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**LEGAL SCENARIO OF MARITAL RAPE IN INDIA:-A CRITICAL ANALYSIS**

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**ABSTRACT**

Marital Rape is a form of Domestic Violence where a wife is subject to the mercy of her husband. Marital Rape is still a major concern in our country because any forceful sexual act on the part of the husband upon his wife goes unpunishable. And the husband does not have to face any legal consequences for the same. One of the major reason for the escalating cases of marital rape in our country is because of the past beliefs and myths that cohabitation is an essential ingredient of marriage and the husband does not needs the consent of the wife for the same. Despite of numerous of legislations being made for the protection of women, there is still no law in existence in present which provides remedy to the victims of marital rape. There is still a question on the legality of marital rape. A large section of women have been subject to physical abuse, sexual assault and wrath of the husband because of non-criminalization of this hazardous practice. Through this paper an attempt has been made to define the term marital rape in it's proper sense. This paper also explains the legal position regarding marital rape in India. This paper also exhibits a comparative study between the laws of marital rape in India vis-a- vis, the other countries. This paper also covers constitutional and other provisions regarding marital rape, need for criminalization of martial rape in India, types of marital rape, reports of 172<sup>nd</sup> law commission regarding marital rape. This paper also mentions

suggestive measures that may be taken to eradicate this problem of marital rape for the protection of women's rights, and conclusion at the end on the said subject.

**Keywords:-** Marital Rape, Domestic Violence, Cohabitation, Legislation, Sexual assault, Physical abuse, Non-Criminalization, Constitutional Provisions, 172<sup>nd</sup> Law Commission.

**INTRODUCTION**

Marital Rape is an act under which husband compels his wife to have sexual intercourse with him even without her consent. Due to it's non-criminalization it is practiced widely in India. This inhumane practice exists mainly because of cultural beliefs, societal and traditional ideologies that the husband shall have a right to have sexual intercourse with his wife and he can exercise this right whenever he desires, and it shall be an onus upon the wife to succumb herself to the wishes of her husband. It was since the inception of 1960's that many developed countries started acknowledging women's rights against any form of sexual abuse by their spouse, and thereafter certain legislations were made in pursuance of the same for the protection of women's rights. By the end of 20<sup>th</sup> century, it was observed that many countries have started criminalizing marital rape by the way of judicial decisions, explicit legislations being made to bring it within the definition of rape. In the opinion of certain experts, it was owing to the concept of human rights, equity, justice and good conscience that an imperative need was felt for it's criminalization. Despite of great amount of efforts and myriad of measures being taken to combat this practice, marital rape still not have been criminalized in all the countries, and there are certain



countries where such a practice is still prevalent.

India is also one of those countries where marital rape is practiced at a rampant level, and is used as a strong defense by the husband committing rape upon his wife. The major reason for the legitimacy of marital rape in India is because of religious, societal ideologies, sacredness and sacrosanctity of the institution of marriage. Failure on the part of law enforcement agencies to make proper and stern legislations regarding sexual crimes against women have left them in a state of endangerment and vulnerability.

The Practice of Marital Rape is against the Basic Tenets and Principles of Indian Constitution. Any Practice of such a nature is against the odour of constitutional principles and breaches the fundamental rights of a women guaranteed to her under Part-III of constitution of India including Right to live in a dignified manner(Article 21), Right against any form of Exploitation(Article 23-24).

### **OBJECTIVES OF THE STUDY**

- 1). To study and examine the factors that has led to the increase in the incidents of marital rape in India.
- 2). In this piece of study, the author has tried to suggest the measures that may be taken to eradicate the problem of marital rape completely from its roots.

### **METHODOLOGY**

Data used in the study primarily consists of Books, Journals, Articles, Periodicals, Blogs, Conference Papers, Newspaper, Magazines, Previous Research Findings, Online sources, Other References etc.

