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IS MARRIAGE A LICENSE TO RAPE?: **A CRITICAL ANALYSIS OF THE NEED FOR** **CRIMINALISATION OF MARITAL RAPE IN INDIA**

AUTHORED BY - HARICHARAN V & SUJITHA V

ABSTRACT:

Marriage is a sacred institution that unites not only two people, but two families. Anything done in this sacred institution must be with the consent of both the parties, i.e., Husband and wife. If a person has sexual intercourse with a woman without her consent, it is known as Rape and the same is punishable under the Indian Penal Code. But the position is different if the person doing the crime is married man and the victim is his wife. In such a case, the man is not punishable under the law as the Indian Law is yet to criminalise Marital Rape. Marital Rape is criminalized with severe punishments in almost all the countries around the globe. The consequences of Marital Rape are more than that of Rape, as the victim cannot approach the court to seek remedy and, she must live the rest of her life with the offender himself. Marital Rape causes a plethora of ill consequences, both mentally and physically to the victimised woman. By not criminalising Marital Rape, the Indian Legal System has almost denied the most basic right, i.e., Right to Life, to married women by not giving any remedy to them. This Article focusses on the effects of Marital Rape and critically analyses the various arguments favouring the criminalisation of the offence.

Keywords: Marital, Rape, Criminalisation, Rights, Equality, Privacy, Bodily Integrity, Consent, Intercourse.

INTRODUCTION:

We all know Rape is such a grievous crime and the only remedy available to the victim is to punish the offender. But can we imagine a situation where a man rapes a woman and the woman could not seek any sort of remedy, not because of social reasons, but because the law itself allows the man to rape her. That is the situation that is currently prevailing in India. To explain further, the Indian Judiciary is yet to criminalise Marital Rape. So, any person raping his wife is

immune from prosecution by law in India. Even though Marital Rape is a crime in almost all the countries around the world, India is yet to criminalise Marital Rape. This Article focusses on studying the legal framework in India on Marital Rape and analyses the urgent need for the criminalisation of Marital Rape.

MARITAL RAPE:

Marital Rape, in simple terms, can be defined as the act of a person having a sexual intercourse with his spouse, without her consent. Section 375 of the Indian Penal Code defines Rape as follows:

“Rape means unlawful sexual intercourse or any other sexual penetration of the vagina, anus, or mouth of another person, with or without force, by a sex organ, or other body part, or foreign object, without the consent of the victim.”¹

However, the Indian Penal Code provides an exception for the offence of rape which says that a non-consensual sexual intercourse between a married couple may not amount to rape². This exception is the birthplace of a plethora of problems and controversies. This exception tells that a husband can have a sexual intercourse with her wife, without her consent, and the law does not punish it. This literally tells that a husband can rape his wife and still escape legal consequences. So, this exception can be regarded as a form of ‘LEGAL RAPE,’ as even though such an act is a rape, it is not a crime.

This exception to rape is the result of the mindset of people in ancient times, where women were treated as a mere property and the marriage was considered as an agreement to give the ownership of that property from the father to her husband. But even in this era, where women have evolved to empowerment and are being regarded as equal to that of men, this exception does not stay relevant. Marriage is to be regarded as a form of social bonding between both the spouses and everything in this institution needs to have the consent of both. Justice Ahmad in the case of *Bodhisattwa Gautam v. Subhra Chakraborty*³ said that this “cruel act, in turn, destroys the entire psychology of a woman and pushes her into deep emotional crisis.”

¹ The Indian Penal Code, 1860, s. 375.

² The Indian Penal Code, 1860, Exception to s. 375.

³ *Bodhisattwa Gautam v. Subhra Chakraborty*, (1996) 1 SCC 490

MARITAL RAPE LAWS IN INDIA:

In a country like India, laws are often amended to meet the changing needs of the people. The Indian jurisprudence has evolved to untouched corners. It can easily be said that the Indian Jurisprudence is fast evolving to stay relevant. Our country has advanced in many fields and the legal framework has been amended and several new legislations have been passed. But there remain a few dark spots in the clean fabric of Indian Jurisprudence. One of them is Marital Rape provisions.

In India, Marital Rape is not recognized as a crime. It serves as an exception to rape. Under the Indian Penal Code, the instances where a husband can be convicted for the offence of Marital Rape is as follows:

1. When the age of the wife is below 12, there must be imprisonment for a term not less than 7 years but can also extend to life and shall also be liable to fine.⁴
2. When the age of the wife is above 12 but below 15, there must be imprisonment up to 2 years or fine or both.⁵
3. When the wife is judicially separated, the offender can be convicted with imprisonment which may extend up to a term of 2 years.⁶

The above mentioned are the only instances where a husband can be punished for Marital Rape. Thus, from the above-mentioned provisions it becomes clear that the wife, above 15 years of age, has no remedy against Marital Rape. This means that a law treats married women above the age of 15 as a mere property of the husband. This gives rise to many questions such as:

1. Does Marriage give the license to rape?
2. Do women age above 15 are the property of her husband?
3. Don't women aged above 15 have any remedy towards rape by her husband?
4. How does Rape by Husband differ from Rape by other persons and how does the Law do not recognise the former but severely punishes the latter?

