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Marital Rape: An Unaddressed Stigma

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Marriage is considered as one of the most sacrosanct unions which don't only unite two bodies but two souls for a lifetime. The importance of marriage is evident by the fact that it is treated as an inevitable Sanskaar for few and for others a mandatory ritual to be followed. In legal terms too, Husband and wife are considered as one unit. However, the purity of this institution gets diminished when either party to it stops respecting the ideals of this establishment and the wish of his/her partner. One such emerging unaddressed stigma is termed as Marital Rape. It has always been a debate between intellectuals as to whether to criminalize this act of a husband or not. Undoubtedly, rape is one of the heinous and barbaric crimes a man can commit, therefore he should not be safeguarded just because he is the husband of the lady with whom he establishes an unwanted and not called for intimacy. The Constitution gives everyone equal liberty to establish their right to choose and expression that doesn't discriminate on basis of their Marital status. Therefore, this Article is an attempt to highlight the evils of Marital Rape, which still remains an unaddressed Stigma.

Keywords: *constitution, marital rape, marriage, stigma.*

INTRODUCTION

"I say nothing, not one word, from beginning to end, and neither does he. If it were lawful for a woman to hate her husband, I would hate him as a rapist¹."

Rape is considered as one of the most heinous crimes against women. Rape in the literal sense is -sexual intercourse without consent. The Cambridge Dictionary defines Rape as - to force someone to have sex when they are unwilling, using violence or threatening behavior. Thus, the essence of rape is having sexual intercourse without any consent from the partner. There are horrifying statistics released by NCRB which show that in every 16 minutes, a woman in some part of the country is raped. If this is the scenario in the case where we have harsh punishments for rape in our penal system, then it is just hard to imagine the women who are victims of marital rape.

Marital Rape is committed when two people are in wedlock and the husband attempts to have any sexual intercourse with his own wife without her consent. In Indian Penal Code 1860, Section 375¹ Exception II throws light on the issue of Marital Rape. It is a poignant reminder of the status which our society has given to women. Rape is Rape, regardless of marital status. Can there be two different yardsticks to define rape -

1. Unmarried Women being Raped

2. Married Women being Raped

Despite almost 77 amendments, the setting up of law commissions, and new legislation, one of the most inhumane acts are still not considered as an offence in our country. Just because a woman says "I do" in a marriage does not mean that she is saying "I do it anytime, anywhere, or in any way that her husband wants.

To quote Justice Arijit Paraysat in *Tulsidas Kanolkar v State of Goa*² - "While the murderer destroys the physical frame of his victim, a rapist degrades and defiles the soul of a helpless female." But what happens in those cases, where the perpetrator is immune from any punishment because he is the husband and even in the 21st Century, we still consider women as the sex object or property of their husband. There can be no difference depending on the relationship between the victim and the perpetrator. To quote the Delhi High Court Bench, "Marriage does not mean

¹ Indian Penal Code, 1860, s 375

² *Tulsidas Kanolkar v State of Goa* (2004) Appeal (Criminal) No. 298/2003

that the woman is all time, ready, willing and consenting (for establishing physical relations).³ One of the reasons why this topic is unaddressed stigma is 'Matrimonial Obligations' and 'Archaic and Discriminatory Laws' and thereby it does not stand on the touchstone of the spirit of the Constitution.

SECTION 375 & EXCEPTION II VIS-À-VIS THE INDIAN CONSTITUTION

Marital rape and the Right to equality:

As per Nageshwar Rao, who served as director of the Central Bureau of Investigation (CBI), *"What's the purpose of marriage at all if husband was to be sent to jail for sex against his wife's wish, doesn't it destroy family, ruin children and break their marriage?"*⁴

This shows the patriarchal mindset of the society and men who treat women as animals; also it takes away bodily autonomy and forces women to live in constant fear and trauma. Article 14 to 18⁵ constitutes the right to equality as a fundamental right meaning thereby an essential component of life is equality which is of status, opportunity & dignity. However, the very purpose of Article 14⁶ is defeated when it comes to the legal status of married women against rape. The very exception II of Section 375 of IPC, 1860 discriminates between unmarried and married women. The right to Equality enshrined under article 14 is violated when it comes to

To check the Constitutionality of every act or provision, two major aspects have been given

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- The Intelligible Differentia is a must criterion for classification.
- There should be a rational nexus between the objects which needs to be achieved.

