

A STEP TOWARDS CRIMINILIZING MARITAL RAPE

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Abstract:

Despite the increased recognition that the topic of marital rape has generated in the past 2 decades, the literature in this area remains sparse. Marital rape is in existence in India, a disgraceful offence that has scarred the trust and confidence in the institution of marriage. A large population of women has faced the brunt of the non-criminalization of the practice. Sexual violence is defined as the act of exposing someone to a sexual behaviour without one's consent. It includes a large spectrum of behaviours from touching to raping. The majority of the victims are women. Rape is the act of having sexual intercourse with a person without his/her consent. The concept of marital rape has been overlooked for years because of the ideology that promotes men have the right to treat their wives as they wish and the wife must provide her husband with all his needs. Today with the changes and developments in the concepts of marriage, the increase in the awareness of the society and the understanding of the notion of violence against women; it has been understood that sexual intercourse should be mutually desired by both parties of the married couple. Otherwise it should be considered as sexual assault/violence. The aim of the article is to present the current situation about marital rape in India and in the rest of the world, also to discuss how it could be prevented. This paper focuses on the prevalence of this problem in the society. In its justification, this article identifies the motivations & other co-factors for why men rape their own wives in order to ensure gender justice.

Introduction

Marital rape is non-consensual sex in which the perpetrator is the victim's spouse. As such, it is a form of Harassment, molestation and basis partner rape, of domestic violence, and of sexual abuse. Once widely ignored by law, spousal rape is now repudiated by international conventions and increasingly criminalizebut still, in many countries, spousal rape either remains legal or is illegal but widely tolerated and accepted as a spouse's prerogative and India is not out of it. Sexual violence is one of the most extreme and effective forms of control in a male dominated society, which simultaneously damages and constraints women's lives .

Sexual Violence :

Sexual violence describes the deliberate use of sex as a weapon to demonstrate power over and to inflict pain and humiliation upon, another human being. Sexual violence may be defined as any violence, physical or psychological, carried out through sexual means or by targeting sexuality. Sexual violence covers both physical and psychological attacks directed at a person's sexual characteristics. Sexual violence does not necessarily include direct physical contact between perpetrator and victim rather threats, humiliation and intimidation may also be considered as sexually violence .In general, the idea that a woman (wife) has to have sex with her husband irrespective of her will, consent, health, etc, is absolutely unacceptable to a civilized society. Therefore there is no justification or applicability of the notion of marital exemption in the current times. It is true that mere criminalization of marital rape in India will not end the problem, but it sure is an important step towards changing women's experience of sexual violence in a marriage. Just as domestic violence is punishable by law, so should be domestic sexual abuse. According to my views Molestation or Sexual torture is not different whether done by husband or a stranger. By the end of the 20th century, most of the developed nations had criminalized marital rape, but India still hasn't .

Perspectives of Marital Rape :

One of the aspects of marital rape that resembles other types of domestic violence is its recurrent feature. Women who were forced to marital intercourse repeatedly experience the same situation. Whereas repeated rape makes marriage unbearable for women, the percentage of sexual abuse victims who report the abuse to judicial authorities is very low. A study conducted in India indicated that only 25% of women who were subjected to spousal abuse reported that to the police. This situation is mainly related to the victim's fear of the offender near her or of her family, considering the victimization as a topic of privacy that cannot be shared with anyone, the physical and psychological difficulties during the medical and judicial proceedings, which they cannot dare to face. The lack of sufficient knowledge about domestic sexual violence in our society or not considering these behaviours as violence, thinking sexual assault in a marriage is a normal thing can prevent sexual abuse cases from being submitted to the court. Even though some countries still permit husbands to rape their wives with little or no consequence, there is a growing trend that marital exemption is unjust and has no place in a civilized society. However, being aware that it is a mistake to make a distinction about marital and non-marital rape is only the first step to prevent this condition.

Lawyers should take measures in order to equalize the treatment of marital and non-marital rape. Some countries have already been host to the abolition of marital immunity, but this may not be the most effective method. An alignment with societal morals, thorough and thoughtful consideration of the issues and legitimacy in the eyes of the citizens can be counted among these factors.

