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MARITAL RAPE: A STIGMA TO THE INDIAN SOCIETY- Suman Laskar¹**Abstract**

Marriage is a sacred bond in our society but some sections of our society with the patriarchal mindset destroy the sanctity of marriage. This article is about how marital rape violates the basic fundamental rights of women. The article deals with various landmark cases. The article discussed the definition of rape and why the victim of marital rape is not protected under the law. The age-old law is still in existence which deprived the development of the nation. Almost all the developed countries has criminalized the marital rape. The right to life with dignity is the most important and valuable right of the human being but at a certain point, women are deprived of this right. The article deals with international approaches where various declarations were ratified to prevent violence against women. Marital rape is not criminalized in India as the state is of the opinion that interference with the rituals may destroy the value of marriage in the society but now it's the time to wake up and leave the typical thinking behind, so that the future generation should not face the outcome of the present. Sexual assault, sexual harassment cases should be deal with more sensitivity and the awareness related to sexual offence is the need of the time. "An equal world is a better world"

Marital Rape: A stigma to the Indian society

Marital Rape is a burning issue in recent times, from the ages this issue has been buried by women and society, no one talks about this. But in these contemporary times, the issues have been raised by the large section of women who are victims of the offense. Generally, the offense of marital rape is not seen as an offense. People used to mock when they hear the issue. But it's not their fault because our society has always seen a woman as a men's property. They think when a woman is married to a man then she has waved all her rights and she is now owned by her husband. Married women are made bound to do things as per the wish of the husband.

From the ancient period, women are the subjected as an asset, their life has been divided into

¹ Advocate at District Court Cachar, Silchar

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three parts, on an early age a girl is under the guardianship of her father, after marriage her life is controlled by her husband and during old age, her life is controlled by her son. The patriarchal mindset of the society has never given equal position to women as of men. Society is built up in such a manner that resists the freedom of women. Women are subjected to ill practices like Sati and child marriage, which depicts the status of women in our society. Though such ill practices are not in use today, however, the sufferings of women remain the same in one way or the other.

Women are to be treated equally as men, as this is their basic right but in reality, these statements are just lip service. According to Global Gender Gap Report 2021, India has declined on the political empowerment index by 13.5 percent points, and a decline in the number of women ministers, from 23.1% in 2019 to 9.1% in 2021. From these data, it could be seen that the graph of gender equality is declining. And there is a need to change the societal, institutional, and behavioral change.²

Rape

The definition of rape is mentioned in the Indian Penal Code under section 375 which says that A man is said to commit “rape” if he had sexual intercourse with a woman against her will, without her consent, with her consent but by putting her in danger or threatening her, with her consent whom she believes that she is lawfully married to, with her consent but the consent was given in an unconscious state, and with her consent when she is under 16 years of age.

Exception

Sexual intercourse by a man with his own wife, the wife not being under 15 years of age, is not rape, as subsection (2) of section 375.

Section 376 of the Indian Penal Code mentioned the punishment of rape. Whoever, commits rape, except in the cases as mentioned in sub-section (2) shall be punished with rigorous imprisonment of either description for a term of 10 years but which may extend to imprisonment for life, and shall also be liable to fine.³

What is Marital Rape?

Marriage is a form of social bonding between the parties and everything which is done by the spouses needs consent in the institution of marriage. But the whole concept of marriage is

² www.weforum.org

³ The Indian Penal Code, 1860

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ruined when the woman is forced and has to go through mental and physical pain. Marital Rape can be understood as an act of forcing a spouse into having sexual intercourse without the will and consent. Such non-consensual sex is not penalized in India. The Penal Code of India was enacted in 1860 under British Colonial rule. Thus, it was influenced by the England long-standing doctrine that is “doctrine of coverture” which means that husband and wife are one person after marriage and the existence of women is suspended during marriage as a result woman were forbidden to do things against the wish of her husband. The age-old law still exists in our system which not only deprive the rights but also push the country to backwardness. Change is the natural phenomena and if we could not grow with the society then it may lead us to a deprivation, poverty, and lack of development.

In 2015, the NGO RIT Foundation first petitioned the Delhi High Court challenging the legality of the “marriage exception”. Arguments have been heard from the petitioner NGOs as well as the Men’s welfare Trust, a “men’s rights” organization that has opposed the petition. The central Government in 2016 says that it would destabilize the sanctity of marriage and may become a tool to harass husbands.

