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Marital Rape as a Ground of Divorce

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ABSTRACT

Law is not something that can be left stagnant, law also require updates like any other things in the world. One of the latest requirements of the time is recognition of marital rape as a ground of divorce. Right to protection, personal choice is given to every individual then why should a marriage woman be left abdomen. It is important to understand the present scenario, women who marries her husband with a belief to be respected and protected but gets tortured and forced to have undesired sexual intercourse. This is not justified and needs urgent regulation to protect women's health an save her from mental trauma and insure her wellbeing. This paper is about criminalizing marital rape and adding marital rape as a ground of divorce.

Keywords: *criminalization, marital rape, rape, marriage, divorce etc.*

I. INTRODUCTION

Rape is the gravest kind of sexual violence against an individual- an extreme manifestation occurring in the continues sequence of sexual violence which nullifies the human rights of an individual completely. According to section 375 of the Indian penal code, rape is defined as, “A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman without her will and consent.” It is said that Rape stems from sexist value and beliefs and it is not any normalized issue that is affecting individual women. Whereas it is a social as well as a political issue directly connected to imbalance of power between men and women.

Marital rape is a rape committed when the evil doer is the victim's spouse.² Where the definition of the rape remains the same, which means that the essential ingredient to prove the crime of rape is to prove lack of consent.³ Where the burden of prove is on the victim. In some instances, consent it is assumed that consent does not exist, i.e., minor's consent. On other hand, in some cases consent does to even matter, and are assumed to exist, i.e., married women

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² In this paper, since the discussion is couched in the Indian context, it will be assumed that evil doer is the husband and victim is the wife.

³ IPC, 1860, § 375

/ wife.⁴ In such instances, the idea of marital rape becomes antithetical.

At present 150 countries have criminalized the offence of marital rape and there are only 36 countries left, which include India. It is astonishing that countries recognize rape as a crime and prescribes penalty for the same, they exempt the cases when a marital relationship exists between the victim and the evil doer. The exception is named as “marital rape exception clause”. There are four main justification given for not criminalizing the offence of marital rape. With the passage of time and advancement in the gender equality, first two have been almost eliminated.

First justification- wife understood as subservient of the husband.⁵ Thus it is said that there is no scope of rape in marriage since husband is assumed to be master of his wife.

Second justification- a married women does not have any individual identity. An identity of a married women combines with her husband i.e., ‘the unities theory’ which means after marriage the identity women mergers with that of her husband.⁶

Third justification- “the implied consent” theory i.e., after marriage it is widely assumed that when a man and women enter into marital contract, the consent to sex preexist. Marriage is considered to be a civil contract and consent to sexual activities is thought to be the defining element of this contract.⁷

Fourth justification- the most recent and vague, that criminal law must not interfere in the marital relationship, since marital issues are once personal problem and must be dealt in private sphere.

In this paper we will establish why the above-mentioned justifications are not well designed and subsequently recommend a model for the criminalization of marital rape in India. In next part we will study the arguments given by the parliament and government related to criminalization and not criminalization of marital rape. Further paper establish why is it required to criminalization of marital rape. And ending with some suggestions about amendments required in the present laws to deal with the same and why should marital rape be considered as a ground of divorce.

⁴IPC, 1860, §375, Exception 2.

⁵ Rebecca M. Ryan, “*The Sex Right: A Legal History of Marital Rape Exemption*”, 20 LAW AND SOCIAL ENQUIRY, 944 (1995).

⁶ “*To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment*”, 99(6) HARVARD LAW REVIEW, 1256 (1986).

⁷ Supra note 5

II. HISTORY OF MARITAL RAPE IN INDIA

§375 of IPC has a wider scope of rape which includes both sexual intercourse and other sexual penetration such as oral, anal of the women.⁸ However in the exception 2 of the same section excludes the application of rape crime in case of husband and wife.⁹ The exception to the crime can be due to an irrefutable presumption of a consent established in the relation of victim and the evil doer. Or it can be that legislature decides to excludes the married couple form the section giving the holiness of the relation believed by the society. This is probable since according to §376B where spouses are exempted from this exception, i.e., when the husband and wife are on judicial separation.¹⁰

On analysis of these two sections (§375 & §376B) it can be assumed that legislature beliefs that husband and wife living together is an ingredient that denotes the consent for sexual intercourse.