⁴ The Indian Penal Code, 1860, s. 376(1).

⁵ Ibid.

⁶ The Indian Penal Code, 1860, s. 376 A.

LEGAL FACETS OF CRIMINALISING MARITAL RAPE:

There are various arguments against the exception of Marital Rape. There are various legal provisions which can be put forth to support the cause of Criminalisation of Marital Rape. Some of the arguments include:

1. EQUALITY BEFORE LAW:

Every person is entitled to equality before law and equal protection of law as per Article 14 of the Indian Constitution. Although the Constitution of India guarantees the aforesaid right to every citizen of India, the Indian Criminal Law treats married women different from other women. This is evident from the fact of non- criminalisation of the offence of Marital Rape.

Article 14 of the Indian constitution puts an obligation on the state to treat each and every individual equally. The exception for marital rape not only creates an unfair and unreasonable division between women, but it also punishes married women by not criminalising it. This provision is prima facie violative of Article 14. The legal framework of India fails to give equal protection to women against sexually violent crimes just because of the husband-wife relation between them.

In the landmark judgement of *Independent Thought v. Union of India*⁷, it was held by the Honourable Supreme Court that the Exception of Marital Rape in IPC contradicts the provisions of the POCSO Act which criminalises rape of women under 18 years of age. The court held that it was ultra-vires of Article 14 to give differential treatment to women of same age, solely based on their marital status. But the court did not deal with the aspect of Rape of married women above the age of 18.

2. RIGHT TO PERSONAL LIBERTY:

Article 21 of the Constitution guarantees that no person shall be deprived of his life and personal liberty except according to procedure established by law⁸. The Supreme Court has interpreted and expanded the scope of Article 21 by various judgements. In *Kharak Singh v.*

⁷ *Independent Thought v. Union of India*, AIR 2017 SC 4904.

⁸ The Constitution of India, Art. 21.

State of UP⁹, the Honourable Apex court held that the term life in Article 21 is more than a mere animal existence. In *Krishnappa v. State of Karnataka*¹⁰, the Supreme Court held that sexual abuse is an unreasonable intrusion into the privacy and personal liberty of a person. The court further added that the offence of Rape itself is a dehumanizing act and a serious blow to the dignity of the victim.

i. Right to Healthy and Dignified Life:

The Right to live a dignified life is a part of the Right to Life guaranteed under Article 14 of the Constitution¹¹. The exception of Marital Rape is a violation to the Right to good health of a married woman because marital rape causes many health-related effects such as bleeding, fractures, etc. and other psychological effects such as trauma, stress, depression, etc. The Honourable Supreme Court in *Chandrima Das v. The Chairman, Railway Board*¹² held that Rape is a crime violating the right guaranteed under Article 21 of the Indian Constitution. Hence, the exception to Marital Rape is in clear contravention to the Fundamental Right to Life and Personal Liberty as it violates the woman's right to live a healthy and dignified life.

ii. Right to Privacy:

The Supreme Court has held in numerous cases that the Right to Privacy is a facet of Right to life and personal liberty¹³. Therefore, a woman has right over her body and she has full right to consent to any sexual intercourse or reject it. Thus, the marital status of a woman has no say in the Right to Privacy of a woman. So, it can be understood that the exception of Marital Rape is a gross violation of the Right to Privacy guaranteed under Article 21 of the Indian constitution. The Supreme court in the Case of *Madhukar Narayan v. State of Maharashtra*¹⁴ made it clear that a woman is entitled to her sexual privacy and no man, not even her husband, has the right to violate such privacy. Therefore, in the light of the judgements, it is clear that the exception of Marital Rape is a clear violation of the Right to Privacy.

⁹ *Kharak Singh v. State of UP*, AIR 1963 SC 1295.

¹⁰ *Chandrima Das v. The Chairman, Railway Board*, (2000) 4 SCC 75.

¹¹ *C.E.S.C. Ltd. V. Subash Chandra*, (1992) 1 SCC 441.

¹² AIR 2000 SC 988.

¹³ The Constitution of India, Art. 21.

¹⁴ *Madhukar Narayan v. State of Maharashtra*, AIR 1991 SC 207.

iii. Right to Bodily Integrity:

Article 21 guarantees every person Right to his/her Bodily Integrity. A woman is the owner of her body and she has full control of her bodily affairs. She has the right to deny sexual intercourse with anyone. That right cannot be severed just because the woman is married. So, it is clear that the exception of Marital Rape is in violation of a woman's right to Bodily Integrity.

From the above grounds, it becomes clear that the exemption of Marital Rape by the Indian Penal Code is in violation of Article 14, 19 and 21. The classification between an ordinary woman and a married woman in sensitive issues such as Rape does not pass the test of Reasonable Nexus. The classification is not fair or reasonable.