Marital Rape In India:

The present day, studies indicate that between 10 and 14% of married women are raped by their husbands: the incidents of marital rape soars to 1/3rd to ½ among clinical samples of battered women. Sexual assault by one's spouse accounts for approximately 25% of rapes committed. Women who became prime targets for marital rape are those who attempt to flee. Who, when and for what held liable Criminal charges of sexual assault may be triggered by other acts, which may include genital contact with the mouth or anus or the insertion of objects into the vagina or the anus, all without the consent of the victim. It is a conscious process of intimidation and assertion of the superiority of men over women, in India marital rape is not an offence in India. Despite amendments, law commissions and new legislations, one of the most humiliating and debilitating acts is not an offence in India even no legal protection against marital rape Section 375. The section 376 dealing with sexual assault, in a very narrow purview lays down that, an offence of rape within marital bonds stands only if the wife be less than 12 years of age, if she be between 12 to 16 years, an offence is committed, however, less serious, attracting lesser punishment. Once, the age crosses 16, there is no legal protection accorded to the wife, in direct contravention of human rights regulations. Sex has been treated as obligatory in a marriage and also taboo. At least the discussion openly of it, hence, the awareness remains dismal. Reason why marital rape is not an offence Legislators use results of research studies as an excuse against making marital rape an offence, which indicates that many survivors of marital rape, report flash back, sexual dysfunction, emotional pain, even years out of the violence and worse, they sometimes continue living with the abuser. For these reasons, even the latest report of the Law Commission has preferred to adhere to its earlier opinion of non-recognition of "rape within the bonds of marriage" as such a provision may amount to excessive interference with the marital relationship. One of the justifications for not criminalizing marital rape which was that it would amount to excessive interference with the institution of marriage.

The state's Role in Criminalizing Martial Rape :

Marriage is considered to be a sacred institution that forms the bedrock of our society. It is viewed as deeply personal and the State is hesitant to disturb this delicate space. This is to maintain the privacy of citizens and the intrusion of the State in this sphere would disrupt this privacy. Thus, the State does not compel any two individuals to marry or divorce. However, the refusal of the State to enter this private space even in certain specific instances can be problematic. For example, if a wife is subject to cruelty in a marriage, then the State will have to enter this private sphere to criminalize this cruelty that the wife is subject to. If the State does not do so, then the woman will have no redress legally. Thus, it is important for the State to penetrate this private sphere on certain occasions. In this instance, the State has entered into the supposed private sphere by criminalizing activities that happen in the private spaces of husband and wife.

"THERE IS A NEED TO MOVE FROM PRIVACY TO INDIVIDUAL AUTONOMY."

Judicial Trend In Martial Rape :Fundamental rights violation.

Marital rape is also a violation of the fundamental right of a woman specifically under Articles 14 and 21 of the Constitution of India ('Constitution'. In this Part, we argue that the lack of criminalization of marital rape infringes on the fundamental rights of a woman. Even though this crime of marital rape occurs within the private sphere of a marriage, it is the responsibility of the State to penetrate this woman's private sphere. If the State does not penetrate this private sphere, then a woman is left without remedy when raped by her husband. However, an analysis of judicial decisions with respect to matters traditionally conceived to be within the private sphere of marriage and family highlights the hesitation of the judiciary to bring in fundamental rights in this private sphere. The judiciary has created this fictitious private sphere where it refuses to implement and read in fundamental rights. The effect of this has been to negate the question of whether marital rape is an infringement of fundamental rights. This is because in the perceived marital sphere, there is no role for fundamental rights. Thus, in this Part, we will first, rebut this creation of a private sphere where constitutional rights cannot be engaged with. In Part A, we will first trace the creation of the private sphere where fundamental rights cannot be enforced.

In India, no doubt, Hindu religion and conjugal life gives right to have sex with wife. However, Hindu religion and its literature stress on purity, cleanliness and behavior of good

faith in Conjugal life, it cannot be said that Hindu religion and traditions exempts the heinous act of rape to wife. Sexual intercourse in conjugal life is a normal course of behavior, which must be based on consent. The Protection of Women from Domestic Violence Act, 2005 has only created a civil remedy for marital rape, without criminalizing the same. For strengthening anti-rape law, Indian government constituted Justice Verma Committee on December 23, 2012 after the rape of a twenty-three year old student in Delhi, comprising retired Justice J.S. Verma, retired Justice Leila Seth and Solicitor General Gopal Subramaniam to look into the possible amendments in the criminal laws related to sexual violence against women. In view of the significance and urgency of the task, the committee undertook to perform it within 30 days, which task has been completed. The Committee is conscious of the recommendations in respect of India made by the UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) in February 2007. The CEDAW Committee has recommended that the country should "widen the definition of rape in its Penal Code to reflect the realities of sexual abuse experienced by women and to remove the exception of marital rape from the definition of rape....." The Verma committee report points out a 2010 study suggesting that 18.8 percent of women are raped by their partners on one or more occasion. Rate of reporting and conviction also remain low; aggravated by the prevalent beliefs that marital rape is acceptable or is less serious than other types of rape. The recommendation of Justice Verma Committee regarding deleting exception of marital rape is not included in Criminal Law Amendment Bill, 2013 passed by the Lok Sabha on 19 March 2013 and by the Rajya Sabha on 21 March 2013. The Bill received Presidential assent on 2 April 2013 and deemed to come into force from 1 February 2013. The word rape has been replaced with sexual assault in Section 375. Rashida Manjoo, the UN Special Reporter on violence against women said that Justice Verma committee's recommendation and subsequent legislation was a "golden moment for India" but recommendations on marital rape, age of consent for sex, etc. were not adopted in the legislation. The government is hesitant to criminalize marital rape because it would require them to change laws based on religious practices, including the Hindu Marriage Act 1955, which says a wife is duty bound to have sex with her husband.

