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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

MARITAL RAPE: LEGAL AND JUDICIAL **APPROACH IN INDIA**

AUTHORED BY - SUYASH KANT SHUKLA

ABSTRACT

In this article the researcher tries to find out the present legislative and judicial approach while dealing with the offences of marital rape. Marital rape has been considered as an offence in many countries while some countries still doesn't have any laws criminalizing it or doesn't have certainty in defining marital rape. In 21st century this difference of opinion among different nations needs to be compared and studied. My objective of this article is to provide the readers a clear understanding regarding marital so that readers can have diverse and reasonable opinion regarding criminalizing of it.

INTRODUCTION

If all men are born free, how is it that all women are born slaves?" In 21st century when our human civilization is in its peak with the technological advancement covering each and every sphere of our lives from the study and development of subatomic particles to that of space science. But can we say that even in this modern world we are treating women at par with men, providing them the at least the same natural and human rights which the men enjoy? The answer is big no. Right over one's bodily Integrity is one of basic human rights which every person has regardless of gender. Today, even in democratic countries, women suffer from physical and mental abuse, cruelty, assault marital rape, etc., even from their family members. There are laws made to protect them from such offence however marital rape is one the offense which in many countries is either not considered as an offense or even if considered there hasn't been any certain or unambiguous laws regarding it. According to a report of UN population fund 75% of married women in India face marital rape. Marital rape is forced sexual intercourse by a husband with his own wife against her will and without her consent. India is one of the 36 Countries where marital rape is still not a crime¹. According to the National Family Health Survey 5 (2019-21) of India, "Among married women aged 18-49 who have ever experienced sexual violence, 83 per cent report their current

¹ Anusha Agarwal," Only 36 Countries Have Not Criminalized Marital Rape, India is one of them, *The LEAFLET*, November 2, 2022

husband and 13 per cent report a former husband as perpetrator² (business line. Marital rape violates right to bodily integrity and sexual privacy of a woman which has been enshrined in right to life and personal liberty under article 21 of Constitution. Still India doesn't have any laws for protection of the victims of marital rape.

1) LEGAL APPROACH

A) Laws in India

Section 375 of IPC, which defines rape, talks about marital rape but not as an offence but as an exception of rape. It states "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape³." No protection is provided to wife who is beyond 15yr of age except in cases where the wife is living separately from husband under a decree of judicial separation or otherwise i.e., any custom or usage and in such a case if husband has done sexual intercourse without her consent, then he faces imprisonment of either description for a term which shall not be less than two years but which may extend to seven years under Section 376B of the amended IPC. One of the most important ingredients for committing a rape is consent. Now the question is whether marriage in itself include implied consent from wife for sexual intercourse for whole life even if it is against her will. Kersti Yllöin the prologue of *Understanding Marital Rape in a Global Context*, "In some cultures, states that consent is not even something that an individual wife can give. The families that arranged the marriage guarantee her permanent consent⁴. "Therefore section 498 A of IPC acts as last resorts for the women to seek justice which states, 'Whoever being the husband or the relative of the husband of the woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine'⁵. No other statute or law recognizes marital rape, and victims only have recourse to civil remedies provided under the Protection of Women from Domestic Violence Act, 2005 under which women can seek for relief from marital rape by court which may give solutions like legal separation or annulment of marriage itself. An unmarried woman can prosecute a man for sexual intercourse while a married woman cannot be a violation of articles 14 and 19 of the Constitution. According to the finding of justice J.S Verma committee report on Amendments in criminal law, it was recommended that

- I. The exception for marital rape must be removed.

