scrapped as it allows the husband to rape his wife if she is above the age of 18 years as it is arbitrary, unfair. rules should be made accordingly.

¹⁵ Whoever commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine.

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