## **LEGAL STATUS OF MARITAL RAPE IN OTHER COUNTRIES (Position of Legality vis a vis other countries)**

### **1). United Kingdom**

Before 1992, forceful sexual intercourse by a husband upon his wife was considered to be legal and within the vires of the marriage. There was no law made at that time which criminalized the said act. It was believed that there was an implied consent on the part of wife to the act of sexual intercourse by the virtue of marriage. However, after the landmark Judgement of R v. R, certain legislative developments were made in the definition of Rape.

### **Rulings of the House of Lords in R v. R case**

The court ruled that any sexual intercourse committed by a husband upon his wife without her consent will also come under the definition of rape. The court further held that the burden of proof is on the prosecution to prove the fact that there was an act of marital rape on the part of the accused. The court in the said judgement enumerated the following points which were required to be proved by the prosecution in order to establish the act of marital rape on the part of the accused. These points are as followed:-

- 1). Forceful penetration of penis or any other object into the vagina of the women by the accused.
- 2). The act of sexual intercourse by the accused was deliberate and was done knowingly.
- 3). The said act was performed without the consent of the victim.
- 4). There was no reason for the defendant to believe that the victim had consented to the said act.



**Punishment for Marital Rape in U.K-** It ranges from 4-14 years. However in certain circumstances, life imprisonment can also be awarded depending upon the gravity of the offence.

## **2). United States of America**

Today the position in United States regarding Marital Rape is such that marital rape has been criminalized in all the 50 states of U.S.A. In 1975, Nebraska became the first state to criminalize marital rape in U.S.A. In the landmark case of *People v. Liberta*(1984), the court averred the fact that a marriage between husband and wife does not implies that the husband has the license to commit sexual intercourse upon his wife forcefully. The said court further stated that such an act on the part of the spouse is untenable, and shall be liable to undergo punishment for the same. It was through this case that the court have struck down exemption given for marital rape as unconstitutional. However, still there were certain states in U.S.A where marital rape was treated as a lesser serious offence and lesser penalty was imposed for the same. Some of these states declaring marital rape as a lesser serious offence were:- South Carolina, California, Connecticut, Maryland, Michigan, Virginia, Oklahoma etc.

## **3). Australia**

During 1976-1994, a string of legislations were made in Australia regarding marital rape for the protection of women's rights. Legislations regarding Rape were modified in Australia primarily because of shift from traditional thoughts and ideologies towards modernization, changing perception about women's status in the society. Most of these legislations were introduced for improving women's situation in the society. Because of

new law reforms, now it became possible for the state to intervene in domestic realms. In 1976, South Australia became the first state in Australia to criminalise marital rape. However such a criminalisation was of partial in nature. Later on in 1981, New South Wales & Victoria became the first two states in the Australian jurisdiction to fully criminalize marital rape.

**Penalties for Marital Rape-** Different states provided different penalties for marital rape. The extent of penalties were subject to the laws of each state.

## **4). Japan**

In Japan, Marital rape is also considered as a form of rape. Certain Legislations have been made in Japan regarding Marital Rape. Such laws have been made in order to strictly confine male spouse and to preclude them from engaging in any kind of sexual activity with their female partner without the consent of the later.

## **5). Netherlands**

Netherlands also criminalised marital rape throughout its region. In 1991, certain amendments were made in the definition of rape. Through these amendments, statutory exemption of marital rape given to the husband was removed, and the term marital rape was now explicitly included in the definition of rape. The main objective of such legislation was to make crime gender neutral. Penalty regarding marital rape provided by the legislation:- Any person found guilty of marital rape shall be punished with an imprisonment of either description for a term not exceeding 12 years and fine not exceeding 78,000 euros.



## CLASSIFICATION OF MARITAL RAPE IN INDIA

There are three categories of marital rape that persists in the society. These are:-

1). **Battering Rape**- Battering Rape is a kind of rape under which a women undergoes both physical and sexual abuse in a relationship. It is one of the most common form of violence practiced against a married women. Under such a situation, the husband compels his wife to have sexual intercourse with him against her wishes. In certain cases, it has been observed that a husband may resort to physical violence in order to execute rape upon his wife. The degree of violence used in such kind of rape is extreme. Such kind of sexual abuse performed by the husband upon his wife is likely to affect her psychologically as well as emotionally. A Major volume of marital rape cases falls under this type.

