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CRIMINALIZING MARITAL RAPE: NEED OF THE HOUR OR A TOOL FOR FALSE CASES

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Abstract

Marriage is considered to be a holy and a sacred institution on which the pillars of the Indian society stand. This institution while caters to the basic social needs of an individual, acts as a shield to various crimes that are clandestinely committed under its garb. Marital rape is one such reprehensible crime. The law in India fails to take into consideration the needs of married women by not fortifying them from rape committed by their husbands. Marital rape by not being a crime under the Indian Penal Code, 1860 displays a kind of masochism towards which the judiciary and the legislature have turned their blind eye to. The law in this way has been successful in providing immunity to husbands who engage in non-consensual sexual acts with their wives who are above 18 years of age. This article seeks to discuss as to why the already existing laws are not sufficient in providing justice to a married woman. It will also cover the various counter arguments that have continuously been reiterated by various conservatives along with the existence of various social, legal and medical loopholes that need to be addressed in order to provide justice to women.

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Key Words: Marital Rape, Indian Penal Code, Criminalization, Sexual Violence, Non-Consensual Acts.

INTRODUCTION

Rape is considered to be one of the most atrocious crimes not only against women but against humanity itself. Rape is a form of sexual violence that originates from the sexist beliefs and values that have been embedded in the minds of men ever since the dawn of civilization. When a woman is ravished against her own will or consent or if the consent is obtained by physical force,

fear or fraud it comes under the purview of rape.¹ Rape has been defined under Section 375 of the Indian Penal Code as the act of penetration of a woman's vagina/urethra/anus/mouth by the penis/mouth/objects/any other body part manipulated by a man, without the consent of the woman or irrespective of her consent, when she is below the age of eighteen.²

While the law in India protects women from such forms of sexual violence, the law does not recognize rape of women that takes place under the 'sacrosanct' institution of marriage. The Indian Law does not consider Marital Rape as a criminal offence. This can be seen in the Exception 2 to Section 375. This Exception states that sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.³ This exception is popularly known as the 'Marital Rape Exception'. An amendment was made to this exception clause wherein the age was changed from fifteen to eighteen thereby implying that if a man had sexual intercourse with his wife who is above eighteen years of age would not come under the umbrella of rape.⁴

VIOLATION OF FUNDAMENTAL RIGHTS

At the very outset, a law can only stand if it is in consonance with the Indian Constitution. The dereliction in perceiving Marital Rape as a criminal offence prima facie violates the fundamental rights of a woman.

Article 14⁵ of the Indian Constitution ensures the Right to Equality as a fundamental right of citizens. The Marital Rape Exception proves to be unconstitutional as contravenes the Right to Equality. The exception marks a clear dichotomy between women as wives and non-wives which ascertains as to who can bring criminal charges against a man for rape. The Supreme Court in its interpretation of Article 14 held that the classification made under this article must pass the test of reasonableness that can only be achieved if the classification has a rational nexus to the object that the legislation in question seeks to achieve.⁶ However, this interpretation when kept in

¹*Bhupinder Sharma v. State of Himachal Pradesh* AIR (2003) 8 SCC 551.

² Section 375, Indian Penal Code, 1860, No. 45.

³ Exception 2 to Section 375 Indian Penal Code, 1860 No. 45.

⁴*Independent Thought v. Union of India and Anr* (2017) 10 SCC 800.

⁵ INDIA CONST. art. 14.

⁶*Saurabh Chaudhari v. Union of India* (2004) 5 SCC 618.

juxtaposition with Section 375 implies that the entire rationale behind Section 375 stands vanquished when the Marital Rape Exception is upheld. This is so interpreted because the solitary purpose of Section 375 is to protect the integrity and dignity of women from sexual offenders and the function of this section is not performed when marital rape is not acknowledged by the eyes of law.