The first report to deal with the rape issue was 42nd Law Commission Report.¹¹ Many amendments to the law has been witness following this report, the report is limited to understanding the prism through which the law commission views marital rape. In this report 2 suggestions were made, first, in case of judicial separation the exception clause must not be applied. The reason given for this was unclear, which was *“in such a case, the marriage technically subsists, and if the husband has sexual intercourse with her against her will or her consent, he cannot be charged with the offence of rape. This does not appear to be right”* this statement is seemed to be vague since it does not give a reason why is exception not right. The second suggestion was related to non-consensual sexual intercourse between girl aged between twelve and fifteen.¹² Where the suggestion was to separate this crime form the crime of rape, because at that time there was different punishment for rape when wife was of age between twelve and fifteen. The suggestion failed to classify marital rape as rape, but at best as a lower form of sexual minor wrongdoing. Although the report tried to highlight the presumption of consent in case of husband and wife, and difference between marital rape and rape, where the former is vied to be less serious. But fails to indemnify whether to retain or delete the exception clause 2.

The Law Commission directly delt with the issue of validity of exception clause 2 in 172nd

⁸ The Indian Penal Code, 1860, §375 after the Criminal Law Amendment Act, 2013.

⁹ Independent Thought v. Union of India, AIR 2017 SC 4904.

¹⁰ The 42nd Law Commission Report, June 1971

¹¹ Idib.

¹² Idib.

report¹³ the commission argued that if all other forms of violence by the husband to wife are criminalized then why is this solely left in the shadow.¹⁴ Upon this argument the commission completely rejected the proposal. And stated that it will be unnecessary too much interference in the personal life of individual and shelters the light on relation between martial rape and the holiness of marriage.

One of the commissions recommend the criminalization of marital rape. The law commission former under justice J.S. Verma¹⁵, due to the wide spread of heinous crime of sexual assault against women. The report presented by the committed suggested some amendments, one was the criminalization of marital rape, by deleting the exception 2 under §375 of IPC and by clearly stating that any relation being husband wife or any such relation could not be used as a defence for the offence of rape, or determining whether it was consensual or nonconsensual. The report also stated that how this immunity has been withdrawn in many jurisdictions, and that now days marriages are no long treated as a contract where wife becomes part of husband of servant of husband, but is a relation between two equals and individuals.

Flowing this amendment Criminal Law Amendment Bill, 2012 was drafted.¹⁶ As per bill, the word “rape” was edited to “sexual assault” so that the scope of crime can be increased but still the bill missed out on criminalization of marital rape. Which means that the amendment bill 2012 was not made keeping in consideration the suggestions made justice J.S. Verma committee. In the 167th standing committee report (the parliament standing committee on home affairs) reviewed the amendment bill 2012 and setup public consultations.¹⁷ Once again the same suggestion was delivered, deleting on exception clause. But the committee straight forward denied but stating two reasons, one that it will be disturb the entire family system and will just be unnecessary delivery of more injustice in the system, second was that families are self-versed to deal with such issues and in case of legal remedy, criminal law already has the concept of cruelty under §498A IPC.¹⁸

In 2015 when a private member bill was present in the house to criminalize the martial rape¹⁹, the denial was made on the bases that, one the “marriage is treated as sacrament” second, “the

¹³ Law Commission of India, Review of Rape Laws, Report No. 172, 2000

¹⁴ Idib.

¹⁵ JUSTICE J.S. VERMA COMMITTEE, Report of Committee on Amendments to Criminal Law (January 23, 2013)

¹⁶ The Criminal Law Amendment Bill 130, 2012.

¹⁷ STANDING COMMITTEE ON HOME AFFAIRS, Fifteenth Lok Sabha, Report on The Criminal Law (Amendment) Bill, 2012, One Hundred and Sixty Seventh Report, 45, 2015

¹⁸ The Indian Penal Code 1860, §498A.

¹⁹ The Criminal Laws (Amendment) Bill, 2014, 28 of 2014. (This Bill was a Private Member Bill proposed by Ms. Kanimozhi on the 28th of November, 2014 (status of bill pending)

matter is already under consideration by law commission and no decision will be taken before the report is out”.

this stagnant attitude is not shown only by legislature or law commission, but extends to judiciary as well. However, there are no cases in India history where the constitutionality of the exception clause in §375 has been explicitly upheld, but have been cases where judiciary ignored the petitions filed to delete exception clause²⁰; and have also used the clause to save them selves from the ques of husband raping his wife.²¹

To sum-up all the arguments, the reasons stated are,

- sacred relationship,
- family matter,
- other available remedies under IPC and the protection of women from domestic violence act 2005,
- law dealing with divorce,
- cultural values in India

III. MARITAL RAPE: VIOLATION OF FUNDAMENTAL RIGHT.

Law commission mentioned a lot of time that omitting of exception clause will be to much interference within once’s private sphere but criminalizing cruelty under § 376B is also interference in once private sphere. If the state decides to not penetrate the privacy in case of rape, women will be left with no legal remedy when get raped by her husband.