2). **Force only Rape**- Element of force is essential for committing such kind of rape. Under such circumstances, husband uses certain degree of force to the extent necessary for committing sexual intercourse upon his wife. Battering may not be possible in such cases. In such cases, husband uses certain force upon his wife only when the wife has refused to the act of sexual intercourse being performed on her.

3). **Obsessive Rape**- The third category of rape is commonly known as obsessive rape or sadistic rape. It is the least popular form of rape. Women who does not falls under the above two categories are subject to this type. In such cases, if the husband is not able to satisfy his sexual desire through legitimate means, then he will resort to other means in order to fulfil the same such as like

committing physical assault against her. Such assault involves:-

- a) Using of Extreme Physical Violence against her.
- b) Torturing women brutally.
- c) Physical Abuse.

## LEGAL PROVISIONS REGARDING MARITAL RAPE

It is pertinent to note that the existence of marital rape in India is de facto and not de jure. Marital Rape is an exception to Section 375 of I.P.C. Provisions regarding rape is provided under Section 375 of I.P.C. It defines rape as any forceful sexual intercourse committed by a man against any women without obtaining her consent, or by the way of coercion, misrepresentation or through the means of fraud, or where any sexual encounter has taken place at the time when the victim was under the state of intoxication, or where the consent of women was obtained by making false promises to her, or where sexual intercourse has taken place with a women who was of unsound state of mind, and where such a women was by no means in a position to give her formal consent for the said act. This section further states that no rape can be committed against a men, and thus relief under this section can only be sought by a women. In order to constitute rape, following things are required to be proved by the prosecution beyond reasonable doubts:-

- 1). That the sexual act was done by the accused against the wishes of the victim.
- 2). There was no formal consent given by the victim.
- 3). That the consent of the women has been obtained under forced circumstances by



putting her or the life of any other person in whom she is interested under fear of death.

4). That the consent of the woman has been obtained by the reason of unsoundness of mind or by the way of intoxication and where the victim was by no means in a position to understand the nature and consequences of the said act for which she had given her consent.

### **SECOND EXCEPTION TO SECTION 375 OF IPC**

However Section 375 of I.P.C does not provides any recourse to the married woman against any forceful sexual assault on the part of the husband upon her, unless the wife is under the age of 15 years. Second Exception of Section 375 of I.P.C clearly states that any forceful sexual intercourse committed by a man upon his own wife, and where the wife is not below the age of 15 years, then the said act on the part of the husband does not tantamounts to rape. Thus, it can be inferred that Exception 2 of Section 375 of I.P.C is against the core fundamental principles of constitution of India. The aforesaid exception is violative of Article 14 of constitution of India as it tends to discriminate between married women and unmarried women, and thus does not fulfills the test of intelligible differentia provided under article 14 which states that there shall be no discrimination amongst people belonging to same class or strata.

### **CONSTITUTIONAL PROVISIONS REGARDING MARITAL RAPE**

The second exception to S.375 of I.P.C is violative of fundamental rights of married women guaranteed under article 14 & article 21 of the constitution.

Right to Equality- Right to Equality is embodied under article 14 of the constitution

of India. Article 14 of the constitution explicitly states that every person shall be treated equally and no person shall be deprived of equality before law or equal protection of rights on any grounds whatsoever. In State of West Bengal v. Anwar Ali Sarkar case, the apex court held that any classification under article 14 must be made in accordance with the principle of intelligible differentia and such an intelligible differentia must be rational and must not be arbitrary.

