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Marital Rape in India: A Disguised Violation of Human Rights

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ABSTRACT

Women in India are subjected to criminal atrocities such as domestic violence, sexual harassment, trafficking, rape and forced prostitution. This is just a small catalogue of endless crimes against women. The most heinous of all sexual offences, which not only subjects women to a thoroughly detestable physical conquest from which there can be no retaliation, is rape. Among all instances of rape, the most discriminatory and yet largely unreported form of sexual violence is marital rape. Marital rape can be more traumatic and abusive than stranger rape because wife is abused by someone who is generally thought of a careful and protective person as a source of trust and care. It produces a feeling of treachery and disenchantment in the woman. The traditional belief that marriage provides a husband with the 'license to have sex' thereby exempting him for any prosecution for having sex against the will of his wife still persists in the 21st century. Marital rape is, in particular complicated because of the complex, personal nature of marital relationships which makes it hard for the victim to even see herself as a victim. Treatment of marital rape as a civil or moral wrong rather than crime reflects the patriarchal notion that still treats a woman as husband's property. The present paper confines itself to examine the glaring inequities of justice system with regards to marital rape in India. Paradigmatic shifts in law and justice in 21st century call for criminalization of marital rape which is the severest form of human rights violation.

Keywords: Marital Rape, criminalization, human rights, cruelty, laws.

I. INTRODUCTION

Man and woman are two halves of humanity. Neither can reach its highest creative excellence without the co-operation of the other. Through the ages women have been placed on a pedestal 'mother of mankind'. Paradoxically, the most horrendous cruelties have been inflicted on her, often without reason and mostly without just cause. Even in the new millennium, the status of women has not improved mainly due to the traditional bias and prejudice towards that section of the society which has remained, for no fault of theirs, discriminated against all these years.

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The discrimination stems not so much from legislative insufficiency as from the attitudinal bias of the society. Explaining the extent of equality between men and women and interdependence of men on women as equally as women on men, Lord Denning has observed³

“A woman feels as keenly; thinks as clearly, as a man. She, in her sphere does work as useful as man does in his. She has as much right to her freedom - develop her personality to the full – as a man. When she marries, she does not become the husband’s servant but his equal partner. If his work is more important in life of the community, hers is more important in the life of the family. Neither can do without the other. Neither is above the other or under the other. They are equals”.

II. STATUS OF INDIAN WOMEN IN MARRIAGE

Despite the fact that we are nearing to a century since Indian women played a colossal role in fighting for their nation’s independence from the British rule, women in India are still subjected to criminal atrocities such as domestic violence, sexual harassment, trafficking, rape and forced prostitution. This is just a view of the commonly committed crimes on women in the society. After the wedding, a woman is totally under the control of her husband and his relatives who put many unreasonable restrictions on her freedom and movement. Many husbands do not have faith in their wife’s fidelity and loyalty and such is an extent of this distrust that they impose inhuman restrictions on them. Such a case of highly inhuman treatment with young wife was noticed in Rajasthan. A woman named Kamli was married to a man called Balram, who was twenty years older than her. Balram’s jealousy of his young wife made him encase her pelvic region in iron underwear made by the village blacksmith. This underwear had a waist band with a lock. Balram opened this underwear whenever Kamli needed to relieve herself and even went with her to the fields on these occasions but kept her imprisoned in this manner the rest of time. It was Kamli’s brother who discovered how she was being tortured and approached the *saathins* (women social workers) for assistance. The *saathins* managed to free Kamli but she had to be hospitalized for the treatment of the damage done to her pelvic region. This incident puts the whole humanity to shame and illustrates that Indian women still have to endure feudal atrocities in one form or the other².

