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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 IN INDIA: A LEGAL LACUNA OR A SOCIAL NORM?

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Abstract:

According to NFHS-V data, nearly one-third of women in India have experienced physical or sexual violence by their partner. Therefore marital rape which abate the dignity of a woman must be addressed. J. Verma Committee Report 2013 has also recommended the criminalization of marital rape but it was not done. Supreme Court of India in various cases has directed the legislature to legislate provisions regarding marital rape. But various social and legal cannot copy the idea of criminalization of marital rape from other nations since there is a lot of diversity regarding customs and religious. Further contented that criminalization of marital rape may sake the entire institution of marriage. The present paper focus on various social-cultural and legal contentions pleaded or exist in favor of non-criminalisation of it.

Keywords: marital rape; marriage; consent; proof; Indian Penal Code; BNS.

Introduction:

In the era of globalisation where we are entering into the space of science, technology and artificial intelligence, there exist another facet of society where our patriarchal nations still prevails. Since birth a boy is taught to fight, to work and being a strong man for protecting the family while a girl is taught to be soft, calm and fulfill her duty towards the husband and her family. These notions creates a mastership of a man over the female and he starts suppressing her which leads to commission of a lot of immoral crimes against the victim including cruelty, violence, demand-for-dowry, unnatural sexual demands, sexual abuse, marital rape and so on.

Marital Rape is the worst inhuman form of all such evil where the husband, who has promised the girl to provide a safety and protection from others, is himself committing the rape with that girl. National Family Health Survey 2016 (NFHS) published the data which shows that 83% of women aged 15-49 years have suffered with sexual abuse by her husband. This data shows

the miserable and pathetic conditions of all women who are suffering with crime like marital rape silently.

Research Objective:

This paper aims to study the legal validity of marital rape in India by examining all legal frameworks and judicial approach regarding this.

This paper also examines various rationales and societal and patriarchal norms which are preventing India to criminalize marital-rape and to punish the husband which is the main perpetrator of the crime. We shall also try to find a way and effective measures to address the same.

Research Methodology:

The research methodology used in this research paper is primarily has the analytical and theoretical nature based on sources including statutes, reports, case laws, books, journals and other publications as well.

What is Marital Rape:

There is no statutory definition for marital rape. In general parlance when the husband himself is a perpetrator of rape. It may be defined as “an act sexual in nature which may be vaginal, anal, oral or by whatever means and such act is done without the consent of spouse or by practicing force, fraud or deception with her.” Marital rape sometimes also accompanied with assault and violence.

When women faces both sexual and physical violence in various ways, it is known as ‘battering rape’. Whereas in various other scenario husband uses some amount of force which is required to commit rape on her.

Marital Rape is not Rape in India:

Section 375 of Indian Penal Code 1860 (I.P.C.) and corresponding section 63 of Bharatiya Nyaya Sanhita 2023 (BNS) defines it and contains the various circumstances under which commission of a sexual act shall amount to the offence of rape.

But Exception II of that section 375 IPC provides that sexual intercourse by the man with his wife who has attained the age of 15 years is NOT RAPE. This exception was challenged before Supreme Court in famous case of **Independent Thought and others Union of India [2017] 13 S.C.R821**. The court held the exception unconstitutional ruling that any sexual act with the minor wife below age of eighteen year amounts to rape.

Present Scenario in this regard is governed under section 63 BNS Exception II which states that no sexual act amounts the offence of rape if the wife is above eighteen years of age.

Societal Norms and Perception regarding Rape in Marriage:

No doubt exists that in a patriarchal society where every role is determined as per the gender of a person. Women is restricted only in their private sphere and every role is gender biased. Historic contentions shows that a women is bound to serve his husband throughout her life time whether she wishes for same or not. According to SIMONE DE BEAVOIR “A women is not born rather she is made by the society. And marriage is obscene because it provides a woman the rule of a servitude.” Doctrine of Implied Consent which is so common in our society always carry out the notion of implied consent by the wife that she permanently and irresistibly available for sexual needs of the husband.