The Indian Constitution provides Right to Life as a fundamental right to its citizens. Article 21⁷ states that “No person shall be denied of his life and personal liberty except according to the procedure established by law”. In *Maneka Gandhi v. Union of India*⁸, the Supreme Court perspicuously stated, “Article 21, is not merely a physical right but it also includes within its ambit, the right to live with human dignity”. The Exception 2 of Section 375 fails to provide women the right to live with human dignity as husbands are not discouraged to engage in non-consensual sexual acts with their wives. Such iniquitous acts of the husbands take a toll on the mental health of a woman thus negating her life of dignity.

In the wake of the *Maneka Gandhi* judgment, the Supreme Court has incorporated various other rights under Right to Life which consists of right to health, right to a safe environment, right to safe living conditions and right to be informed among other rights. One of the major establishments was made by the Supreme Court in the judgment of Justice K.S. Puttaswamy v. *Union of India* and others⁹, in which the Honorable Court held privacy to be a fundamental right under Article 21. Right to Privacy thus entailed, “Decisional privacy reflected by an ability to make intimate decisions primarily consisting of one’s sexual or procreative nature and decisions in respect of intimate relations”. This again directs to the infringement of a woman’s right of not being able to make intimate decisions for herself. In *BodhisattwaGautam v. SubhraChakraborty*¹⁰, the Supreme Court was crystal clear in saying, “Rape is a crime against basic human rights and a violation of the victims’ most cherished of fundamental rights, namely, the right to life enshrined under Article 21 of the Constitution”. Yet the Exception negates this

⁷INDIA CONST. art. 21.

⁸AIR (1978)SC 597.

⁷ (2015) 10 SCC 92.

⁸ (1996) 1 SCC 490.

⁹ N. Tandon & N. Oberoi, *Marital Rape — A Question of Redefinition*, Lawyer's Collective, Mar 2000, 24.

very pronouncement by not recognizing marital rape.¹¹

EXISTING CIVIL AND CRIMINAL LAWS

According to the National Health and Family Survey (NFHS-4) for 2015-16, 5.4% of Indian wives have experienced non-consensual and forced sexual intercourse by their husbands.¹² The Indian law does not provide a specific criminal remedy for cases of marital rape instead cases of such nature are registered either under Section 498A of The Indian Penal Code or a civil remedy is sought under The Protection of Women from Domestic Violence Act, 2005. Section 498A encompasses 'Cruelty' i.e. when the husband of a woman poses great danger to the life of a woman¹³. These provisions alone do not prove to be beneficial for cases of marital rape because the punishment under these provisions and punishment for rape differ massively in quantum. Section 498A subjects the perpetrator to imprisonment for up to three years while on the other hand the punishment for rape itself is imprisonment for a term not less than ten years¹⁴. This difference of term of punishment itself proves to be a viable reason for recognizing marital rape as a separate crime rather than allowing the victims to seek remedies through Section 498A.

IMPEDIMENTS IN RECOGNIZING RAPE WITHIN MARRIAGE

While the fact that the country is in the dire need for criminalizing marital rape and repealing Exception 2 has been recognized by various women's rights activists and NGO's, the same has not been executed due to the various social and legal impediments that have not ceased to exist.

The proponents of the Marital Rape Exception have put forth various arguments for not recognizing rape within marriage. Many of the supporters believe that by recognizing marital rape, it would be detrimental to the very institution of marriage. Ashwani Kumar, former Union Law Minister, stated the reason for not recognizing marital rape as an offence was that marriage in India is not treated as a contract like in other Western nations; rather it is treated as a

¹²Ministry of Health and Family Welfare, *National Family Health Service (NFHS-4)*, (May 13, 2020, 1:11PM), <http://rchiips.org/NFHS/NFHS-4Reports/India.pdf>.

¹³ Section 498A Indian Penal Code, 1860 No. 45.

¹⁴ Section 376 Of Indian Penal Code, 1860 after The Criminal (Amendment) Act, 2018.

sacrament.¹⁵ This implied that while in other countries, marriage being a contract, the state can interfere and make laws in its respect but by doing so in the Indian context, it could harm the fundamentals on which the culture of the society is upheld.