Fundamental rights are the one every individual is born with; so, why has judiciary created illusionary private sphere where they are so reluctant to penetrate to deliver justice. Which brings us to the question, where marital rape is an infringement to once fundamental rights. In order to understand engagement of fundamental right to private sphere, the constitutionality of ‘restitution of conjugal rights’²² under §9 of Hindu marriage act, 1956. According to this section court me order the party (who distanced the other party socially) to live with the other party. In other words, “if a husband or wife does not live with the other spouse ‘without reasonable excuse’, the court can grant a decree of Restitution of Conjugal rights” or we can say court is compelling the women to have sexual relationship with her husband, only because he does not have reasonable excuse to deny for that. Isn’t this the penetration to th e private

²⁰ Nimeshbhai Bharatbhai Desai v. State of Gujarat, 2017 SCC OnLine Guj 1386

²¹ Apoorva Mandhani, Marital Sex Even if Forcible is Not Rape; Delhi Court, LIVELAW (Delhi) May 14, 2014

²² The Hindu Marriage Act, 1956, §9.

sphere?

It quite shocking to see that at one end state is not criminalizing marital rape by presuming that women has consented for sexual intercourse with her husband. And on other hand women are not even provided with any option to say not. Thus, participation in sexual activity is only the option she has. Which shows that state is interfering in the private sphere by forcing a woman to have conjugal relationships.

There are cases in which court strike the constitutionality of the §6 of HMA on the basis of violation of article 14, 19, 21 of the constitution. the court stated that the Restitution of Conjugal rights are violation once right to choose her preference to have sexual relationship.²³ But also held that RCR is not related to marital rape and both are independent. In *Harvinder Kaur v. Harmander Singh*²⁴ the Delhi high court stated that the §9 of HMA was not to establish sexual relation or force women to give forced consent for the sexual activity, it was just “to protect the institution of marriage” the court further added that the marriage is not just to establish sexual relation but are many other relationships that encompasses a marriage. And ignored the question of marital rape by stating that it is “marital privacy”.

So, this means states are selective to penetrate the imaginary privacy sphere, state feels ok to invade once privacy/ marital sphere in case of restitution of conjugal rights under §9 of HMA, cruelty under §376B of IPC, §377 of IPC, §497 of IPC. Which means state can force someone to establish sexual relation with someone, can punish someone for cruelty committed in once private sphere, can interfere in once sexual preference that to consented. But cannot criminalize marital rape when the same state has criminalized rape²⁵.

IV. THE MODEL FOR CRIMINALISATION OF MARITAL RAPE

The J.S. Verma Report is the landmark report in the history of debate on marital rape. As discussed above, the committee gave some suggestions to criminalize marital rape.²⁶ The committee asked for the removal of the exemption clause, it asked to specifically mention that it is not a defence, that there would not be a presumption of consent and lastly, that the quantum of punishment is the same. But the 42nd Law commission responded by stating that marital rape is to be put under separate section, moreover not to be called as “marital rape’ and also

²³ T. Sareetha v. Venkata Subbaiah, AIR 1983 AP 356.

²⁴ *Harvinder Kaur v. Harmander Singh*, AIR 1984 Del 66.

²⁵ VIDHU VERMA, *NON-DISCRIMINATION AND EQUALITY IN INDIA: CONSTESTING BOUNDARIES OF SOCIAL JUSTICE* (2012); Saptarishi Mandal, ‘Right to Privacy’ in *Naz Foundation: A Counter Heteronormative Critique*, 2 NUJS L. REV. 525 (2009)

²⁶ J.S. VERMA REPORT, *Supra* note 15

have different punishment.

A. marriage relationship: not a walkout: Merely omission of exception clause in §375 IPC is not sufficient to ensure the crime of marital rape is covered. Because, this will lead to too much judicial interpretation thus increase in judicial cases and discretion. A separate definition must be established and if exceptions laid, should be clearly stated to reduce the scope of too much interpretation.

