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Marital Rape : Consent Within Marriage

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Domestic violence has been a serious problem in India and has seen an increase in recent years. According to the 'Crime in India-2019' report released by the 'National Crime Records Bureau' (NCRB), about 70% of women in India are victims of domestic violence. Marital rape is also a form of domestic violence. Marital rape refers to forcing the wife to have sex without her consent. Such acts are unjust but still such cases of humiliating and humiliating women are not uncommon.

At present, marital rape has been declared a crime in more than 100 countries of the world, but unfortunately India is one of the 36 countries in the world where marital rape is still not classified as a crime. Although many major amendments have been made in the criminal laws to protect the rights of women, but not criminalizing marital rape undermines the dignity of women and their human rights.

Currently In India if husband commit an offense of Rape under S. 375 of Indian penal code and the victim is his legally wedded wife, above the age of 18 then the husband can claim exception of s.375 and wont be liable for punishment under s. 376 of IPC.

Since centuries rape was considered to be more heinous crime than murder, as it was seen to be against a whole community of woman.

The Karnataka High Court has allowed the husband to be tried for rape and has taken forward a debate from which the so-called civilized society has so far seen it best to escape. Justice M. Nagaprasanna made it clear that rape should be treated as rape even if the husband does not. Because an institution like marriage is not a license for a man (man) to treat his wife (woman) beastly and neither should it be. Setting aside the exemption granted to the husband under Section 375 of the IPC, the court observed that "...the man is the man, the law is the law and rape is rape...". Although the court has left the final decision to the legislature, the force with which it has advocated to classify marital rape as extramarital rape is bound to have far-reaching implications.

Actually, the basic difference between humanity and animalism is the control of desires, from which our civilization begins. In this episode, if the establishment of an institution like marriage would have made it easier to determine the relationship of man and woman, then society would have been able to control many of its evils long ago. Respect for each other is a 'necessary condition' for the relationship between man and woman to remain loving. It is only in the absence of love and respect that the idea of a 'sex maid' can flourish and one can mistake marriage as a way to emit animalism. Despite such a mistake, the guilty person keeps on wearing the mask of being civilized. If the husband gets the legal right to prosecute the rape, then this mask is in danger of coming off. Are we ready to take this risk? There is no doubt that only after accepting this risk can we become a better person.

The question arises is what is rape, according to s. 375 of IPC "A man is said to commit rape Exception 2 – Sexual intercourse or sexual acts by a man with his own wife , the wife not being under fifteen years of age is not rape"

The exception provided in this section is that any sexual relations between husband and wife above 18 won't come under the definition of rape.

So in the marital relationship no rape is considered. Recently in Delhi High court many writs are filled to end this biased and unconstitutional exception which not only allows husband to have sexual intercourse without the consent of wife but also make it not an offense under penal laws. But the central government has requested Delhi High court for postponing the hearing in this matter as they will be able to reply in this instant matter after a deep analysis and discussion. every male is not a rapist and removing this exception will destroy the marital bond between couples.

The minimum age for marriage under Child marriage prohibition act 1919 for female was decided to be 14 and for male it was 18, later in 1949 the minimum age for marriage for female was increased to 15. The act was again amended in 1978 and the minimum age for female was increased to 18 and for male it was increased to 21 but the same were not amended in Indian penal code. Constitutionality of s. 375 exception was challenged in supreme court and the court in case of *Indian thought v. UOI* held that the age of woman under the exception to be increased to 18 instead of 15 but court did not held anything for non consensual sexual intercourse with wife above the age of 18.

The parliament can amend Indian penal code for increasing the age for exception of s. 375 but whether the parliament will remove the exception is the main question and if it is removed and parliament chooses to provide woman equal rights before and after marriage in cases of non consensual sexual intercourse, will it be read along with Indian evidence act for the evidence regarding the consent and burden of proving the sexual intercourse as similar to s. 114A of IEA which states About presumption as to absence of consent in certain prosecution of rape “ in prosecution of rape under section 376 of Indian penal code, where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and such woman states in her evidence before the court that she did not consent, the court shall presume that she did not consent”. If the similar stance is applied in the cases of marital rape then it will be very hard to protect the bond of husband and wife as the couple stays in a room after marriage for rest of their lives and they have right to privacy but what happens in a closed room is hard to prove by any of the party, if wife's prove the sexual intercourse and says that she did not consent of then the court shall presume that wife did not consented and the onus of proof lies upon the husband which is hard to prove.