In 2017, petitions were filed by the All-India Democratic Women’s Association (AIDWA) as well as three individual petitioners, one of whom is a victim of domestic violence. The Supreme Court in its decision stated that the marriage exception mentioned in section 375 does not apply if the wife is under the age of 18 years.⁴

Under the protection of women from Domestic Violence Act 2005, the definition of Domestic Violence is mentioned under section 3(a) which says that “harm or injuries or endangers the health, safety, life limb or well-being, whether mental or physical of the aggrieved person or tends to do so and include causing physical abuse, sexual abuse, verbal and emotional abuse, and economic abuse.” Sexual abuse mentioned under this definition includes any conduct sexual which degrades the dignity of women and provides an opportunity for wives to fight against violence. But the act of domestic violence is not criminal but civil in nature. It does not provide imprisonment to the accused but provides compensation, monetary gain, restraining, and protective order.⁵

⁴ www.Indiatoday.in

⁵ The Protection of Domestic Violence Act,2005

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In *SreeKumar v. Pearly Karun* ⁶

In this case, Kerala High Court observed that intercourse by a husband with his wife during separation where the wife is living separately from him under a decree of separation or under any custom or usage without her consent shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.

Constitutional safeguard against marital rape

The Indian Constitution in its part III described the fundamental rights of the citizen, which is to provide every citizen equality, justice, and morality. Indian judiciary has played a vital role to protect the fundamental rights of the citizen, judiciary always set an example by uplifting the valuable rights of the citizen. The Constitution of India under Article 21, says “No person shall be deprived of his life or personal liberty except according to procedure established by law”. And the scope of Article 21 has been expanded by the Supreme Court, where the right to live life with human dignity is the fundamental right of every human being. Marital rape violates the basic right of women.

In *Menaka Gandhi v. Union of India* ⁷

The scope of Article 21 was expanded and it was held that the right to life does not mean mere animal existence it includes the right to live with dignity. Rights to privacy, the right to a speedy trial, right to a clean environment were some of the rights which are recognized by the judiciary.

The right to live with human dignity is the basic human right that every individual possesses by virtue of their birth, humans’ sentiments should be respected and given value. Constitution of India under Articles 14 and 21 provides the right to equality and equal protection to every citizen and the right to life and personal liberty respectively.

In *The Chairman, Railway Board v. Chandrima Das*⁸

The Supreme Court in this case held that rape is a crime not only against the person of women, but it is also a crime against the entire society. It not only hurt the body but also destroys the entire psychology of a woman and pushes her into a deep emotional crisis. Therefore, rape is the most heinous crime. It is a crime against basic human rights and is violative of the right to

⁶ 1999 (2) ALT. Cri 77

⁷ AIR 1978 SC 597

⁸ 2000-2 SCC 465

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life which includes the right to live with human dignity contained in Article 21 of the Indian Constitution.

In *Vishaka v. State of Rajasthan*⁹

In this case, the supreme court is of the opinion that due to the absence of enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and sexual abuse, certain guidelines and norms are to be followed at all workplaces or other institutions, until legislation is enacted for the purpose. Thus, the sexual harassment of women at the workplace (prevention, prohibition, and redressal) Act 2013, came to force to protect the fundamental rights of the women at the workplace.

In the *State of Karnataka v. Krishnappa*¹⁰

The Supreme Court held that sexual violence apart from being a dehumanizing act is an unlawful intervention to the right to privacy and sanctity of a female. It is a serious blow to her supreme honors and offends her self-esteem and dignity, it degrades and humiliates the victim, and where the victim is a helpless innocent child, it leaves behind a traumatic experience. The courts are, therefore, expected to deal with cases of sexual crime against women and children with the utmost sensitivity.

Violative of Article 14 and 15: Article 14 of the Indian Constitution says that “Everyone is equal in the eye of law.” Article 15 clearly says that there should not be any discrimination on the basis of sex, race, caste, religion, and place of birth. But Section 375 of the Indian Penal Code provides an exception which says that sexual intercourse by a man with his own wife is not rape which creates a division among the victims of the same offense where unmarried women are protected under the act but the married women when raped by their husband the act does not provide protection to them. The exception provided under section 375 is discriminatory to married women. The crime of rape is heinous whether committed by a husband to his wife or by anyone. Exception 2 violates the right to equality enshrined under Article 14. The exception mentioned under section 375 fails the test of classification mentioned under Article 14 as the classification is unnecessary, unintelligible, and violates the mandate of Article 14.

⁹ AIR 1997 SC 3011

¹⁰ 2000 Cri LJ 1793

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Judicial Approach

It is a matter of concern that despite the increasing number of cases of marital rape in our country, marital rape is not defined in any statute/law. It is not penalized in our country because it may destroy the very institution of marriage, as in India marriage is seen as a sacred ritual.

