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Research Paper

Marital Rape- Is IT or Not a Sexual offence- A Retrospection

Law

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Ms. Gifty Oommen ASSISTANT PROFESSOR, GOVERNMENT LAW COLLEGE, ERNAKULAM-11

ABSTRACT

Marital Rape refers to unwanted intercourse by a man with his wife obtained by force, threat of force, or physical violence, or when she is unable to give consent. The marital rape exemption can be traced to statements by Sir Mathew Hale, Chief Justice in England, during the 1600s in his treatise Historia Placitorum Coronae or The History of the Peas of the Crown. He wrote, "The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife hath given herself in kind unto the husband, whom she cannot retract." Now in India the new Section 375 has been inserted replacing the earlier Section 375 which had defined 'Rape' in the Indian Penal Code by the term 'Sexual Assault', by the Criminal Law Amendment Ordinance 2013. Here in this section there is an exception provided which states that sexual intercourse or sexual acts by a man with his own wife , the wife not being under 16 years of age is not sexual assault. This concept defies the basic foundation of marriage, which is trust. If this trust is lacking , and if sex is forced, then it amounts to sexual assault, and no law can by legalizing sexual assault reinstate the lost trust in a marriage.

Marital Rape refers to unwanted intercourse by a man with his wife obtained by force, threat of force, or physical violence, or when she is unable to give consent. 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.

''*Raptus*", the generic term of rape was to imply violent theft, applied to both property and person. 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.

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Now in India the new Section 375 has been inserted replacing the earlier Section 375 which had defined 'Rape' in the Indian Penal Code by the term 'Sexual Assault', by the Criminal Law Amendment Ordinance 2013. Here in this section there is an exception provided which states that sexual intercourse or sexual acts by a man with his own wife , the wife not being under 16 years of age is not sexual assault.

Going back a few years the 172nd Law Commission report in the year 2000 had made the following recommendations for substantial change in the law with regard to rape. The report stated:

1. 'Rape' should be replaced by the term 'sexual assault'.
2. '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.

During this time Sakshi , a women's organization had approached the Supreme Court with their suggestions, and these were forwarded to the Law Commission . The suggestions included 1. The exception given in Section 375 to husband of women above the age of 15 be deleted. 2. Section 376A, which gave lessor punishment to husband raping his separated wife, should also be deleted, as they can be tried under than Section 375. Both these suggestions were rejected by the Law Commission on the ground that, it is interference into marital affairs.

Justice J.S Verma Commission Report of 2013, accepted the above views of Sakshi on this matter and justified it on the basis of decisions of European Court in C.R.v. U.K. , where the court said that a rapist remains a rapist and relationship is immaterial, even if he happens to be a husband, and in another case in Canada in R.v. J.A, in 2011, in which the court stated consent cannot be presumed in marriage for sexual offences.

On the basis of the above views, the Verma Commission recommended:-

1. In section 375, defining Rape- The exception for marital rape be removed.
2. The law ought to specify that (a) marital or other relationship between the perpetrator or victim is not a valid defence against the crimes of rape or sexual violation.
3. The relationship is not relevant to an inquiry to consent to sexual activity.
4. Marriage or in another intimate relationship maybe not regarded as a mitigating factor for lower sentences for rape.

Finally the Commission concluded in this matter of marital rape, by stating that marriage should not be regarded as extinguishing the legal or sexual autonomy of the wife.

Section 375 as recommended by the above therefore contained, an Explanation III, which stated:-

''Consent will not be presumed in the event of an existing marital relationship between the complainant and the accused. ----------

---- provided that a person who does not offer actual physical resistance to the act of penetration is not by reason only of that fact , to be regarded as consenting to the sexual activity.''

But sadly the above strong recommendation was not accepted by the Government on the ground, as stated by the Union home secretary R.K.Singh, that marriage presumes consent. Secondly he stated that marital rape was not recognised as this would go against the traditional family system in India where a marriage is seen as a steadfast institution and such accusation might cause irreparable damage to marriage as an institution.