The parliamentary panel examining the Criminal Law (Amendment) Bill, 2012, said that "In India, for ages, the family system has evolved. Family is a blend or evolve the (marital) problems and there is also a provision under the law for cruelty against women, It was, therefore, felt that if marital rape is brought under the law, the entire family system will be under great stress and the committee may perhaps be doing more in justice". In 2005, the Protection of Women from Domestic Violence Act, 2005 was passed which although did not

consider marital rape as a crime, did consider it as a form of domestic violence. Under this Act, if a woman has undergone marital rape, she can get other court an dobt ain judicial separation from her husband. However, the same doesn't entirely protect the women from the crime has undergone.

In India however, the judiciary seems to be operating at cross-purposes. Though marital rape is the most common and repugnant form of masochism in Indian society, it is hidden behind the iron curtain of marriage. The Hon'ble Supreme Court of India, the last hope for reforms in outdated approach towards marital rape after Parliament had hung up its boots, said that country isn't ready to accept marital rape as a crime. It can be seen that the law makers have a different view and believe marital rape cannot be applied in the Indian context because of factors like "level of education and illiteracy, poverty, social customs and religious beliefs". The amendments to the Criminal Penal Code and the Evidence Act were aimed at ensuring that women are not re-victimized when they approach the legal system after an act of rape against them. The amendments sought to remove irrelevant medical examinations and unnecessary questions that women were asked during cross-examination, and to facilitate better investigation and trial in rape cases. However, despite the changes in law, the law makers and the governments have taken no step regarding framing of law for Marital Rape. Even the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), of which India is a signatory, has viewed that this sort of discrimination against women violates the principles of equality of rights and respect for human dignity. Further, the Commission on Human Rights, at its fifty-first session, in its Resolution No. 1995/85 of 8-3-1995 titled "The elimination of violence against women", recommended that marital rape should be criminalized.

The Supreme Court has held in a catena of cases that the offense of rape abuses the right to life and the right to live with human dignity of the victim of the crime of rape. In *Bodhisattwa Gautam v. Subhra Chakraborty* the court held that rape is a crime against the basic human right and violation of the right to life enshrined in Article 21 of the Constitution and provided certain guidelines for awarding compensation to the rape victim. In the landmark case of *State of Maharashtra v. Madhkar Narayan* the Supreme Court has held that every woman is entitled to her sexual privacy and it is not open to for any and every person to violate her privacy as and whenever he wished. In the landmark case of *Vishakha v. State of Rajasthan* the Supreme Court extended this right of privacy in working environments also.

Further, along a similar line we can translate that there exists a right of privacy to get into a sexual relationship even inside a marriage. In *Sree Kumar vs. Pearly Karun*³², the Kerala High Court watched that the offense under Section 376A, IPC won't be pulled in as the spouse is not living independently from her husband under a declaration of partition or under any custom or use, regardless of the possibility that she is liable to sex by her better half without wanting to and without her assent. For this situation, the spouse was subjected to sex without her will by her husband when she went to live with her husband for 2 days as a result of settlement of separation procedures which was going on between the two parties. Subsequently the spouse was held not liable of raping his wife even though he had done so. The judiciary appears to have totally consigned to the fact that rape inside marriage is impractical or that the disgrace of assault of a lady can be erased by getting her married to the attacker. In India, it is not illegal for a man to rape his wife — but a high court judge said in a ruling this week that it should be. Justice J.B. Pardiwala of the Gujarat High Court was presiding over a case involving a woman who'd accused her husband of sexually assaulting her. He repeatedly forced sex on her. He also subjected her to “mental and physical torture,” the woman claimed. The judge said the man could be charged with sexual harassment and spousal cruelty (which carry lesser punishments than rape). As he delivered his decision, however, Pardiwala expressed dismay at the limitations of the law. He advocated for the criminalization of marital rape, saying that outlawing nonconsensual sex in a marriage is the “first necessary step in teaching societies that dehumanized treatment of women will not be tolerated.” “Marital rape is not a husband's privilege, but rather a violent act and an injustice that must be criminalized,” he added.