III. MARITAL RAPE IN INDIA

The husband cannot be held guilty of a rape committed by himself upon his lawful wife, for by

their mutual matrimonial consent and contract, the wife hath given herself upon this kind unto her husband whom she cannot retract³. The traditional belief that marriage provides a husband with the ‘license to have sex’ thereby exempting him for any prosecution for having sex against the will of his wife still persists in the 21st century. “Sex is the foundation of marriage and marriage without sex is anathema”⁴. The most heinous of all sexual offences which not only subjects women to a thoroughly detestable physical conquests from which there can be no retaliation is rape. Among all instances of rape, the most invidious and yet largely unreported form of sexual violence is marital rape. Marital rape occurs when a man imposes to having sexual intercourse with his wife against her will either by force, threat of force or when she is unable to give consent. It is non-consensual act where a wife is physically and sexually abused by her own husband. Marital rape can be more traumatic and abusive than stranger rape because wife is abused by someone who is usually a source of trust and care. It produces feeling of treachery and disenchantment in the woman.

Marital rape is, in particular complicated because of the complex, personal nature of marital relationships which makes it hard for the victim to even see herself as a victim. The institution of marriage has recognized sexual intercourse as an integral part of married life. Denial of sex to your spouse is considered to be a form of cruelty⁵.

“A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female.”⁶ In Indian society marriage is regarded as a sacrament and it cannot be denied that religious beliefs, customs, norms and traditions have been the source of contemporary modern laws. According to Manusmriti, wives are property of the husband and should be under the custody of her husband. Moreover a wife should procreate and worship her husband and must not seek separation from him⁷. Marital rape was not a criminal offence in past and it is still not an offence⁸. The ancient religious beliefs still persist in our judicial system wherein under Indian Penal Code (IPC), marital rape is not a criminal offence⁹. People in India still follow the traditional archaic notion that once a woman is married, she gives all bodily right to husband and should meet the sexual requirements of husband, whenever required. And for this their marriage certificate acts as an entitlement to have sex according to whims and fancies. In Islam there is a conflict of opinions regarding marital rape. Some say that a husband cannot force his wife to have sexual intercourse and if he does so, it is a crime¹⁰. However some others say that a woman is not allowed to deny sex to her husband even if she is not willing. A husband can dominate her and can force her to have sex with him¹¹. A husband is incharge of his wife and a wife should not be disobedient to to her husband. If a wife denies sex to her husband and if the husband spends the night angry with her, she will be cursed by the angels¹².

Minister for Women and Child Development, Maneka Gandhi in her written reply to the Parliament said that, “It is considered that the concept of marital rape, as understood internationally, cannot be suitably applied in the Indian context due to various factors level of education/illiteracy, poverty, social customs and values, religious beliefs, mindset of the society to treat the marriage as a sacrament etc”¹³. This statement is totally contradictory to her previous statement when she viewed marital rape as condemnable and stemmed from a man’s need to assert power over a woman. In an interview with journalists in June 2015 she said: “My opinion is that violence against women should not be limited to violence by strangers. Very often a marital rape is not always about a man’s need for sex. It is only about his need for power and subjugation. In such a case, it should be treated with seriousness¹⁴.

Today’s raging debate on marital rape in India echoes arguments that go back more than 125 years ago to the Phulmonee case when a 11 year old Bengali girl died after being brutally raped by her 35 year old husband. Phulmonee Dasse was married at the age of 11 years. After marriage her husband Hurree Mohun visited her mother’s house and stayed there overnight. Her mother slept in one room, Hurree Mohun in another room and three little girls including Phulmonee slept in verandah. At midnight her mother was woken by her daughter’s cries. On looking around she saw Phulmonee on her husband’s bed bathed in blood with Hurre Mohun standing beside her. The girl did not speak except to ask for water and died in the night the same day. Hurre Mohun was charged under Section 304, 304-A, 325 and 338 IPC. This case was heard by a single judge bench of the High Court of Calcutta in its original jurisdiction. The medical evidence as given by the police surgeon was that Phulmonee had died of bleeding caused by ruptured vagina¹⁵.