² Parvati Benu, "Marital Rape: Most married women are sexually abused by their husbands", *The Hindu Business Line*, May 16, 2022

³ The Indian Penal Code, 1860 (Act 45 of 1860) s.375

⁴ Kersti Yllo, Gabrielle M. Torres, "Marital Rape: Consent, Marriage, and Social Change in a Global Context" 345 (Oxford University Press, United States of America, 2016)

⁵ Supra note 4, s.498A

II. The law ought to specify that:

- A. A marital or other relationship between the perpetrator or victim is not a valid defense against the crimes of rape or sexual violation.
- B. The relationship between the accused and the complainant is not relevant to the inquiry into whether the complainant consented to the sexual activity
- C. how it violates right to equality, right to freedom of speech and expression, right to live with dignity
- D. what alternative the existing laws provide to marital rape victims⁶

A similar report 'Status of Women in India', by the high-level Pam Rajput committee of the Ministry of Woman and Child Development, criticized the legislature for its failure to criminalize or even recognize marital rape in the Criminal Laws (Amendment) Act 2013 enacted following the Justice Verma committee report. The recent criminal amendment Act, 2013 reformed many provisions proposed in the 172nd law commission reports. But ignored to reform the provisions of marital rape as recommend by various criminal law reports and justice JS Verma committee. Central gov. in its affidavit to Delhi high court, on various petition for criminalizing marital rape, argued that

1. It would be nearly impossible of proving marital rape and would only increase burden on the judiciary
2. whether a sexual act is a marital rape or not will rest entirely with the wife. "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,"
3. It might be used as a tool for Harassing the innocent husband of an offence of marital rape, in case of any marital disputes
4. There is an implied consent to have sexual intercourse when a woman marries a man
5. marital rape" would "destabilize the institution of marriage
6. States should implead in this matter as criminal law is on concurrent list
7. The Delhi government has also stated that a woman subjected to sexual violence by her husband has several other criminal avenues available to her, and that changing the IPC section is not necessary.

In one of the discussions Rajya Sabha on whether marital rape should be criminalized or not, the ministry of home affair clarified that concept of marital rape, as understood internationally, cannot be suitably applied in the Indian context due to various factors e.g., level of education/illiteracy,

⁶ Jus. J.S Verma, "Report of the Committee on Amendment to Criminal Law" (January 2013)

poverty, myriad social customs and values, religious beliefs, mindset of the society to treat the marriage as a sacrament, etc⁷.

B) HISTORY OF THE LAW

For understanding history why India has such patriarchal and unjust laws about marital rape we need to look into the precedents set by the English laws and their judiciary since most of the Indian laws and laws around the world are highly influenced and impacted by the English laws. Initially rape was considered as crime or tort of theft of property. The body of women was not considered her own but as a property initially of her father and later of her husband. Husband having sexual intercourse with his wife even against her consent will not be considered as rape because being a property of her husband, the husband has all rights related to his wife. Sir Mathew Hale (1609-1676) in *HISTORY OF PLEAS OF CROWN* published in 1736 wrote that, “the husband can't be guilty if rape committed by himself up in his wife, for by their mutual consent and contract the wife has given up herself in this kind unto her husband, which she can't retract⁸. This implied consent was adopted by the British laws and was eventually followed by and influenced all former British colonies which followed the commonlaw system. Spousal rape was considered a property crime against a husband, not against a woman's right to self-determination⁹.

The American and the English laws were following the doctrine of coverture. According to this doctrine a woman has no legal identify and legal rights after marriage. Although this doctrine is not recognized by the Constitution of India but still India has very uncertain and unclear laws related to marital rape

C) LAWS AROUND THE WORLD

Many countries around the world have criminalized marital rape although there are still many countries following the same patriarchal ideology. Poland tops the list to recognize Marital Rape as a criminal offence in 1932. Australia, in the seventies, was another country to pass reforms in 1976 that made rape in marriage a criminal offence. Two decades before that, Scandinavian countries like Sweden, Norway, Denmark, and former Soviet Union and Czechoslovakia passed laws that criminalized spousal rape. The originator and influencer of the doctrine of coverture i.e., the UK itself criminalized marital rape in 1992 and considered as a form of sexual assault under

⁷ Rajya Sabha Debates on 29th April, 2015 available at: <https://mha.gov.in/MHA1/Par2017/pdfs/par2015-pdfs/rs-290415/656.pdf>