Ironically, when the government recognises the above offences in The Domestic Violence Act 2005, which is functioning in the background of marriage, this justification lacks conviction. Marriage presumes consent for marriage where sexual acts are consensual and not violent and then when there are so many marital offences on record and the divorce rate so high, it is hard to understand as to whether the secretary was talking of India of today or yesterday, it is time the government comes out of its dream and faces the reality.

Marriage does not thrive on sex and the fear of frivolous litigation should not stop protection from being offered to those caught in abusive traps, where they are lowered to the status of chattel. Apart from judicial awakening; we primarily require

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 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.

Rape is forced, unwanted sexual intercourse. Rape, sometimes also called sexual assault, can happen to both men and women of any age. These offences show greater frequency being committed on women, the basic reason being more muscle power in men. The various reasons attributed to it are desperateness in life, uncontrolled tension, perverseness, deviant behaviour and many other reasons. Along with this the complex of superiority and dominance add fuel to the fire, which results in exploitation of the weaker sex.

Position abroad.

In U.S. the position till 1984, was not women friendly in matters of marital rape. But the position underwent great change in 1984, in *People* v. *Liberta*, was a case where Mario and Denese Liberta were separated. The husband was allowed visitation right to visit their son. On one of these visits where she came with her son to a hotel, where her husband had asked her to come, he beat her, threatened to kill her, and forced her to perform *fellatio* and engaged her in sexual intercourse. She alleged rape and sodomy, while the husband claimed marital exception to both the offences.

The New York state Court of Appeals held in the above case that male is guilty when he engages in sexual intercourse with a female by forcible compulsion. It stated that when a statute draws a distinction based upon some ground of difference that *rationally explains* the differential treatment. The court finds no rational basis for distinguishing between marital and non-marital rape. Rationales for such a distinction are based either upon archaic notions about consent and property rights or are simply unable to withstand even the slightest scrutiny—1. A married woman has the same rights over her body like an unmarried woman Tradition saw this as the property of her husband; this concept has been long rejected by the state. 2. Right to privacy protects consensual acts and not violent sexual assaults. 3. Marital rapes is difficult to prove, so it gives rise to fabricated complaints, but the court said that, this matter is for the state to take action upon and not a reason to reject the ground for punishing marital rape.4. Women faces the probability of medical, sociological and psychological problems unique to her gender-justified.5.Finally it is claimed that it is either impossible physiologically or an extremely rare case where a women could rape a man. This is based on the concept that sexual intercourse is only possible if the male is sexually aroused and if he is aroused he is consenting. However sexual intercourse occurs after penetration, however slight. Such penetration can occur without the arousal of the woman. Therefore on the following grounds the court held the husband convicted.

The above court stated that there is no basis for distinguishing between the marital rape and non-marital rape and struck the marital exemption from the New York statute. This brought repudiation of the doctrine of exemption of marital rape from the general rape.

Marital rape is illegal in 50 American States, 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, and not just penile/vaginal penetration. The importance of consent for every individual decision cannot be over emphasized. A woman can protect her right to life and liberty, but not her body, within her marriage, which is just ironical. 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 'perversion' or 'unnatural', within the intimate spousal relations?

Therefore it is time that the Indian legislators also consider the above principle and incorporate the recommendation of the Verma report and include marital rape in the offence of sexual offences as defined in the Criminal Law Amendment Ordinance 2013. Secondly the marital rape of sexual offence should also include live-in relationship. Live-in relationship is included in domestic Violence Act 2005; therefore there is no ground for not including this relationship in the definition of marital offences.

REFERENCE

Criminal Law Amendment Ordinance 2013, Exception- Sexual intercourse or sexual acts by a man with his own wife, the wife not being under sixteen years of age, is not sexual assault. | C.R.v. U.K.(1995)21 E.H.R.R. 363. | R.v.J.A.[2011]2 S.C.R.440. | Justice J.S.Verma Commmission Report 2013, p.118. | Id at p.439. | The Times of India , February 19, p. 5. | 62N.Y.2d651, 1984, N.Y.