At the end of the trial the judge, directed the jury of six Hindus, two Europeans and one Mohammedan. The learned judge *inter alia* said, “It by no means follows that because the law of rape does not apply between husband and wife if the wife has attained the age of 10 years, that the law regards a wife over ten years of age as a thing made over to her husband or as a person outside the protection of law. Under no system of law has it ever been the law that a husband has the absolute right to enjoy the person of his wife without regard to the question of her safety. It is true that that law is very unwilling to trespass inside the chamber where husband and wife live together and never does so except in case of absolute necessity”. The accused husband in the above case got punishment of only one year imprisonment for causing the death of his minor wife in a most shameful and ghastly manner because the law of rape was not applicable to the case as Phulmonee had attained the age of 10 years¹⁶. After the above incident which attracted the attention of the Government, the age limit was increased to 12 in 1891. It

was further increased to 13 in 1925 and to 15 in 1949. Since then there is no change and it remains 15. At present the age for giving valid consent by a woman for sexual intercourse is 16 years and in case of husband, he can have sexual intercourse with his own wife if she has completed 15 years of age¹⁷.

Despite the myth that has historically existed that rape by one's partner is a relatively insignificant event causing little trauma, research indicates that marital rape often has severe and long lasting consequences for women. The physical effects of marital rape may include injuries to the vaginal and anal areas, lacerations, soreness, bruising, torn muscles, fatigue and vomiting. Women who have been battered and raped by their husbands may suffer other physical consequences including broken bones, black eyes, bloody noses and knife wounds that occur during the sexual violence. Specific gynaecological consequences of marital rape include vaginal stretching, anal tearing, pelvic pain, urinary tract infections, miscarriages, stillbirths, bladder infections, infertility and the potential contraction of sexually transmitted diseases including HIV/ AIDS¹⁸. Women who are raped by their partners are likely to suffer severe and long term psychological consequences such as disordered eating, sleep problems, depression, problems establishing trusting relationships, distorted body image and increased negative feelings about themselves. Similar to other survivors of sexual violence, some of the short-term effects of marital rape include anxiety, shock, intense fear, depression, suicide ideation, disordered sleeping and post-traumatic stress disorder¹⁹.

(A) Marital Rape: Laws and Position in India

Though we have advanced in every possible field, marital rape is not considered as an offence in India. In India marital rape exists de facto but not de jure. In *State of Punjab v. Ramdev Singh*²⁰ Supreme Court said "Rape is a crime against basic human rights and it also violates most cherished fundamental right guaranteed under Article 21 of the Constitution of India. Indian judiciary on one hand is recognizing rape as a crime but on the other hand negates to pronounce by not recognizing marital rape²¹. Marital rape is a slap on women's dignity and violation of individual's fundamental right to privacy, thereby defeating the whole purpose of fundamental right. Article 21 has a wide ambit and it also covers right to live with personal liberty and dignity. The validity of women's right to live with dignity comes into question when she is forced by her husband to have sexual intercourse without her will and consent. Every woman has a right to choose whether or not to indulge in sexual intercourse with her husband. The exception of Section 375 of IPC also contravenes Article 14 of the Constitution of India. The exception vanquishes the principle of equality before law embodied in Article 14 as it is arbitrary and discriminatory in nature. As per exception only two groups of women are protected

by the present rape laws – one who are under fifteen years of age and another who are living separately from their husband.

Ironically Section 375 of the IPC makes a classification in terms of an exception that does not regard a forceful sexual intercourse within a marriage as rape. The exception legally differentiates and withdraws the protection from a married woman solely on the basis of her marital status. Thus the classification is unreasonable, unintelligible and violates the mandate of Article 14. Owing to the violation of fundamental rights, exception of Section 375 is still existing which should have been struck down as being unconstitutional²².

Moreover, exception to Section 375 is in itself contradictory because as per the Prohibition of Child Marriage Act, 2006 Section 2(b) read with Section 2(a), the legal age for a female to marry is eighteen years. Since marriage with a girl below eighteen years of age is prohibited (though it is not void as a matter of personal laws), sexual intercourse with a girl within eighteen years of age should also be prohibited. Moreover the Protection of Children from Sexual Offences Act, 2012 prohibits any sexual activity with any child below 18 years of age²³. Exception to Section 375 exhaustively contradicts with the existing laws pertaining to restrict sexual activity with children below 18 years of age²⁴. Women so far have recourse only to Section 498A of IPC which deals with cruelty either physical or mental, to protect them from violence within marriage. Further with the enactment of Protection of Women from Domestic Violence Act. 2005 sexual abuse was recognized as a domestic violence but not as a crime²⁵.