⁸ Sir Matthew Hale, *Historia plectrum coronae The History of the Pleas of the Crown* 67 (Original Manuscripts, London 1800)

⁹ Jill Elaine Hasday, “Contest and Consent: A Legal History of Marital Rape” 88 *California Law Review* 1373 (2000)

UK law, in contravention of the Sexual Offences Act 2003 according to which the offence occurs when an individual commits a sexual act without the consent of their spouse or their ex-spouse, or against their will and if someone doesn't consent for a sexual act or their consent is obtained by force, threat or intimidation, the sexual act is committed without consent. European Parliament's resolution on Violence against Women of 1986 called for the criminalization of spousal rape which was done soon after by several nations including France, Germany, Netherlands, Belgium, and Luxembourg. Since the 1980s, many common law countries have legislatively abolished the marital rape immunity. These include South Africa, Ireland, Canada, the United States, New Zealand, Malaysia, Ghana, and Israel. In UNITED STATES since 1993, all 50 states and DC have enacted laws against marital rape. The only marital exemption that still exists in some states is for statutory rape¹⁰. Statutory rape occurs when an adult has sex with a minor—someone younger than 18¹¹.

In 2002, Nepal recognized Marital Rape as a criminal offence after its Supreme Court held that it went against the constitutional right of equal protection and the right to privacy.

Although countries such as Ghana, India, Indonesia, Jordan, Lesotho, Nigeria, Oman, Singapore, Sri Lanka, and Tanzania still expressly allow Marital Rape or doesn't have very clear laws relating to it. Four of these countries even permits when the victim is a minor. Ghanaian law, for example, states that “consent given by husband or wife at marriage, for the purposes of marriage, cannot be revoked,” unless the parties are divorced or legally separated. And spousal rape is only illegal if the perpetrator also uses abusive language, violence, or threats. Even the United Nations Convention on the Elimination of all Forms of Discrimination against Women, of which India is a signatory, has proposed in its resolution that marital rape should be criminalized and that this sort of discrimination is a clear infringement of the law of equality and human dignity.

2) JUDICIAL APPROACH

A) Supreme court

Indian judiciary has a diverse variety of views regarding penalizing of marital rape as an offence. Till now supreme court has not given a concrete judgement where it considers marital rape as an offence regardless of age.

¹⁰ Monica Steiner, “Marital Rape Laws”, *Criminal Defense Lawyer*, 25 Sep 2022, available at : <https://www.criminaldefenselawyer.com/marital-rape-laws.html>

¹¹ *Ibid.*

Supreme courts in one of the landmark cases i.e., *Independent Thought v. Union of India* regarding the age under which marital rape would be considered as offence. The issue that has been challenged i.e., Exception 2 of section 375 of IPC which only considers marital rape as an offence regarding minor only till the age of 15 years. The petition was filed to increase this age till 18 years. Supreme court held that sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape¹².” Hon’ble court noted that:

- (i) it is arbitrary, capricious, whimsical and violative of the rights of the girl child and not fair, just and reasonable and, therefore, violative of Article 14, 15 and 21 of the Constitution of India¹³.
- (ii) it is discriminatory and violative of Article 14 of the Constitution of India¹⁴.

The Supreme Court in the landmark cases of *Puttaswamy v. Union of India* and *The State of Maharashtra v. Madhukar Narayan* ruled that sexual privacy is a fundamental right of all judgments make no distinction between the rights of married and unmarried women, and there is no contrary judgment establishing that marital relationship abridges an individual’s right to privacy.