Exception II does not stand on the touchstone of Article 14 as there is no intelligible differentia behind the classification between unmarried and married women by not

³ 'Marriage doesn't mean consent for sex: Delhi High on marital rape' (*The Economic Times*, 18 July 2018) <<https://economictimes.indiatimes.com/news/politics-and-nation/marriage-doesnt-mean-wife-always-ready-for-sex-delhi-high-court-on-marital-rape/articleshow/65034722.cms?from=mdr>> accessed 25 March 2022

⁴ Leher Sethi, 'Marital rape exposes our society's inherent misogyny | VIEW' (*India Today*, 17 January 2022) <<https://www.indiatoday.in/news-analysis/story/marital-rape-consent-in-marriage-society-inherent-misogyny-1900914-2022-01-17>> accessed 25 March 2022

⁵ Constitution of India, 1950, art.14 to 18

⁶ Constitution of India, 1950, art.14

considering the husband as the rapist when the act of sexual intercourse is done without consent of the wife in the marriage. Also, it is important to know that there is no rational nexus between the object as laws are made to protect women from crimes, but this very exception encourages husbands to continue the disgraceful act of rape on their wives. Also, this is considered as Indian husbands have got the license from the legal system to rape.

If we analyse the whole provision being Argus-eyed, we see that on one side it protects women and on the other hand, it takes blind note. The provision's reasoning lacks a sense of logic in approach, and so as a result, we have no hesitation in considering it blatantly arbitrary under Article 14 of the Constitution. The goal of the law is to withhold justice and provide equal rights to every class of women, whether unmarried or married. But encouraging forced cohabitation by law and thus protecting a husband who is a potential rapist is clearly unreasonable.

Marital Rape and Right to life & Bodily Integrity:

'To have a human life and to live as a human are two different things'

Article 21 says - No person shall be deprived of his life and personal liberty except according to the procedure established by law. However, Exception II says that 'Sexual Intercourse or sexual act by a man with his own wife, the wife not being under the age of 18 years, is not rape'. The right of a woman or girl to make autonomous decisions about her own body and reproductive functions is at the very core of her fundamental right to equality and privacy, concerning intimate matters of physical and psychological integrity and it is not only limited to ICCPR and Declaration on the elimination of Violence against women¹⁰ but also the Constitution of India provides the same and various landmark pronouncements by the Supreme Court of India give effect to that. A Judgment delivered in January 1978 changed the landscape of the Constitution of India by stating that life is not limited to physical breathing but includes the right to life with human dignity and it is more than mere animal existence⁷

⁷ *Maneka Gandhi v Union of India* (1978), AIR 597, See also, *Kharak Singh v State of UP* (1963), AIR 1295

this meaning transformed the entire position of Article 21⁸, but even now we tend to overlook human dignity in the perspective of married women when a horrible crime such as rape was imposed upon her by her own husband, there is literally no way to say "NO" for her and defend her own dignity. She cannot tell her husband, "I have the right to bodily autonomy as a basic right,"⁹ because no matter what she does, her husband would use force since he knows that there is no such thing as marital rape in our Indian Criminal Justice System, and therefore the stigma remains unaddressed. Because we evolved our habits, nature, intelligence, and emotions, humans are considered the most intelligent beings on the earth but a class of human beings in the character of husbands believe that they have control over their wife's dignity and he can do whatever he wants without considering her will and wish.

JUDICIARY'S OUTLOOK ON MARITAL RAPE

A mindset that a husband can't be charged with the rape of his wife was described by Sir Matthew Hale (1609–1676) in *History of the Pleas of the Crown* who was a barrister, judge, and jurist. This particular notion has been adopted in the Indian scenario as in the year 1992 Supreme Court upheld that *'it is not possible to believe that when a married woman has sex with her husband in the privacy of their bedroom she would suffer abrasions on her body and the vaginal walls.'*¹⁰

With the advent of time, many High Courts have interpreted the real essence of Section 375 Exception II. Earlier in January this year the Delhi court while hearing the petitions for criminalizing marital rape questioned that it needs to be clarified to the Court how the dignity and bodily integrity of married women are not in threat as an unmarried woman when a man forces himself on her. It was also asked to justify the intention of the Legislature on this issue.

⁸ Constitution of India, 1950, art.21

⁹ *Suchita Srivastava v Chandigarh Administration* (2009) Civil Appeal No. 5845/2009

¹⁰ *State of Rajasthan v Shri Narayan* AIR 1992, SC 2004

One of the landmark judgment recently pronounced by the Karnataka High Court is- *Marriage is no license to "provide special male privilege or a license for unleashing a brutal beast"*. However, the Court declined to criminalize marital rape and asked the legislators to throw some light on this issue. But undoubtedly, it is a progressive step for preserving the dignity of women.

FACTS & FIGURES

Many countries have evolved their laws to make marital rape an addressed issue; in the United States of America, roughly 10-14 percent of married women are raped, nevertheless, on July 5, 1993, the entire scenario changed, and marital rape became a criminal offence in all 50 states. The National Family Health Survey from 2015-16 sheds light on spouse rape, revealing that 31% of married women had encountered some form of abuse from their husband (physical, sexual, or emotional) and 6% of women have experienced spouse sexual assault.