Regardless the laudable efforts of the 42nd Law Commission Report(1971), the 84th Law Commission Report(1980) and the 172nd Law Commission Report(2000), IPC still stands archaic and fails to redress the changing nature of sexual offences in India. 42nd Law Commission Report recommended that criminal liability should be attached to intercourse of man with his minor wife. Subsequently the 84th Law Commission Report recommended an amendment to the marital rape exception by increasing the age of wife to eighteen years. Thereafter the 172nd Law Commission Report and Criminal Law Amendment Bill 2012, adhered to the earlier position of not recognizing “rape within the bonds of marriage” to prevent excessive interference with the marital relationship. Subsequent to the Delhi gang rape²⁶ Justice Verma Committee was constituted. The Committee recommended that the exception to marital rape should be removed, reasoning that the “consent will not be presumed in the event of an existing marital relationship between the complainant and the accused”. Moreover, the fact that the accused and the victim are married or in another intimate relationship may not be regarded as a mitigating factor justifying to lower sentences for rape²⁷.

Ironically the recommendation of the Justice Verma Committee was not included in the Criminal Law Amendment Bill 2013 which reveals the disinclination of the Government to criminalise marital rape in India. If legislature does not want to amend any of the recommendations, then what is the purpose behind constituting such committee? The wife's consent is based on the common law rule of marital exemption. However this concept has undergone a change and marital rape is now an offence in US, Sweden, Denmark, Australia and the UK²⁸. In *R. v R*²⁹, the House of Lords widened the scope of criminal liability by declaring that a husband could be charged as the principal offender in the rape of his wife. This decision seems to have obliterated the protection of the husband from such prosecution under the doctrine of marital exemption. This exemption was based upon a belief under which the wife was regarded as the husband's chattel. She was supposed to have given a general consent to her husband as a natural implication of the marriage. This has now become an outmoded view of marriage³⁰.

IV. JUDICIAL ACTIVISM IN REGULATING MARITAL RAPE IN INDIA

In *State of Karnataka v Krishnappa*³¹ and *The Chairman, Railway Board v Chandrima Das*³² it was held that rape is a crime against the basic postulates of human rights and is an unlawful intrusion on to the right to privacy and sanctity of female as guaranteed under Article 21. The Supreme Court in the landmark cases of *Puttaswamy v Union of India*³³ and *State of Maharashtra v Madhukar Narayan*³⁴ ruled that sexual privacy is a fundamental right of all citizens and forced sexual act would be a clear violation of this right. These judgments make no distinction between the rights of a married and unmarried women and there is no contrary judgment establishing that marital relationship abridges an individual's right to privacy. As a result, the Supreme Court recognizes the sexual rights of all women regardless of marital status as a basic right provided by Article 21 which is evidently being violated through non-legalisation of marital rape.

Recently the Chhattisgarh High Court discharged a man from facing trial for allegedly raping his wife, given that Indian law does not recognise marital rape if the wife is above 15 years of age³⁵. The High Court was hearing a criminal revision plea by the husband against the framing of charges based on the complaint by his wife. The wife's complaint alleges that she was subjected to cruelty, abuse and dowry harassment days after her marriage. She has also alleged that her husband had unnatural physical relations with her, and despite her protests, inserted his fingers and a radish in her vagina. Taking note of the allegations of cruelty, which have been supported by her parents and "neighbouring witnesses", the judge held, "I do not find any

infirmity in framing charges under Section 498-A/34 of the IPC against the applicants.” The court also sustained the charges under Section 377, while observing that “where dominant intention of the offender is to derive unnatural sexual satisfaction, repeatedly insert any object in the sex organ of the victim and consequently derives sexual pleasure, such act would constitute as a carnal intercourse against the order of nature.”