Right to life(Article 21)- Right to life cannot be equated as a mere Right to existence. Right to life means right to live in a respectful and in a dignified manner. Moreover, the honorable supreme court has also established the fact that right to live with dignity includes the right of a women to have consensual sexual intercourse, right of a women to be free from all kind of exploitation, physical abuse and humiliation of any nature. And therefore second exception of S.375 of IPC, 1860 which provides for marital exemption to the husband for the commission of any sexual act is a blatant violation of right to life and personal liberty of married women provided under Article 21 Part-III of the constitution of India. The Scope of Article 21 can be properly explained through a settled principle:-

In Justice KS Puttuswamy v. U.O.I case, the Supreme court held that right to privacy includes the right of a women to make decisions regarding sexual intercourse. And the said right does not excludes married women from it's scope.

### **CRIMINAL LAW AMENDMENT ACT(2013)**



After the horrific incident of Nirbhaya Gang Rape case that left the whole country in an alarming state, an imperative need was felt to amend definition of rape. In order to eradicate loopholes in the existing legislation and to provide for more stringent penalties in cases of rape, criminal law amendment act, 2013 was passed in the parliament. Through the said amendment in criminal law, scope of Section 375 of I.P.C was extended, and clause(a), (b), (c), (d) were inserted in section 375 of I.P.C. The newly inserted clause states that penetration of penis, or of any object (like syringe, iron-rod, needle), or any part of body (including finger nails) into the mouth, urethra, anus, or vagina of a woman is likely to constitute an offence of rape. Any act of touching private parts of a woman inappropriately and without her consent would also fall under the category of Section 375 of I.P.C and will attract punishment for the commission of the said act under Section 376 of I.P.C. However, despite of certain amendments being made in the legislation regarding rape, the criminal law amendment act, 2013 failed to provide any relief to the victims of marital rape. Legislators had failed to insert any provisions regarding marital rape under the said amendment act, and as result the said issue was left unattended and had gone unnoticed.

### **JUDICIAL PRONOUNCEMENTS REGARDING MARITAL RAPE**

#### **1). Suchita Srivastava v. Union Territory of Chandigarh**

Ratio of the case:-

Supreme court in its judgement said that a woman should exercise complete liberty and freedom to make reproductive choice. The Apex court while doing a constitutional interpretation of the said issue ascertained

that the right of the women to make reproduction is an integral facet of personal liberty enshrined under Article 21 of the constitution of India. The learned bench of the apex court further averred that a woman should have complete autonomy to live her life in a dignified and respectable manner, right to have privacy of her own, right to have complete control over body. The said rights are not exhaustive in nature and also includes right of a woman to restrain herself from indulgence in any kind of sexual act.

#### **2). Sree Kumar v. Pearly Karun**

Ratio of the case:-

Kerala High court in the said case founded that despite the order of Judicial separation, wife did not separate herself from the husband and was living with him under the same roof. Later on, the husband forced his wife for sexual intercourse and committed the said act against her wishes. When the matter went before Kerala High Court, the Kerala High court exculpated the accused of the charges of rape. However, the court acknowledged the fact that the husband was de facto guilty of committing rape.

Reason for Judiciary Stand

Kerala High court delivered the said judgement because it was of the view that marriage is a contractual and consensual relationship between two partners as recognized by law. And therefore by the virtue of getting married, it is an obligation upon the wife to surrender herself to the wishes of her husband. And therefore any forceful sexual act within the marriage does not amount to rape. The court in the said judgement further stated that the husband has the right to derive sexual pleasure out of the marriage. The said judgement of the Kerala high court was highly criticized because any



kind of sexual violence on the part of the husband is an infringement of right of personal liberty of a married women as well as right to have sexual privacy and bodily control.

### **3.) Queen Empress v. Hurree Mohun Mythee**

#### Facts of the case

This case is 130 year old long case. Under this case, the husband asked his wife for cohabitation. On the refusal of the wife for the same, husband got infuriated and forcefully committed sexual assault on her. At the time of the incident, prosecutrix was only 11 years old.

