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CRIMINALISATION OF MARITAL RAPE: A DISTANT DREAM IN INDIA

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ABSTRACT

A family is presumed to be one such zone where a person feels safest and most secured more than anywhere. Notwithstanding the said statement, when a family who suffers from violence, it encounters its worst manifestations. The repercussions of family violence are the most destructive when the perpetrator of one such violence is the man who is supposed to be the saviour of his women. Unfortunately, the husbands inflict the physical and sexual savagery in the name of irrevocability of consent to marital cohabitation. India does not criminalize this vicious act of marital rape till date and on the other side of the coin, India is progressing in making anti-rape laws to forbid rape in the country. Isn't it ironic that we live in a culture that respects and prays goddess and on the contrary, it molests and harasses women?

This paper attempts to consider the pace of atrocity against women in our society. By virtue of this paper one will have the option to discern what spousal rape is and further the author will delineate about the exception in section 375 of the IPC, 1860 which establishes discrimination between married and unmarried women who seeks to attain justice. This paper will further enlighten how our Indian legal system has been tied with the bar fetters of the British colonial influence and ideas. Our Indian legal system demonstrates the state of patriarchy and hypocrisy as criminally prosecuting the husband for rapping his wife is a far-gone lane for our Indian legal system. Altogether, the paper will highlight the main challenges faced by India in criminalizing marital rape.

INTRODUCTION

They said, “women are now safe in the country, but those case-files full of rape, molestation, and harassment screamed out a different story”. While various speeches, debates, protests, cases and judgments have been witnessed regarding the assurance of the women's safety in the twenty-first century, ‘rape: a global epidemic’ is still considered as one of the most heinous crimes that can be committed against a woman and is therefore penalised with strict laws globally. However, there also exists one such heinous crime which is not only globally unrecognised but is as long as the institution of marriage, that is, ‘marital rape’.

Marital Rape refers to unwanted intercourse or all sorts of penetration (whether anal, vaginal or oral) by a man on his wife obtained without her assent or by force, threat of force or physical violence or when she is in such a state where she is unable to give consent. This form of partner rape, domestic sexual violence, has been penalised by 159 countries out of 195 countries whereas the remaining 36 countries such as India, China, Singapore, etc., have not criminalised such a sin.

While India has been considered as an emerging & developing nation with a great advancing rate, it is an appalling fact that the nation still lacks some of the vital laws among which criminalisation of marital rape is of them. However, according to the exception of section 375¹ a partial criminalisation of marital rape exists in the legal system which states that “sexual intercourse by a man with his wife, the wife not being under fifteen years of age, is not rape, the exception fails to protect a large number of suffering women and has provided men a licence to rape their wives freely. Thus even though a complete criminalisation of marital rape is required the same has not yet taken place, ostensibly due to the various aspects among which, the influence of early colonial laws & doctrines, prevailing societal conditions, patriarchal social norms, ignorance of rights violation and most significantly the unmodified facet of the country’s legal system, pose as the barriers in the criminalisation of this offence, hence making it a tremendously challenging task.

CHALLENGES FACED BY INDIA

In the early period, the ideology of a woman, after marriage, giving a permanent and irrevocable consent to her husband for sexual pleasure anytime he wants has led to the control of a woman’s body as well as encouraged patriarchy through marriage. The doctrine of coverture² was another component for the encouragement of this ideology in the earlier period. As, according to this doctrine, upon marriage, the woman gave up her separate identity and legal rights to become one person in law i.e. the husband. Thus, the husband had an absolute and complete control over his wife, where control over her sexuality was just one of the facets of his control. And since raping

¹Indian Penal Code, 1860

² Keri Engel, The Law Of Coverture, April 29, 2019, <http://amazingwomeninhistory.com/law-of-coverture-why-call-a-woman-by-her-husbands-name/>

oneself cannot be considered a crime, marital rape was never considered as a crime due to the influence of this doctrine. A similar concept has been addressed by the British Jurist Matthew Hale in 1736, that ‘the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract³’. Thus, this view and doctrine took away the basic rights of the women and granted the husbands with a license to rape their wives and since the roots of this doctrine can be traced in the British colonial rule, it can also be traced in India as being a colony for two hundred years the influence of the same can be seen in the Indian law system too as all Indian laws enacted in that period are deeply influenced by the English laws, norms, and ideas and therefore, the discrimination made between the rape of a woman on the basis of her marital status where the unmarried woman is protected from rape than the married ones and the unreasonable distinction formed between the married women based on their age, as provided in the exception of section 357⁴ which determines as to whether a rape committed in a conjugal relationship is a marital rape or not, is a prevailing example of the colonial influence in the Indian legal system and its patriarchal views which did not recognise the basic human rights and equality between men and women. Therefore, to this day, a man cannot be criminally prosecuted for raping his wife under the Indian legal system which consequently reflects a state of inequality, hypocrisy and highlights an outdated legal system of the country which is required to be amended and modified according to the dynamics of society and needs of the people of the country.

