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Issues in Criminalising Marital Rape in India

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ABSTRACT

Sexual violence is defined as the act of exposing someone to sexual behaviour without one's consent. It includes a large spectrum of behaviours, from touching to Rape. The majority of the victims are women. Rape is the act of having sexual intercourse with a person without his/her consent. The concept of marital Rape has been overlooked for years because of the ideology that promotes men have the right to treat their wives as they wish, and the wife must provide her husband with all his needs. Today with the changes and developments in the concepts of marriage, the increase in the awareness of the society and the understanding of the notion of violence against women, it has been understood that sexual intercourse should be mutually desired by both parties of the married couple. Otherwise, it should be considered as sexual assault/violence.

The aim of the article is to review the medical, social and legal aspects of marital Rape, to present the current situation about marital Rape both in Turkey and in the rest of the world, also to discuss how it could be prevented.

I. INTRODUCTION

Marital Rape refers to unwanted intercourse by a man with his wife obtained by force, threat of force, or physical violence, or without her consensus. Marital Rape could be by The use of force only, a battering rape or a sadistic/obsessive rape. It is a non-consensual act of violent perversion by a husband against the wife where she is physically and sexually abused to satisfy intimate desires.

II. HISTORY

In Roman law, "raptus" (orraptio) meant kidnapping or abduction primarily; sexual

violation was a secondary issue. It was synonymous with abduction, and a woman's abduction or sexual molestation was merely the theft of a woman against the consent Of her guardian or those with legal power over her. The harm, ironically, was treated as a wrong against her father or husband, women being wholly-owned subsidiaries. The marital rape exemption can be traced to statements by Sir Mathew Hale, Chief Justice in England, during the 1600s. He wrote, "The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and

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contract, the wife hath given herself in kind unto the husband, whom she cannot retract.”

Not surprisingly thus, married women were never the subject of rape laws. Laws Bestowed an absolute immunity on the husband in respect of his wife, solely on the basis of the marital relation. Their volition started with women activists in America raising their voices in the 1970s for the elimination of the marital rape exemption clause and extension of guarantee of equal protection to women.

III. CURRENT POSITION

In the present day, studies indicate that between 10% and 14% of married women are raped by their husbands: the incidents of marital Rape soars to 1/3rd to 1/2 among clinical samples of battered women. Sexual assault by one's spouse accounts for approximately 25% of rapes committed. Women who became prime targets for marital Rape are those who attempt to flee. Criminal charges of sexual assault may be triggered by other acts, which may include genital contact with the mouth or anus or the insertion of objects into the vagina or the anus, all without the consent of the victim. It is a conscious process of intimidation and assertion of the superiority of men over women. Approximations have quoted that every 6 hours, a young married woman is burnt or beaten to death or driven to suicide from emotional abuse by her husband. The UN Population Fund states that more than 2/3rds of married women in India, aged between 15 to 49, have been beaten, raped or forced to provide sex. The NHFS-4 reports that 31% of married women (nearly one in three) have been subjugated to physical, sexual and

emotional violence at the hands of their spouse. 56% of Indian women believed occasional wife-beating to be justified. Although the proportion of married women suffering physical and sexual violence at the hands of their husbands has come down from 37% in 2005-06 to 29% in 2015-16, surveys also show that 83% of the married women are exposed to marital rapes between the age of 15 to 49. In 2005, 6787 cases were recorded of women murdered by their husbands or their husbands' families.

IV. POSITION IN INDIA

Advancing well into the issue, marital Rape is not an offence in India. Despite amendments, law commissions, and new legislation, one of the most humiliating and debilitating acts committed by men exploiting the very sanctity of matrimonial relationships is not an offence in India. A look at the options a woman has to protect herself in marriage tells us that the legislations have been either non-existent or unspoken, and everything has just depended on the interpretation by Courts. Section 375, the provision of Rape in the Indian Penal Code (IPC), has echoing very archaic sentiments, mentioned as its exception clause- “Sexual intercourse by a man with his own wife, the wife not being under 15 years of age, is not rape.” Section 376 of IPC provides punishment for Rape. According to the section, the rapist should be punished with imprisonment of either description for a term which shall not be less than 7 years but which may extend to life or for a term extending up to 10 years and shall also be liable to fine unless the woman raped is his own wife, and is not under 12 years of age, in which case,

he shall be punished with imprisonment of either description for a term which may extend to 2 years with fine or with both.