#### Ratio Decidendi of the case

In the said case, the court held husband guilty of rape because the age of the prosecutrix was 11 years only.

#### Reasoning of the Judgement

The court while delivering it's judgement stated that there is only 1 condition under which a husband will not be held liable for raping his wife, that is if the age of the wife is above 15 years, then the husband shall be immune from the charges of rape. And since in the said case the age of the wife was 11 years. Hence, the husband will not be immune from the charges of rape and was thus held liable for committing rape upon his wife.

### **4.) Sakshi v. Union of India**

#### Facts of the case

In this case, Sakshi an NGO filed a petition before the supreme court of India. In this petition, the said NGO pleaded that certain amendment shall be done in the definition of rape under criminal law and the revised definition of rape shall include all the kinds

of forcible penetration within its ambit. Sakshi contended that the existing definition of rape is narrowing down and limiting its legislative purpose and is also an infringement of fundamental rights of women guaranteed under article 21 of constitution of India.

#### Ratio of the case

The court did not change the existing definition of rape stating that making any legislative changes in the existing definition of rape would lead to ambiguity and confusion and would also be prejudicial to the interest of the society at large.

### **5.) Independent Thought v. Union of India**

This case is a result of Criminal Law(Amendment) Act, 2018. In this case, the Apex court increased the age limit given under Exception 2 of Section 375 of I.P.C. The Hon'ble Apex court in this judgement ruled that "sexual intercourse committed upon a girl below the age of 18 years" will attract Section 375 of IPC regardless of the fact that whether girl was married or not and her consent for such an act would be considered as immaterial.

### **REPORT OF 172<sup>ND</sup> LAW COMMISSION**

The Law commission of India in it's 172<sup>nd</sup> Report had reviewed Rape Laws thoroughly. After doing thorough examination of Rape Laws, the commission reached to the conclusion that there is no need for amending the second exception to Section 375 of IPC and therefore did not suggest criminalization of marital rape in it's report. The Law commission of India in it's submission further stated that every country have their own set of laws and it is possible that the law of one country may not be suitably applied in any other country. And therefore, mere fact



that majority of countries have criminalized marital rape cannot be any justification that India should also make it's path towards criminalization of marital rape. Adding on to this, the law commission of India stated that there are various factors which makes the criminalization of marital rape at this juncture impossible. These factors are:- Social and Religious customs, improper education, extreme level of poverty, lack of social awareness, paradox of the society to treat marriage between the partners as a sacrament and right of the male partner to have sexual intercourse with the spouse. And thus basing it's decision on the above factors, the law commission in the said report concluded that criminalization of marital rape would lead to an unwarranted interference in the sacrosanctity of marriage.

#### **SUGGESTIONS REGARDING THE ISSUE OF MARITAL RAPE**

- 1). It is important to understand that the obligation of safeguarding the women's rights shall not be restrained to the judiciary itself. In order to achieve this objective of safeguarding the women's rights, it requires the collaborative efforts of the whole nation.
- 2). It is required on the part of the Law commission that it must send recommendation to the parliament regarding the scrapping of Exception 2 of S. 375 of I.P.C which exempts the husband for the offence of marital rape. And recommendations must also be made to the parliament for making certain amendments under rape laws.
- 3). There is a strict need of incorporation of provisions in Indian Penal Code penalizing marital rape as an offence. It is important that the parliament acknowledge the fact that marital rape is also a form of rape and

therefore it is not possible to segregate it from the offence of rape.

4). Apart from the customary practice, the wrong perception being framed in the society that the husband holds the right to engage in sexual intercourse with his wife and that the wife shall subject herself to the wishes of the husband is one of the major factor which contributes to the offence of marital rape, hence such a myth ought to be removed.

5). Raising moral and social awareness amongst people will play an important role in curbing the incidents of marital rape in India.