Marital rape is a widespread problem in India. According to a 2018 National Family Health Survey, more than 80 percent of married women who have experienced sexual violence named their current spouse as the perpetrator. In a 2014 survey of more than 9,200 men across seven Indian states, one-third admitted to having forced a sexual act on their wife. The government has said the main problem lies in determining the value of evidence. “The question is what evidence the courts will rely upon in such circumstances as there can be no lasting evidence in case of sexual acts between a man and his own wife,” reads the affidavit. The government also feels that marital rape might destabilize the institution of marriage. The government has quoted SC verdicts to further bolster their stand. “It has to be ensured adequately that marital rape does not become a phenomenon which may destabilize the institution of marriage apart from being an easy tool for harassing the husbands. The

Supreme Court and various High Courts have already observed the rising misuse of section 498A of IPC,” the Centre submitted. The government has relied on the Law Commission’s 172nd Report titled Review of Rape Laws and the 167th report by the Department Related Parliamentary Standing Committee on Home Affairs which did not recommend criminalization of marital rape.

Suggestion :

There is an immediate need to enact laws for prevention of marital rape or to amend and insert section regarding marital rape and the definition of marital rape should be expanded as there are many ways in which marital rape can happen but that law at least should list some of the facts or expand in wider term. However, by another provision it makes rape of a wife who is living separately a criminal offense. The age limit of 15 years above which marital rape is not an offense is inherently problematic, as normally sex with a girl up to the age of 18 is an offence regardless of consent. The exemption given to marital rape, as Justice Verma noted, “Stems from a long out-dated notion of marriage which regarded wives as no more than the property of their husbands”. Marital rape ought to be a crime and not a concept. Several women wake up to their spouse having sex with them when they are under the influence of drugs. As Prescription drugs or even liquor can cause a woman to not be able to make choice or fight the person off of her since she is under the influence of drugs. b. When the husband commits Sodomy without the consent of wife, it is rape sodomy is the most painful. The husband has no right to commit sodomy just because of the fact that he is doing it to his own wife. A wife has a right to say no regarding to what happens to her own body. c. If women’s spouse doesn't stop the sexual intercourse when she say no, it should be considered rape. Wife should not have to say no more than once. Any man that keeps going after the wife say no once than it should be rape no matter what the situation is. d. If the husband uses religion against the wife. Some husbands attempt to use religious lines against wife in order to force sex upon her. Husbands can still be charged with rape when they use religion to force themselves upon wives. Some husband says that they have a right to wife’s body by using the name of religion in order to justify what they do. Religion is something that sometimes husbands turn around on the wife in order to make her feel like it isn’t really rape that happened. So the husband should have no right to use any religious line on you to strip wife of all of her rights as a human being. e. If the husband threatens the wife with force if she fights him. Many husbands tell their wife that it can happen in the easy way or the difficult way if the wife refuses. It is way of force someone to submit to something that they

don't want to do in the first place. It is no different than when a man beats his wife until she does something that he wants no matter what the situation is. At the same time law should also provide damage with penal provision so that victim could have the courage to stand the perpetrator. Secondly the government has to raise awareness among the public about the marital rape. Educating boys and men to view women as valuable partners in life, in the development of society can also play an important role in this awakening. And also from these steps marital rape should also be criminalized as it violates her right to live with dignity which is a part of her right to life and liberty guaranteed under Article 21 of the Constitution. As consequences of marital rape are really high, the legislature cannot afford to turn a blind eye to the same. It is high time for reviewing our legislation and inculcating in it the needed. But mere declaration of a conduct as an offence is not enough. Something more is required to be done for sensitizing the judiciary and the police. There is also need to educate the masses about the prevailing myth because without change in the patriarchal mentality, no legislation can bring reforms. Only time will tell whether this will be achieved. Legal aid groups and government legal aid agencies should come forward to provide legal assistance to victim.

Conclusion :

This thesis has analyzed the treatment of marital rape in India, arguing for its Criminalization and application of additional measures to effectively protect married women from spousal rape. It is crucial to recognize that this is a major lacuna in criminal law at present defeating the constitutional provisions that grant women equality and autonomy. We have argued that the exemption clause in A-375 of the IPC as it stands today is unconstitutional. This is because it fails the equality test as given in Article 14. In addition to this, Indian women's organizations have succeeded to achieve public awareness and to pass legislation on domestic violence, but marital rape has not been fully criminalized by abolishing the distinction between marital rape and stranger rape. But marital rape will neither be criminalized nor punished, until legislators and the society acknowledge women's individual rights within the marriage. If the reformers see rape as a crime against a woman and her person and bodily integrity and humanity, then marital rape and its punishment would be a legal possibility. The woman has and still continues to be victimized by man and society.