Earlier the Kerala High Court delivered a landmark judgment earlier in August 2021 that deemed marital rape to be a valid ground for divorce. In the case at hand, where the appellant forced his sick wife to have sexual intercourse with him, the Division Bench comprising of Justice Kauser Edappagath and Justice A Muhamed Mustaque opined that “husband’s licentious disposition disregarding autonomy of wife is marital rape”. The bench held that while marital rape is not penalised in India, it would not deter the court from recognising it as an act of cruelty and granting a divorce. They also opined that there is a need for the law to evolve in a manner where human problems are dealt with a humane approach³⁶. Section 375 of the Indian Penal Code(IPC) categorises acts of penetration sans informed consent as rape. However, it categorically mentions that sexual intercourse with one’s wife who is over the age of 15 will not constitute the offence of rape. The statutory age of consent was raised from 15 to 18 by the Criminal Amendment Act of 2013.

(A) International Scenario

Marital rape is a widespread problem across the world but various countries have acknowledged it as had either recognized it as a crime or had repealed marital rape exception. The United Nations Committee on Elimination of Discrimination against Women wants India to criminalise marital rape. UNDP Chief Helen Clark stated that, “The issue is not one of culture but of consent. If India fails to criminalise marital rape it would flout the Sustainable Development Goals (SDG)³⁷. The Commission on Human Rights at its fifty- first session entitled “The Elimination of Violence Against Women”, recommended that marital rape should be criminalized³¹. Moreover UN General Assembly of which India is signatory affirmed that “Violence against women constitutes a violation of the rights and the fundamental freedoms of women and impairs or nullifies their enjoyment of those rights and freedoms and concerned about the long standing failure to protect and promote those rights and freedoms in the case of violence against women³⁸. Despite of obligatory prevalence India is ignorant to make a step forward to recognize it as a criminal offence. Neither judicial system nor the people of India are willing to bring a change in the legislature and society to promote the rights of women in case of rape within marriage. The fight is not for woman’s status but for human worth. The claim is not to end inequality of women but to restore universal justice. The bid is not for loaves and

fishes for the forsaken gender but for cosmic harmony which never comes till woman comes³⁹.

V. CONCLUSION

Violence against women is a reflection of unequal distribution of power between men and women which led to domination by men and discrimination against women in the patriarchal society. Orthodox beliefs resist full advancement of women so that they are forced into a subordinate position when compared to men. It is imperative to criminalise marital rape in India. The rationale behind not recognizing marital rape is based on the ground that it would hamper the “institution of marriage”. It is the time to change the mentality that marriage thrives only on sex and women’s consent is immaterial when it comes to sex within marriage. The marital rape exemption is depriving married woman’s right over their body which is unethical as well as unconstitutional. It has both long term physical or psychological effect which develops feeling of betrayal and hatred. Apart from judiciary or legislature, the foremost requirement is to educate the masses about this crime as the real objective can be achieved only if the society acknowledges and challenges this myth that rape by one’s spouse is inconsequential. Men are the perpetrators of this crime and therefore it is essential to make them educate so as to bring a change in their ideology. Rape is rape and institution of marriage cannot be a defense to commit such a heinous crime. It is desirable that a married woman should be treated at par with other woman by defying the myth of irrevocable consent to marital rape.

(A) Suggestions

But does this denial to not have an intercourse at any time by the wife gives the right to rape one spouse? What is the rationale behind such different standards of punishments for rapist outside marriage and within it? Treatment of marital rape as a civil or moral wrong rather than crime reflects the patriarchal notion that still treats a woman as husband’s property. The present paper confines itself to examine the glaring inequities of justice system with regards to marital rape in India. Paradigmatic shifts in law and justice in 21st century call for criminalization of marital rape which is gravest form of human rights violation. Marital rape should be a criminal offence under Indian Penal Code. Punishment for marital rape should be same as that of rape. No exemption in punishment should be granted considering the relationship between the accused and the victim. Law on sexual offence should be gender neutral so as to eliminate the inequalities. Marital rape should be a ground for divorce so that victim can have an option to dissolve the marriage rather than living with the rapist. It should be no defense that the wife submitted herself to perform her marital duties and obligations.

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