#### **CONCLUDING REMARKS**

From the aforesaid arguments and discussion done, it can be clearly inferred that there is an imperative need to criminalize marital rape in India in order to safeguard women's rights and to protect them from any act of physical and sexual violence committed against them by their male companion. The manner in which the cases of marital rape are rising in India at a rampant pace has shook the whole nation. Non-inclusion of Marital Rape under the definition of rape reflects incompetency on the part of the legislature in safeguarding married women rights. At this juncture, there is no formal law in existence regarding marital rape in India, hence its important that the parliament addresses the seriousness of the issue before its respective houses and make certain amendments in S. 375 of IPC in such a manner that the expression marital rape is included within its purview. And for its proper and effective implementation judiciary plays a vital role in criminalizing marital rape. Most of the developed countries like:- USA, UK, Australia have a formal legislation regarding marital rape. It's high time that India also follow the footsteps of these countries and take necessary measures



for the protection of women's rights. The Menacing Practice of marital rape undermines and abridges women's right postulated under Article 21 that is the right to live with dignity, right to have personal freedom of her own and to have complete control over her body.

At the end, the author concludes the paper by saying that Criminalization of marital rape is the NEED OF THE HOUR and there is an imminent need to stop this evil practice at any cost.

**REFERENCES**

- 1) Suchita Srivastava & Anr. v. Union Territory of Chandigarh, (2009) 9 SCC 1 (India).
- 2) Sreekumar & Anr. v. Pearly Karun, (1999) 2 ALT Cri 77 (India).
- 3) Queen Empress v. Hurree Mohun Mythee, (1891) ILR 18 Cal 49.
- 4) Independent Thought v. U.O.I and Anr, (2017) 10 SCC 800 (India).
- 5) Sakshi v. Union of India, A.I.R 2004 S.C. 3566.
- 6) Exception 2 of S.375 of IPC inserted by Criminal Law(Amendment) Act, 2013.
- 7) R v. R [1991] UKHL 12.
- 8) Rape defined under S.375- (Chapter XVI) of I.P.C, 1860.
- 9) supra note 4.
- 10) Law Commission of India, One Hundred and Seventy Second Report on Review of Rape Laws March(2000).
- 11) 1, Connerton K.C, The Resurgence of the Marital Rape Exemption: The Victimization of teens by their Statutory Rapists 237-284 (61<sup>st</sup> ed. 1997).
- 12) 1, Featherstone Lisa, " That's What Being a woman is for opposition to Marital Rape Law Reform in Late 20<sup>th</sup> Century" 87-103 (29<sup>th</sup> ed. 2017).
- 13) Stark Barbara, 'Does International Law require the Criminalization of Marital Rape' 332-36 (2015).
- 14) 3, Eskow L.R, 'The ultimate weapon demythologizing spousal rape and reconceptualizing its prosecution' 677-710 (1996).
- 15) The Chairman Railway Board & Ors v. Mrs. Chandrima Das & Ors, (2000) 2 SCC 465 (India).
- 16) Justice Verma Committee submitted its report vis a vis Amendments under Criminal Law on January 23, 2013.
- 17) Ibid.
- 18) Vishaka & Ors v. State of Rajasthan & Ors, (1997) 6 SCC 241 (India).
- 19) Law Commission of India, Indian Penal Code, Forty-Second Report submitted on June 1971.
- 20) Physical Abuse & Sexual Abuse, Explanation I Section 3 of Protection of Women from Domestic Violence act, 2005.
- 21) Bodhisattwa Gautam v. Subhra Chakraborty, (1996) 1 SCC 490 (India).
- 22) CESC Ltd y. Subash Chandra, (1992) 1 SCC 441 (India).
- 23) Govind v. State of Madhya Pradesh & Anr AIR 1975 SC 1378.
- 24) Commission of Sexual Assault upon a women under S. 354 of Indian Penal Code- Punishable with an Imprisonment for a term not less than 1 year but which may extend to 5 years and fine shall also be imposed, Criminal Law(Amendment) Act, 2013.
- 25) T. Sareetha v. T Venkata Subbaiah AIR 1983 AP 356.

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