B. Presumption of consent: as stated by J.S. Verma consent is not something to be presumed in the case of marital rape. But practically judiciary will no-doubted look into some threshold of force to understand consent in such cases. There are three ways to treat consent while criminalizing marital rape. One, assume consent and leave burden of proof on victim; second, assume no consent and leave burden of proof on evil doer to establish consent. Third, the most important draw a particular system to trace consent in special cases like marital rape using Indian evidence act. The above-mentioned ways have its own backdrops, since an sexual act is committed in a private sphere/ inside four walls. And producing evident to prove consent/ no-consent will be difficult for both the parties.²⁷ As per todays law, usage of force is not essential to prove consent in cases of marital rape.²⁸ Moreover, as stated in Uday v. State of Karnataka,²⁹.consent is understood on the basis of circumstantial evidence.³⁰ Keeping into consideration the nature of crime, producing evidence will be extremely difficult and a minor gap of interpretation will can also lead to false rape charges to take revenge and can also lead to more crime against women since evidence production is hard, men will feel safe from any kind of eviction.

C. Problems in case of marital rape

i. Existence of sexual intercourse is not evident to prove marital rape. Since it is assumed that married couple will engage in sexual intercourse³¹. Thus, differentiating marital rape form the normal rape case.

ii. The presence of evidence of sexual intercourse along with signs of physical injury, or other form of cruelty can be considered as sign of marital rape.

iii. History of assault, domestic violence, can be attached to the women testimony just to ensure the series of cruelty against women by husband. But this will be contradicting §53 and

²⁷ The Indian Evidence Act 1872, §114A

²⁸ State of H.P. v. Mango Ram, (2000) 7 SCC 224.

²⁹ Uday v. State of Karnataka, (2003) 4 SCC 46;

³⁰ Pradeep Kumar alias Pradeep Kumar Verma v. State of Bihar, (2007) 7 SCC 413; Dilip v. State of Madhya Pradesh, (2013) 14 SCC 331.”

³¹ Encyclopedia of rape, 169 (Merril D. Smith, 1st Ed., 2004)

§54 of the Indian evidence act, 1872 which says that any past bad character of an individual is not relevant to present case.

iv. It was established in a case that past sexual history of a women is not required in order to establish consent.³² That is to be considered in the case of marital rape since women could have had consensual intercourse with her husband at an instance and non-consensual i.e., rape. Thus, in the case of marital rape expert testimony of doctor is important to relate the incident with the mental trauma and psychological trauma the victim is facing.

D. Punishment policy: the punishment for marital rape must be same as the punishment of rape under §376 of IPC that is 7 years to life imprisonment. Since the offence as well as the ingredients of the crime is same i.e., absence of free will and consent. Moreover, an addition of a clause of marital rape as a ground of divorce under every marriage act i.e., Hindu marriage act, Muslim marriage act, parsi marriage act, etc.

V. GROUND OF DIVORCE

There are primarily two marriage acts in India the Hindu marriage act 1955 and special marriage act 1954, but there are some legislative acts to govern the marriages in minority groups namely Muslim marriage act, 1939; parsi marriage and divorce act,1862; Indian Christian marriage act, 1872. But grounds of divorce are same across all the acts, i.e., cruelty, male being impotent at the time of marriage, husband lost for four year, no maintenance given for two year, adultery, change in religion, failed to maintain restitution of conjugal right for two year, etc.

From all the decrees given by the act for divorce, it is clear that any king of cruelty, assault, not able to perform martial functions like sexual intercourse, distancing for more than 2 year or not taking care of the partner which means that state has penetrated the “privacy sphere” or “marital sphere” and granting cruelty as a ground give the scope of validity for marital rape as a ground of divorce. As stated about rape is a heinous crime against an individual which includes- assault, violence, morality deterioration. Further keeping in mind, the punishment for rape, seven years is the minimum punishment given to the convicted person thus separation of husband from wife for more than 4 year, also if the husband is punished with 7 years if imprisonment it is a decree of divorce under §2 clause iii of the dissolution of Muslim marriage act, 1939.³³ Ac as an addition to grant divorce on the ground of marital rape.

³² Narender Kumar v. State (NCT of Delhi), (2012) 7 SCC 1

³³ §2 of the dissolution of Muslim marriage act, 1939