Considering the prevailing societal conditions of the country marital rape cases, in today’s time as well as in the coming times, are bound to go unnoticed and unreported due to the fear of shame and stigma associated with it as a country where marriage is considered as a sacred institution with a culture of protecting the sanctity of the same even at the cost of silently suffering violence or abuse in the relation, marital rape in such a society is considered a taboo to speak about as any disturbances caused within a conjugal relation is looked down upon by the society. While in the Indian society most of the women are expected to save the honour, values and pride of their families by adjusting, tolerating or compromising to every arising situation, the families fail to

³ British Jurist Hale, Sir Matthew, The History of the Pleas of the Crown: In two Volumes, Volume 1, (1736)

⁴ Indian Penal Code, 1860

notice the violence, abuses and incest committed against them. And since most of the Indian women are financially dependent and would not survive outside their marital framework⁵, these women prefer to suffer in silence due to the fear of retaliation and reputation of the family honour and those who seek a remedy against it are not only refused to be helped by the society but are marginalised and often regarded as the villain of a relation trying to destroy the divinity of marriage. According to the Research Institute for Compassionate Economics every one in ten women have faced sexual violence by their husband in India and as per the 2018 report⁶ 83% of women, between the ages of 15-49 years, have faced sexual violence in their married life where the use of physical force or coercion by the husband for sexual intercourse was the most common form of sexual violence to be committed and while only 14% of them have sought external assistance, which has dropped from 24% as per the previous report, the remaining have stayed silent. Thus, resulting in the cases being left unspoken. Furthermore, not only this but to avoid the long court processes and the pendency of cases for several years marital rape cases go unreported, as observed in that of rape cases where even after strictly amending the rape and criminal laws by introducing stricter punishments and fast-track courts for speedier trials especially after the infamous Delhi gang-rape case (Nirbhaya case) in 2012 the statistics of pending rape cases have not only increased, instead of decreasing, but the rate of rape cases has escalated too. For instance, there are more than 32,500 rape cases registered according to the report of The National Crime Records Bureau released in 2019⁷ for the year of 2017, which stated that more than 127,800 rape cases were pending by the year ending and a total of 359,849 cases of crime against women have been reported the same year. Furthermore, according to the annual crime report by the Ministry of Home Affairs 34,000 rape cases were registered in 2018⁸, and over 2.4 lakh cases of rape and

⁵ Swarupa Dutt, why marital rape should be criminalised, REDIFF NEWS, Sept. 12, (2017), <http://www.rediff.com/news/interview/why-marital-rape-should-be-criminalised/>

⁶ National Family Health Survey-4, The Indian Express, June 11, 2020, <https://indianexpress.com/article/gender/national-family-health-survey-undercores-need-for-serious-discussion-on-marital-rape/>

⁷ Varalika Mishra, a rape in India every 15 minutes: government data, Asia Times, January 15, 2020, <https://asiatimes.com/2020/01/a-rape-in-india-every-15-minutes-government-data/>

⁸ One woman reports a rape every 15 minutes in India, Aljazeera, January 10, 2020, <https://www.aljazeera.com/news/2020/01/woman-reports-rape-15-minutes-india>

POSCO⁹ are reported to be pending across the courts in 2019¹⁰. Therefore, when a grievous crime as that of rape even after being amended still lacks its thorough implementation and consequently is still dealt poorly with a low conviction rate and a large number of pending cases before the legal authorities then, in such a scenario marital rape is predestined to go unregistered to avoid the hassles of society and its culture as well as the long legal process which result in the pendency of cases for several years.

Furthermore, the current power structures and deep-rooted patriarchy present in India are one of the other barriers in criminalising marital rape. As in a patriarchal society the idea of marital rape seems to be non-existent i.e. according to this society a conjugal relation implies a free consent of the wives to engage in any sexual activity with their husbands and thus sometimes considered as a right of the husbands to demand the same from their wives. And while this issue seems to exist in the Indian society only it ,unfortunately, exists in the Indian legal system too, as witnessed in the well-known case of NGO RIT Foundation and All India Democratic Women’s Association v. Union of India¹¹ where petitions filed for challenging the unconstitutionality of the exception of section 375 are pending before the High Court due to the statements released by the centre stating that criminalising marital rape ‘might destabilise the institution of marriage’ and would become ‘an easy tool for harassing husbands’¹². And while the Justice Verma Committee¹³ was formed to ratify the issue of crimes against women including the removal of exception of section 375, the centre submitted a similar report expressing its concern of disturbing the harmonious conjugal relation and a possible harassment of the husbands by criminalising marital rape. It is an extremely bizarre situation where the centre is outrightly ignoring the violation of basic human rights, deprivation of equality & safety and shutting eyes to the mental trauma of several women who are a prey to marital rape, all in the name of protecting the husbands and safeguarding the institution of the marriage which was already destabilised the moment an attempt of rape was made by the

⁹ The protection of children from sexual offence act 2012

¹⁰ Over 2.4 lakh cases relating to rape and pocso pending, The New Indian Express, March 05, 2020 <https://www.newindianexpress.com/nation/2020/mar/05/over-24-lakh-cases-relating-to-rape-and-pocso-pending-in-courts-across-india-centre-2112579.html>

¹¹ (2017): Writ Petition No 284 of 2015.