Will it be the same in case of husband? It will undermine the social fabric. The concept of 'innocence' emerged in Britain in the early 19th century. It simply means that every person is innocent, until his guilt is proved and it is the responsibility of the prosecution to prove the guilt. The British lawyer Walter Garrow (1760–1840) coined the phrase 'innocent until proven guilty'. Earlier there was no such concept in Britain also, because there was no difference between civil and criminal cases, since both had the same law 'Law of Rogues'. The tribal chiefs had a list of writs according to which they compensated those who came to complain and those who were oppressed. A part of this compensation also went to the tribal chief. Thus, in criminal matters, the state party did not exist. A few decades after the Norman conquest, the king realized that he had no role in the administration of justice and that all authority rested with the tribal chiefs. Then the crime was divided into two parts in which compensation was given. will go and which will not be given. This led to the introduction of criminal law that made punishment mandatory for some crimes. Later the king and then later the state became very powerful. With power comes cruelty. Therefore, in the legal system, giving protection to the accused became a matter of great concern, as the state stood against the individual. Therefore his trial should be fair.

The question is, if there is no difference between the husband and the other, then what is the need of marriage. The question is, why do feminists want to send men to jail? Is sex only needed by men? If sex with wife without consent is an offence, then it can be made a civil matter and a ground for divorce. It is well known how widespread is the misuse of Section 498-A of the IPC. In the end, the Supreme Court had to issue directions that arrests in such cases should not be made immediately. Referring to the misuse of legal provisions relating to dowry harassment for dragging relatives of husbands, the Supreme Court said that courts have to be very careful in dealing with such complaints.

If the exception is abolished, there will be sexual relations between husband and wife at night and if there is a dispute between the two in the morning, then the wife will directly go to the police station and file a case of rape. What will be the proof of consent?

After the court's stand and strictness, many kinds of confusion may arise before the law makers, which they will have to deal with. In the past also our system has failed to prove rape cases. What kind of science will be used to prove such charges against the husband, how facts matter and how courts will be able to separate milk and water will be considered before determining the offense and punishment. There is no doubt that the relationship of man and woman cannot and cannot be sustained by being bound by the books of law. That's why our concern should be first that how the human being will be able to become better (civilized) than before. Certainly not by being an ostrich.

Constitutional and legal rights

- 1) Doctrine of coverture: Non-Criminalized nature of Non- consensual Marital sexual intercourse originates from the British period. The Marital rape generally affected by and got from this doctrine of consolidating the females identity with that of her spouse. Married woman was not considered as independent when the IPC was drafted in the year 1860. The exemption for the IPC's meaning of Rape under s. 375 was drafted based on Victorian male centric standards that didn't perceive man and woman equivalents, didn't permit married woman to claim property, and the personalities of a couple under the "Doctrine of Coverture"
- 2) Violative of Article 14: Marital rape violates the right to equity revered in Article 14 of the Indian constitution. The Exception makes two classes in light of their marital status and protect activities executed by men against their spouses. In doing as such, the Exception makes conceivable the exploitation of married woman for not a glaringly obvious explanation other than their marital status while shielding unmarried ladies from those equivalent demonstrations.
- 3) Defeats the Spirit of Section 375 of IPC: The reason for Section 375 of IPC is to safeguard woman and punish the individuals who engage in the cruel and gruesome act of Rape. Notwithstanding, absolving husband from criminal liability is completely inconsistent to that goal, as the results of rape are a similar whether a lady is married or unmarried. Besides, married woman may really find it more hard to get away from oppressive circumstances at home since they are lawfully and monetarily attached to their spouses.

Way by which marital rape can be dealt

Multi-stakeholder Approach: The criminalization of marital rape would certainly be the best and symbolic. Way by the parliament or by any judicial precedent .Sentencing can be decided by an expert committee consisting of medical personnel, family counsellors, judges and police based on various aspects such as sexual history of the couple, physical and psychological harm to the victim. As well as giving both the parties equal chance to prove their side under the Indian evidence act as Section like 114A could easily be in favour of victim while removing s. 114A will take the matter in favour of Accused.

Bringing about behavioural change: through awareness campaigns that sensitize the public (citizens, police, judges, medical personnel) on the importance of consent, timely medical care and rehabilitation, skill development and employment to facilitate economic independence of victims. Should be improved