In context, Section 375 (4) says that A man is said to commit “rape” if he applies his mouth to the vagina, anus, urethra of a woman or makes her do so with him or any other person, under the circumstances falling under any of the following seven descriptions:

1. her will
2. Without her consent.
3. With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.
4. With her consent, when the man knows that he is not her husband and that she is given because she believes that he is another man to whom she is or believes herself to be lawfully married.
5. With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome Substance, she is unable to understand the nature and consequences of that to which she gives consent.
6. With or without her consent when she is under eighteen years of age.
7. When she is unable to communicate consent.

This section is dealing with sexual assault, in a very narrow purview, lays down that an offence of Rape within marital bonds stands only if the wife is less than 12 years of age, if she is between 12 to 16 years, an offence is committed, however, less serious, attracting milder punishment. Once the age crosses 16, there is no legal protection accorded to the wife, in direct contravention of human rights regulations.

How can the same law provide for the legal age of consent for marriage to be 18 while protecting from sexual abuse, only those up to the age of 16? Beyond the age of 16, there is no remedy the woman has. The wife’s role has traditionally been understood as submissive, docile and that of a homemaker. Sex has been treated as obligatory in a marriage and also taboo. At least the discussion openly of it; hence, the awareness remains dismal. Economic independence, a dream for many Indian women, still is an undeniably important factor for being heard and respected. With the women being fed the bitter medicine of being “good wives”, to quietly serve and not wash dirty line non-public, even counselling remains inaccessible.

Legislators use the results of research studies as an excuse against making marital Rape an offence, which indicates that many survivors of marital Rape report flashbacks, sexual dysfunction, emotional pain, even years out of the violence and worse, they sometimes continue living with the abuser. For these reasons, even the latest report of the Law Commission has preferred to adhere to its earlier opinion of non-recognition of “rape within the bonds of marriage” as such a provision may amount to

excessive interference with the marital relationship.

A marriage is a bond of trust and affection. A husband exercising sexual superiority by getting it on demand and through any means possible is not part of the institution. Surprisingly, this is not, as yet, in any law book in India. The very definition of Rape (section 375 of IPC) demands change. Then arrow definition has been criticised by Indian and international women's and children organisations, who insist that including oral sex penetration by foreign objects within the meaning of Rape would not have been inconsistent with any constitutional provisions, natural justice or equity. Even international law now says that Rape may be accepted as the "sexual penetration, not just penal penetration, but also threatening, forceful, coercive use of force against the victim, or the penetration by any object, however slight."

Article 2 of the Declaration of the Elimination of Violence against Women includes marital Rape explicitly in the definition of violence against women. Emphasis on these provisions is not meant to tantalise but to give the victim and not the criminal the benefit of the doubt. Marital Rape is illegal in 18 American States, 3 Australian States, New Zealand, Canada, Israel, France, Sweden, Denmark, Norway, Soviet Union, Poland and Czechoslovakia.

Rape in any form is an act of utter humiliation, degradation and violation. Restricting an understanding of Rape reaffirms the view that rapists treat Rape as sex and not violence and hence, condone such behaviour. The importance of consent for every individual decision cannot

be overemphasised. A woman can protect her right to life and liberty, but not her body, within her marriage, which is just ironic. Women so far have had recourse only to section 498-A of the IPC, dealing with cruelty, to protect themselves against "perverse sexual conduct by the husband". But, where is the standard of measure or interpretation for the courts, of 'perversion' or 'unnatural', the definitions within intimate spousal relations? Is excessive demand for sex perverse? Isn't consent a sine qua non? Is marriage a license to Rape?

There is no answer because the judiciary and the legislature have been silent. The 172nd Law Commission report had made the following recommendations for substantial change in the law with regard to Rape. 'Rape' should be replaced by the term 'sexual assault'. 'Sexual intercourse as contained in section 375 of IPC should include all forms of penetration such as penile/vaginal, penile/oral, finger/vaginal, finger/anal and object/vaginal.