In English Common law one more doctrine which violates the dignity of a woman was very common where both husband wife were considered to be a single entity and a woman has no separate existence without her husband. She was just a “Chattel” of the husband but was not a human being. This doctrine known as “Doctrine of Coverture”. All these patriarchal principles still exist in society which even does not dare to consider marital rape as an inhuman act.

Why Criminalization of Marital Rape is A Dire Need?

Article 1 of UDHR1948 provides basic human rights to every human being irrespective of his gender. It states “every human being is born free and have right to life with dignity.” Here the word “human” refers to all humans i.e. men, women and third gender as well. Thereby no woman can be considered to be a chattel of his man and she cannot be forced to cohabit and be subjected to any act of sexual violence.

Further article 14, 15, 21 of the constitution of India guarantees equality to all so there cannot

be discrimination on the ground of sex and marital status of a woman. Rape is a crime if it is committed by any stranger then exclusion of man from punishment for committing rape with his wife is totally arbitrary and violation of right to equality of a married woman.

Again the doctrine of Implied Consent violates the dignity and bodily autonomy of a female and bears no relevance after enactment of human rights.

India is a signatory nation to the “Convention on All Forms of Discrimination Against Women 1979 (CEDAW)” since June 1993 and thus hereby bound to eliminate the violence faced by the women within her family and by her close family members including husband.

Also the highest judicial body of our country has observed in 2017 abovementioned case that marital rape sakes the dignity of a women and it is cruelty with her. The court expressed an urgent need for criminalizing marital rape irrespective of the age of woman. And held marriage cannot be a license for forceful sexual act with the wife.

Following the recommendations of ‘Verma Committee’ marital rape must be made punishable and legislature should take effective steps to deal with this inhuman act likewise other nations such as U.K., America where consent is absolutely necessary for every sexual act irrespective the marital status of the couples.

Impediments In Criminalising Marital Rape:

(i) **Sacrament nature of Marriage :** This the most contented reason among others that marriage in India is not just like other legal obligations rather it inherit a sacramental nature along with other legal rights. Among Hindus it is considered as a tied knot and an unbreakable bond of spouse. Among other communities as well, marriage is considered as the union between two persona as well as a union of their families. So, these disputes needs to be resolved outside the court-premises since interferences of law in a personal dispute may create a lot of chaos and breaking up of the matrimonial ties. Union Government before the court has stated that criminalization of Marital Rape may sake the entire institution of marriage.

(ii) **Right to privacy of the spouses:**

The argument of right to privacy within the family is again the most cited reason for

not criminalizing marital rape. It is often contented that law must not be enter into the bedroom of a person and conduct/personal affair of any member of family must not be stated before state or the society.

(iii) False cases on husband:

It is one of the major concern for the legislators as well as the society. Commonly seen that, more than 60% of rape cases lead to the acquittal of the perpetrator and many of them later proven to be false, vexatious and revengeful. This is a mental cruelty for the accused. If wife files a case for rape it completely destroy the reputation and goodwill of the husband. Society gives a tag of rapist of his own wife' without waiting for the final verdict of the court. It remains a stigma for the whole life and many sometimes leads to the mental cruelty and trauma for him.

(iv) Consent:

When two persons binds themselves in a marriage knot, it is presumed that both shall fulfill their most common obligations to the marriage i.e. cohabitation with each other. According to the doctrine of implied consent; for every sexual is given as soon as they perform a marriage. Neither spouse need to ask for consent for each sexual act.

(v) Remedies available under Domestic Violence Act and IPC\ BNS:

Section 3 of Protection of Women from Domestic Violence Act, 2005 provides that- any sexual abuse to the woman is considered to be the 'Domestic Violence' against that woman and she is entitled to avail various remedies which are available under the statute .According to the section, Sexual abuse includes " any conduct of sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of women."