B) High courts

Kerala high court division bench comprising of justice A Muhammad Mushtaq and justice Kauser Edappagath gave a significant judgment considering an appeal against a family court order on divorce on grounds of marital rape. The court noted that merely because the law does not recognize marital rape under penal law, it does not inhibit the court from recognizing the same as a form of cruelty to grant divorce and therefore held that we are of the view that marital rape is a good ground to claim divorce¹⁵. More said that privacy is an invaluable right and since marital privacy is intimately and intrinsically connected to an individual’s autonomy, any intrusion — physical or otherwise — into such a space would diminish privacy. “This essentially would constitute cruelty. Recently Karnataka high court has held very important judgement contradicting the exception mentioned in section 375 of IPC marital rape as an offence. Karnataka High Court's judgment of March 23 which had held that a man under Section 375 of the IPC cannot be absolute¹⁶. It further noted that the exception granted to husband under the law against the offence of rape leads to inequality and runs counter to Article 14 (equality) of the Constitution and said that a brutal act of

¹² *Independent Thought v. Union of India* (2017) 10 SCC 800

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ P.S Goopikrishnan Unnithan, “Kerala High Court: Marital Rape Sufficient Ground for Divorce”, *India Today*, 21 August 2021

¹⁶ *Hrishikesh Shahoo v. State of Karnataka & Ors.* SLP(Cr)4063/2022

sexual assault against a woman, albeit by her husband, cannot but be termed as rape¹⁷. Although supreme court has put stay on this order by a bench of Chief Justice N V Ramana and Justices Krishna Murari and Hima Kohli.

Recently Delhi high court in RIT Foundation union of India has given a split verdict on this matter regarding criminalizing of Marital rape where Justice Rajiv Shukla has held that the exemption to the husband from the offence of marital rape is unconstitutional. Exception 2 of 375, 376B IPC was therefore struck down by him as violative of Article 14¹⁸. While Justice Chari Shankar has held that Exception 2 to Section 375 does not violate Constitution and that the exception is based on an intelligible differentia¹⁹. The most important question before the court is how "consent" can be defined, especially when there is "implied consent" and "expectation of conjugal sexual relationship" in a marriage. The judges also noted that there is a distinction between the "right to have sex" and the "reasonable expectation of sex," but the definition of consent within a marital relationship must be considered. Is there "inherent consent" if someone is married? The court has also expressed concern that the "right to say no" must be regarded as an inherent part of the fundamental right to privacy and dignity. There is also the issue of "expectation of conjugal relationship," as well as the social construct of "marriage," which is based on implied physical, sexual, and emotional companionship. Amicus Rajshekhar Rao, in his arguments, also said that marriage is no longer seen as "sacrosanct" and that there are several legal provisions in place to protect women²⁰. However, an appeal has been made to supreme court on the said matter whose decision till is pending. In the cases of *The State of Karnataka v. Krishnappa* and *The Chairman, Railway Board v. Chandrima Das*, it was held that rape is a crime against the basic postulates of human rights and is an unlawful intrusion onto the right to privacy and sanctity of a female as guaranteed under Article 21.

CONCLUSION

The reason India has such patriarchal laws still in 21st century is that it still implicitly follows the doctrine of coverture. The shackles of the colonizing laws are still imbibed in the minds of not so modern and reasonable law makers of India. The best approach for maintaining the peace and development is to adapt in accordance with the time and circumstances. Modern democracy can't

¹⁷ *Ibid.*

¹⁸ *RIT Foundation v. Union of India* 2022 SCC Online Del 1404

¹⁹ *Ibid*

²⁰ *Ibid*

continue to rely on 17th-century legal principles that regarded women as "property of the husband," with no decision-making power or autonomy.

Countries who were previously of view of not considering marital rape as an offence are now criminalizing it. Even the English laws, from where most our legal system have been influenced, have criminalized marital rape in 1991. Criminalising it doesn't create a new offence but makes a recognition and criminalization of these anachronistic and offensive laws that still prevails in a democratic country. The issue regarding "implied consent" in a marriage cannot be considered "irrevocable consent," and a woman must have the freedom and choice to say "No. For a developing nation aiming to be at par with developed nation needs to get rid of such laws promoting human rights violation because the fulcrum of a developed country can never be supported by the pillars of inequality.