In the light of **Sakshi v. Union of India and Others [2004 (5) SCC 518]**, 'sexual assault on any part of the body should be construed as Rape. In the landmark case of **The Chairman, Railway Board v. Chandrima Das**, the Hon'ble Court held that Rape is not a mere matter of violation of an ordinary right of a person but the violation of Fundamental Rights, which is involved. Rape is a crime not only against the person of a woman; it is a crime against the entire society. It is a crime against basic human rights and is a violation of the victim's most cherished right, namely, the right to life which includes the right to live with human dignity contained in

Article 21. Rape laws should be made gender-neutral as custodial Rape of young boys has been neglected by law. A new offence, namely section 376 E with the title 'unlawful sexual conduct', should be created.

Section 509 of the IPC was also sought to be amended, providing severer punishment where the offence set out in the said section is committed with sexual intent. Marital Rape: explanation (2) of section 375 of IPC should be deleted. Forced sexual intercourse by a husband with his wife should be treated equally as an offence, just as any physical violence by a husband against the wife is treated as an offence. On the same reasoning, section 376 A was to be deleted. Under the **Indian Evidence Act(IEA)**, when alleged that a victim consented to the sexual act and it is denied, the court shall presume it to be so. The much-awaited **Domestic Violence Act, 2005 (DVA)** has not proved much helpful in the context. It has provided civil remedies to what the provision of cruelty already gave criminal remedies while keeping the status of the matter of marital Rape in continuing disregard. Section 3 of the Domestic Violence Act, amongst other things in the definition of domestic violence, has included any act causing harm, injury, anything endangering health, life, etc., mental, physical, or sexual.

It condones sexual abuse in a domestic relationship or marriage or alive-in, only if it is life-threatening or grievously hurtful. It is not about the freedom of decision of a woman's will. It is about the foundation of their marital institution that despite being married, she retains an individual status, where she doesn't need to

concede to every physical torture even though it is only her husband. Honour and dignity remain with an individual, irrespective of marital status and gender.

Section 122 of the Indian Evidence Act prevents communication during the marriage from being disclosed in court except when one married partner is being persecuted for an offence against the other. Since marital Rape is not an offence, the evidence is admissible, although relevant, unless it is a prosecution for battery or some related physical or mental abuse under the provision of cruelty. To prove the offence of Marital Rape in court, provisions of the DVA and IPC will be an early impossible task even when combined.

The trouble is, it has been accepted that a marital relationship is practically sacrosanct. Rather than making the wife worship the husband's every whim or force his desires upon, especially sexual, it is supposed to thrive mutual respect and trust, which is the basis of every relationship. For any act to be committed together in a relationship, consent is the sine qua non. It is much more traumatic being a victim of Rape by someone known, a family member, and worse to have to cohabit with him, and even by her husband. How can the law ignore such a huge violation of a fundamental right of freedom of any married woman, the right to her body, to protect her from any abuse?

As a final piece of argument to show the pressing need for the protection of women, here are some effects a rape victim may have to live with,-

1. Physical injuries to vaginal and anal areas, lacerations, bruising.

2. Anxiety, shock, depression and suicidal thoughts.
3. Gynaecological effects include miscarriage, stillbirths, bladder infections, STDs and infertility.

Marriage does not thrive on sex, and the fear of litigation should not stop protection from being offered to those caught in abusive traps. Apart from judicial awakening, we primarily require the generation of awareness. Men are the perpetrators of this crime. 'Educating boys and men to view women as valuable partners in life, in the development of society and the attainment of peace are just as important as taking legal steps to protect women's human rights', says the UN. Men have the social, economic, moral, political, religious and social responsibility to combat all forms of gender discrimination. In a country rife with misconceptions of Rape, deeply ingrained cultural and religious stereotypes, and changing social values, globalisation has to fast alter the letter of the law. And last but not least, women should learn to say no when it's not acceptable to their self-respect, dignity and honour. They should oppose the very intention of their partners at the right moment and stand against malafide intentions.