INTERNATIONAL ASPECT

In India, marital rape exists as *de facto* not *de jure*. The husband cannot be guilty of rape committed to his lawful wife as there is a Mutual Matrimonial Consent that is termed as implied consent theory and this was laid down by Chief Justice Sir Mathew Hale in History of the plea of the crown published in 1739. This theory was further supported by the Doctrine of Coverture - it stated that after the marriage all the rights of the woman were placed within the hand of her husband and it symbolized wife and husband as one person. This mindset shows how women were treated back in the 17th century but after the feminist movement in Mid-19th Century backlashes the theories.

- *The Convention on the Elimination of all Form of Discrimination Against Women (CEDAW)*

In 1979, the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) was adopted by the UN General Assembly with 189 countries as Member states,

and also India later ratified the convention. Article 1¹¹ of CEDAW states women has the freedom to enjoy their human rights, and fundamental freedom and should not be discriminated on the basis of sex. Moreover, It guarantees basic human rights and states that the government has to take appropriate action on providing rights to women.¹² India should end marital immunity was also suggested by the UN Committee on Elimination of Discrimination against Women (CEDAW) back in 2013. General Recommendation no.19 suggested making laws to protect women from any kind of violence including sexual violence, civil remedies, and compensatory provision.

- *Other International Documents*

One of the most fundamental documents relating to Civil and Political Rights i.e. ICCPR also emphasizes that every person is equal in the eyes of law and there should be no discrimination in equal protection of the law by way of Article 26¹³. India is one of the 36 countries where marital rape is still an unaddressed stigma.

INDEPENDENT THOUGHT *v* UNION OF INDIA - A RAY OF HOPE

In the year 2018, a landmark judgment was pronounced in the matter of *Independent Thought v Union of India*,¹⁴ which reflected the need to protect women from such archaic law. The Court interpreted this very exception II and said that it is regressive in nature, and also violates of fundamental rights of the girl child. However, the Court was silent on the issue of marital rape with women above 18 years but at least it brings some hope that the day will definitely arrive soon when the poise of women will be upheld in the spirit of letters cum laws. Therefore, it is inherently unfair and discriminatory if a provision differs from other laws just because a womanis married.

¹¹ Convention on the Elimination of all Form of Discrimination against Women, 1979, art.1

¹² Convention on the Elimination of all Form of Discrimination against Women, 1979, art.3

¹³ International Covenant on Civil and Political Rights, 1966, art.26

¹⁴ *Independent Thought v Union of India* (2017) Writ Petition (Civil) No. 382/2013

SUGGESTIONS & ANALYSIS

- *Retaining Dignity before Marriage*

One of the main contentions put forward by parliamentarians while rejecting the JS Verma Committee Report that recommended the criminalization of Marital Rape is that it will destabilize the union of two souls – Marriage. But needs to be focused on that when a husband rapes his wife, marriage is already destroyed. Any attempts to hold the marriage can be any individual's matrimonial obligation but it cannot override the fundamental objective of the law.

- *Upholding the Constitutional Spirit*

The Constitution of India in 1950 guarantees every person the fundamental right to equality, privacy, bodily integrity, and life. But this exception violates the rights of married women by denying these above-stated Rights. This is the need of the hour to remove the exception and criminalize marital rape in the light of Article 13(2) of the Constitution of India.

- *Replacing Societal Stigma with Laws*

It is generally believed that a wife must complete all of her husband's sexual tortures, whether she likes it or not. The situation worsens when they cannot reach out to the criminal justice administration because of the absence of laws in this regard. Therefore, it becomes essential to create public awareness campaigns that reach out to all segments of society which will strengthen the victims so that soon one day, all these voices will reach Parliament.

CONCLUSION

Irrespective of what religion one belongs to, the importance of marriage cannot be disregarded in the society we live in. Some repute it as a pure sacrament and one of their holy "*solaah sanskaras*" and some regard it as an establishment for the pro-creation of children. Any social foundation is incomplete without the essence of the union of two souls. However, it is high time to remove gender stereotypes from our society that establishes that a woman is

supposed to be tortured mentally and physically in general and sexually in particular. This sacred union seeks to respect and reverence from both partners for each other. To cure such disgraceful and heinous acts, the legislature must now take the command into their hands and draft & promulgate laws that uphold the dignity of a lady irrespective of her marital status and punishes the man who pushes himself onto her in the guise of marriage.

Because unapologetically,

A husband can only love and respect but one who rapes is a beast!