The Supreme Court in the case of *State of Maharashtra v. Madhukar Narayan Mardikar*¹⁵ held that a Prostitute also had the right to refuse sexual intercourse if she does not consent to it. It was held that even though a prostitute, she has the right to privacy and maintain her bodily integrity. Likewise, the Indian Judiciary in a plethora of cases has almost criminalised every form of rape and prescribed punishments. But the married women are still considered as exception to rape. Due to this exception left by the Indian legislature and judiciary, a vast number of female populations is being victimised.

REASONS TO CRIMINALISE MARITAL RAPE:

1. Against Basic Rights of Women:

The exemption of marital rape violates some of the fundamental rights of women such as Right to equality, Right to Personal Liberty, Right to privacy, Right to bodily integrity, etc. By this exception Marital women are treated as mere properties of their husbands and treated lower than that of an ordinary woman.

2. The Sanctity of Matrimonial Institution is distorted:

As we all know, marriage is a sacred institution. The moment a man has sexual intercourse with his wife without her consent, the sanctity of such an institution is breached. It cannot

¹⁵ Ibid.

be argued that criminalising Marital Rape is unreasonable intrusion of state into the family matters of an individual as Rape is not a civil crime, but it is a crime against society. So, it is important to criminalise Marital Rape.

3. Changing Culture:

By going through the various mythologies and epics, it becomes clear that women were treated as mere chattel and they were sold in a marriage. After marriage a girl was believed to be foreign to her own family and she was considered as a property of her husband. So, in the then prevailing society, the non-criminalisation of marital rape was acceptable by a majority. But, in the present society, where women are achieving on par with men, in fact more than that of men, in all walks of life, this provision of Marital Rape is a mere archaic law and must be criminalised.

4. Vague Remedies:

Section 498-A of the Indian Penal Code¹⁶ prescribes punishments for cruelty to married woman by her husband or other relatives. The courts usually apply this provision in cases of Marital Rape, thereby considering Marital Rape as a mere form of cruelty. But Marital Rape is more than that and it is a separate and heinous crime against the society. Thus, there is a need to criminalise Marital Rape as a separate crime with aggravated punishment.

5. Need for Criminal Liability of Offenders:

The Hindu Marriage Act¹⁷ and the Domestic Violence Act¹⁸ provides women a civil remedy to dissolve the marriage if she is being subjected to cruelty. People may argue that there is no need for a separate criminalisation when there is already a legislation. But in a civil liability, the offender may escape just by paying compensation. So, this brings in a need to make a legislation that makes the perpetrator criminally liable.

¹⁶ The Indian Penal Code, 1860, s. 498 – A.

¹⁷ The Hindu Marriage Act, 1955.

¹⁸ Protection of Women from Domestic Violence Act, 2005.

CONCLUSION:

In the case of Rafiq v. State of UP¹⁹, Justice Krishna Aiyar has expressed his opinion of gravity of the offence of rape by saying that “*A Murderer kills the body but a Rapist kills the Soul.*” From these words, we can understand the gravity of the offence of Rape. Thus, anybody who commits such an offence must be severely punished. Those who are victimised in the offence of rape suffer a lot of pain and agony and face consequences that last for a lifetime. The only remedy they have is to approach courts with a hope to punish the offender, thereby preventing such crimes from happening in future. But the law provides an exception for Marital Rape, thereby preventing married woman from accessing the last remedy after undergoing such an amount of pain and agony. Some may argue that criminalising Marital Rape is undue intrusion of the State into the sanctity of marriage. But when the sanctity of marriage is already destabilized by the very act of Marital Rape, then the State must not remain as an onlooker. So, it is clear that criminalisation of Marital Rape is the need of the Hour.

SUGGESTIONS:

After understanding the urgent need for the criminalisation of Marital Rape, it cannot be concluded by saying that the government must take appropriate and necessary steps. As students of law, we are duty bound to make a few suggestions that come up in our mind in order to facilitate the faster criminalisation of such a heinous crime. Some of our suggestions are listed below:

1. Marital Rape must be clearly defined in the legislation and the elements of a non-consensual sexual activity within a Marital Relationship must be explicitly mentioned.
2. The new legislation must be framed so as to place immense importance on the concept of consent and the scope of such consent must be clearly defined within the legislation.
3. The penalties must be appropriately fixed by the legislation considering both the gravity of the crime and the sufferings of the victim.
4. The legislation must also provide for a mechanism in which a victim of marital rape can get the marriage dissolved much quicker than compared to the mechanism provided by other personal laws.

¹⁹ Rafiq v. State of Uttar Pradesh, 1980 Cr. L.J. 1344 SC.

5. The legislation must ensure that both the legal proceedings and the reporting mechanism are confidential to the maximum extent possible.
6. The legislature must consider various international conventions and laws before framing Marital Rape Laws in India.

The criminalisation of Marital Rape is not too far. The recent trend of Indian Jurisprudence has shown great progress in the direction of criminalising Marital Rape. Thus, we hope India will become a country where Marital Rape is fully criminalised in the near future.