One of the main arguments given by the conservatives was that there would be a rise in the number of fake cases and allegations of sexual assault against the husbands. They have also in various occasions reiterated that the misuse of the Protection of Women from Domestic Violence Act, 2005 along with Section 498A of IPC is already on the rise and by doing away with the Marital Rape Exception would leave married men to ruins. This issue had been highlighted as a defence for not criminalizing marital rape several times but specifically the defence was stated when the RTI Foundation had filed a PIL in 2015 and approached the Delhi High Court to challenge the Marital Rape Exception. The hearing of the cases was interrupted by an NGO called Men's Welfare Trust. This Trust indicated that approximately 62,000 husbands commit suicide every year which is more than double the suicides by women who faced marital rape.¹⁶ The Trust further pointed out that this number was solely because of the misuse of the law which is much more propitious to women than it should be.

In addition to the misuse of the laws stated, conservatives have pointed towards the judgment given in the case of Vishnu v. State of Maharashtra¹⁷, in which it was held by the Honorable Court that, "Conviction of the accused can be sustained on the sole testimony of the prosecutrix". This case therefore implied that the sole testimony of the woman was enough to convict a man for rape. This judgment thus can be used in favour of the victim and can reduce the probability for men to obtain innocence.

Another argument that is generally stated by the supporters of Marital Rape Exception is that there is no 'lasting evidence' in cases of Marital Rape. To determine if rape took place within four walls of a room is highly questionable as normally in cases of marital rape there are no witnesses. Generally, in rape cases, when force is used it leaves injuries on the body of the victim as well as the accused. However, it is not necessary that injuries are sustained in every case.

¹⁵*Marriage Not Deemed As a Contract: Ashwani*, HINDUSTAN TIMES, 2013 at 3.

¹⁴*Delhi High Court to Hear NGO's Plea Opposing Marital Rape*, INDIAN EXPRESS, August 28, 2017, at 4.

¹⁵ (2006) 1 SCC.

Hence, evidence also becomes hard to gather if there are no physical injuries prevalent on the woman's body.

In order to determine if rape took place, the victim would have to report the incident within a few hours otherwise reliable evidence would be difficult to collocate. Various Medical Manuals that are used to gather evidence to establish rape have stated that evidence is difficult to procure if the victim has changed clothes or has showered. They also state that evidence starts to become weak or starts disappearing after 36 hours of the incident.¹⁸ This implies that a woman would have to report the incident within three days in order to clearly establish that rape took place. This becomes an impediment for women as they have to face backlash from the society in order to seek justice for themselves. Not only the lack of lasting evidence but it is also difficult to prove that there was no consent at the time of the act because of the social belief that consent to sexual relations in a marriage is presumed. Thus, the key to proving marital rape would be differentiating that consent was given one night but not on the next.

CONCLUSION

Marital Rape stands to be one of the most horrific forms of crimes against women in a family. Women mostly choose not to come up with their sufferings because of the patriarchal subjugation and the lack of facilities for them to be economically independent. The ever-existing patriarchy embedded in the minds of the society pays no heed to the abuse faced by women. This mindset proves to be crucial in letting the law makers provide plethora of unreasonable defences to not provide any penalties for this crime.

Marital rape can be observed in families of all types irrespective social class, level of education, economic reasons and so on. Women in rural areas lack the very basic awareness that such an act is a wrongful one and are forced to believe that it is a part and parcel of marriage. This is another reason why even the research data cannot be fully relied upon because of the untold stories of these unaware women.

While the Marital Rape Exception continues to be central to the struggle faced by the supporters

¹⁸Erin G. Clifton, *Medical Examination of Rape Victim*, MSD Manual Professional Version, (May 14, 2020, 2:05PM), <https://www.msmanuals.com/professional/gynecology-and-obstetrics/domestic-violence-and-rape/medical-examination-of-the-rape-victim>.

and feminist activists but problems such as gathering reliable evidence especially in cases where there are no physical injuries and proving that consent of the wife was not taken, still exists. Relying on the sole testimony of the woman with no concrete evidence or where evidence is negligible leads to the rise of false allegations against men to which there exists no damage control.



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