In Dec 2021, the Gujarat High Court issued notice to the center and state of Gujrat in a petition challenging the legality of the marital rape exception. "It is high time" that constitutional court decided if this exception impinged on woman's fundamental rights, it said. The Kerala High Court held that even if marital rape is not panelized within the penal code, it could be grounds for divorce. The Supreme Court in recent years has recognized the importance of privacy and bodily autonomy of married women in sexual relations. In the right to privacy judgment of 2017, the court affirmed the view that declining to participate in sexual activity is a part of the right to personal liberty under article 21 of the constitution. Further in 2018, while decriminalizing adultery the court held that even marital relations are not exempted from constitutional validity.¹¹

In 2013, the JS Verma Committee was constituted to recommend an amendment to criminal law so as to prevent delay trail for criminals accused of committing sexual assault against women which recommended legal changes to crimes of sexual assault against women, said that the exception to marital rape should be removed.¹²

As marriage should not be considered as an irreversible consent to sexual acts. However, this suggestion made by the JS Verma Committee has not been acted upon by parliament and the law commission in its 172nd report denied criminalizing marital rape on the ground that excessive interference in the marital relationships may destroy the institution of marriage. Thus, in India, the only recourse against non-consensual sex for married women in India is civil in nature that is provided under the protection of women from the Domestic Violence Act or section 498A of the Indian Penal Code on the cruelty against a wife by the husband or a husband relative.

Marital Rape:Status in other countries

Most of the countries of the world have either made amendments to the existing law or added a

¹¹ www.researchgate.nets

¹² The Verma Committee Report,2013

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new law for the same. Marital Rape has been criminalized in around 150 countries of the world. In the United States, marital rape is a crime in all 50 states whereas in the United Kingdom the maximum legal penalty for marital rape is life imprisonment.

Countries like India, Bangladesh, Pakistan, Afghanistan, Iran, Nigeria, Libya are some of the countries where the law of marital rape is not criminalized because women are considered as property and the state does not interfere in the institution of marriage.¹³

International approach

The United Nations Declaration on the Elimination of Violence against Women defines violence against women under Article 1 and Article 2, “any kind of physical, sexual, or mental harm or suffering to women, including threats of, coercion or arbitrary deprivation of liberty, amounts to violence. Article 1 and 2 of the declaration elaborately defined the violence against women.

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was adopted in 1979 by the United Nations General Assembly, it is also known as an international bill of Rights for women. It defines discrimination against women and sets up agenda for national action to protect women and end such discrimination. The Convention demands equality between women and men ensuring women equal access to political and public life such as education, health, employment. Most of the countries including India have ratified the convention. And the convention legally binds the State parties to set international standards to fulfill the objectives of the convention. In 2013, the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) recommended that the Indian government should criminalize marital rape.¹⁴

Conclusion

Thus, it could be concluded by saying that marriage could not be a medium for never-ending, irrevocable and perpetual consent, to force the partner. “Consent” is the important and essential factor and every human being is free to decide things for themselves, consent of women should be there to engage in any form of activities and such consent should be free and voluntary without coercion, undue influence. Women are easy and soft targets they are vulnerable as they are deprived of basic rights like education, many parts of our country do not allow girl children to educate themselves. Women are forbidden from the basic human rights which are necessary

¹³ www.thehindu.com

¹⁴ www.ohchr.org

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to live a dignified life.

And the crime of rape and marital rape not only destroy the body of the victim but also destroy the very soul. The person who is commits force with whom she is again forced to live the rest of her life. Marriage is a social contract where both the partners should respect each other decision, dominance, slavery, sexual abuse and harassment could not be a sacred ritual. And the very institution of marriage is already destroyed when force is applied to women. Thus, it is high time to wake up and criminalize the offense of marital rape. And the most important thing is to educate and create awareness among the women that such kinds of things are not acceptable, women are supposed to live there with confidence and dignity. Article 14 and 21 of the Indian constitution also widened the scope of the right to life with dignity and the right to equality. Most of the time marital rape has become a serious issue of debate, but the state is of the opinion that marital rape is international law, India is not ready to accept the law relating to marital rape due to its social, economic, and cultural background. The law of marital rape could be misused and it may lead to a new form of offense. The state must think about the other side how the victims of the marital rape suffer the constant terror and assault, which does not allow them to worth their life.

But in my opinion, every act or statute has its own pros and cons. While thinking about the cons we cannot deny the pros. Every coin has its two sides. Laws relating to cruelty, dowry, domestic violence also exist, then why the law to acknowledge women as a very human being, remains a topic of discussion till today. To curb the menace of marital rape and prevent miscarriage of justice criminalization of marital rape is necessary so that women can protect their basic human right.