Further section 498A of IPC 1860 and corresponding section 85,86 of BNS,2023 incorporates the penal provision for an act of cruelty by husband or the relatives providing imprisonment upto 3 years and with fine as well. Under these provisions husband may be held liable and dealt accordingly for the commission of marital rape as well. It is contented that if a new provision is inserted it shall unnecessary be harsh for the man and wife may mentally torture him by initiating a new proceeding where he is already facing a lot.

(vi) Difficulty in Proving the Consent:

The most concerned and justified reason for non-criminalization of marital rape is to prove that wife had the consent for the particular act sexual act. Section 114A of Indian Evidence Act, 1872 and corresponding section 120 of Bharatiya Sakshya Adhiniyam, 2024 clearly states that once the prosecutrix states in the testimony that she didn't

consent for the alleged sexual intercourse and it has been proved that sexual intercourse has taken place, the court shall presume the absence of consent. Now let's presume that on a particular day both husband and wife had a voluntary sexual intercourse. But due to a heated argument on any other day, wife just in ill-will and malice filed a case of rape. The man got arrested, fired from his job, society is considering him as a culprit and he is running from pillar to post just to collect evidences in his defense. The whole incident was in a private room with no camera he how he shall put his defence strongly to reject the already presumed testimony of his wife!

Way Forward to address these contentions:

Marital Rape is also a rape and each rapist whether unknown or known must be punished accordingly and equally. Supreme Court of India has also reiterated that legislature must address the issue of marital rape and it is the need of hour that India likewise various other nations has to criminalize marital rape. It violates the right to equality and dignity of a women. No discrimination before the law may be justified just on the ground of marital status and all must be treated equally.⁴ Following were the recommendations of the committee regarding marital rape:

“The preliminary recommendation watch simply that the exception clause must be deleted. The second suggestion was that the law must specifically state that a marital relationship or any other similar relationship is not a valid defence for the accused, or relevant while determining whether consent existed for law and that it was not be considered mitigating factor for the purpose of sentencing.”

Every woman has right to live a dignified life guaranteed by the constitution. Any distinction just on the basis of marriage is purely unjust and arbitrary.

Secondly, law never enters into the private sphere of any individual unless there is violation of basic human right which states always aims to prefect. If the husband is harassing his wife sexually, law must protect her rights.

Again, the contention of sacramental nature of marriage is not justifiable. Personal laws contains the provisions about talaq, divorce, judicial separation, maintenance, adoption, succession etc. which all suggest that marriage may be dissolved and its relationship is going

toxic, it is better to end it rather than continuing it while compromising with the dignity and self-worth.

Another contentions of consent and of proof also has no substance in it. Since doctrine of implied consent has no application in the present world. This doctrine contains the patriarchal notions and such plea must be outrightly rejected. Almost every rape takes place privately and it is also proved before the court. Then why may the marital rape not be proved? If the wife accuses the husband falsely, law must make stringent provision to specifically dealt with it.

Last but not the least, the contention of social stigma and mental cruelty which is raised in favour of non-criminalization of marital rape do also lacks in substance. Since we are ignoring the pain, suffering, mental trauma which a woman faces while she is subjected to such a heinous crime. Is there remain any dignity? What about the principle of Ubi Jus Ibi Remedium.

Conclusion:

All we find is that, It is not easy to criminalize marital rape in India. But NCRB report 2024 states that in 96% of rape cases the accused is already known to the victim. Therefore, India also need to look for the various circumstances where marital rape may be made a crime and to make specific enactment/provision for U/S better enforcement and preventing its misuse. Recently, Delhi High Court constituting a division hence of J. Rajiv Shakti and J.C. Hari Shankar has passed a split verdict on criminalization of marital rape. Now the matter has been referred to a larger bench of Supreme court headed by the CJI and the final verdict is still awaited.

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