¹² Sanya Dhingra, The Print, Marital Rape, August 29, 2017, <https://theprint.in/report/criminalisation-marital-rape-may-become-easy-tool-harass-husbands-centre/8350/>

¹³ PRS Legislative Research, Justice Verma Committee Report Summary, <https://www.prsindia.org/report-summaries/justice-verma-committee-report-summary>

husband on his wife thus giving rise to a question as to whether the institution of the marriage is more important than the rights of the women in India. Therefore, the state not only reflects a biased mindset by securing the patriarchal status in a marriage and Indian society, but enunciates that the ownership over a female body is more important than addressing the issue and discharging their obligations¹⁴ regarding the same. And although in the recent years the Supreme Court, in case of Independent Thought v. Union of India¹⁵, held that that sexual intercourse with a girl below the age of 18 years irrespective of her marital status will be considered as a rape. However, the court did not criminalise the same offence committed against a wife who is above 18 years of age and even though the court ruled out its verdict in Independent Thought v. Union of India¹⁶ no amendments have been made in the exception of section 357 regarding the same. The Supreme Court of India has also dismissed a plea to criminalise marital rape by stating that the complainant was espousing a personal cause and not a public cause¹⁷. The woman, complainant, was repeatedly a victim of sexual violence and since marital rape was not a crime, she was helpless and even though her fundamental rights of living with dignity and liberty were being violated like that of other several women in the nation, the Supreme Court dismissed this alarming public issue by addressing it merely as a personal cause when in reality if stringent steps had been taken by the Supreme Court in this issue as taken in that of triple talaq, the state of marital rape as well as sexual violence in the nation would have been less perilous.

While the Indian legal system condemns the infringement of the fundamental rights and provides a speedy remedy for it, a hypocrisy lies within the system as not only the fundamental rights of marital rape victims are infringed but no reasonable remedy or relief is available to them. Marital rape prima facie violates Article 14¹⁸ of the Indian Constitution by discriminating against the women who have been raped by their husbands and by denying them a safeguard against the same

¹⁴ INDIA CONST. art 51A, cl (e): 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

¹⁵ (2017) 10 SCC 800

¹⁶ See *supra* note 14

¹⁷ Bhadra Sinha, S.C. rejects plea to make marital rape an offence, Hindustan Times, February 18, 2015, <https://www.hindustantimes.com/india/sc-rejects-plea-to-make-marital-rape-a-criminal-offence/story-URH9IRXhJPK58Qy6AySjPM.html>

¹⁸ INDIA CONST. art 14, 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.

in the criminal law. In *State of West Bengal v. Anwar Ali Sarkar*¹⁹, the Supreme Court, in 1951, held that the exception of section 375 is violative of Article 14 as it fails the reasonable test of classification and does not draw a rational nexus. However, no significant steps to ratify the same were taken until recent years. Marital rape also violates article 21²⁰ of the Indian Constitution by depriving a woman of her liberty and dignity as she is considered a chattel of her husband where her consent does not matter, and while the Supreme Court in recent years has acknowledged the right of a woman to abstain herself from any sexual intercourse²¹, the fact that the non-criminalisation violates her right to privacy and fails to provide her with a safeguard still exists. Moreover, merely providing a civil remedy instead of strict punishments, under the Indian Penal Code (1860), by implementing Protection of Women from Domestic Violence Act where the act of marital rape falls under the category of domestic violence or cruelty against women and not as rape does no justice to this crime. And while the exception of section 375 protects the privacy of marriage, it also infringes an individual's right to personal liberty, dignity and privacy. Thus, an ignorance of the Indian legal system on addressing the issue of rights violation can be witnessed.

CONCLUSION

Unfortunately, marital rape exists in our society. It is a rampant social evil which gives the husbands a legal immunity to enjoy rape and treat their wives as mere chattels. The society which considers it as a taboo to speak about and the Indian Legal system as well needs to realise that women are not objects of their husbands to provide them with sexual pleasure and that their choices have to be respected and protected as well in the country, but India will have to wait much longer to witness criminalisation of marital rape as due the existence: of deep-rooted parochial views including the taboos and stigma, patriarchal social & legal norms, non-acknowledgement of an individual woman's rights within a marriage by legislators & society, and an ignorance of rights violation, as well as an unmodified legal system which is in a dire need of reasonable amendments,

¹⁹ AIR (1952) SC 75 (India)

²⁰ INDIA CONST. art 21, 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

²¹ *Joseph Shine v. Union of India*, (2018) SC 1676 (India)

criminalisation of marital rape is an utmost strenuous task in this scenario. And, with such prevailing conditions criminalization of marital rape will remain a distant dream for India.