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TOPIC: LEGAL CHALLENGES FACED BY THE WOMAN OF 21ST CENTURY: INDIAN PERSPECTIVE.

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I. ABSTRACT:

Women are the active agents of bringing change in the society. In India, women represent half of the population. Terms like empowerment of women, feminism have been used in order to provide them their basic rights, what is their right and also practicing their rights without connoting concurrently to the other genders. Gender deprivation is the violation of basic human rights of an individual irrespective of being a man or a woman. The impasse is created in several ways in our country be it in form of social restriction, stereotype thinking, patriarchal upbringing, misogynistic approach, women herself (considering her to be the second gender). The question arises that what are the factors that have contributed to depriving women of 21st century from realising their rights. Why do they still need to suffer in the name of gender at every place? Is a woman of 21st century a free thinking woman?

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II. INTRODUCTION:

The situation remains the same. The recent campaign launched by Union Minister for Women and Child Development- 'Yes I Bleed' as well as the attempt to create social awareness for menstruation as a natural phenomenon in Akshay Kumar depicting himself as 'Padman' are sweet efforts for addressing these serious issues. They call for the march towards feminist perspective of looking at things and beyond. The question here arises-is it the best approach to create sensitization regarding issues that do not need the "feminist" connotation? When issues like these are brought in limelight, they give rise to the long march to attain justice like Sabrimala Temple entry incident. How difficult it can be to address such issues which is a basic Human Right of an individual irrespective of being a man or a woman. Herbert Spencer, one of the jurist, propagated that an individual can exercise his liberty to the widest extent possible as long as it does not infringe upon the liberty of others. Being vocal about a natural phenomenon in which there is no interference by the state but the age old misogynistic groups confusing superstition with religion. There is a wide gap between the state machinery and an individual crux being the social forces which have been given due recognition. It is not considered a shame to attack the dignity of a woman by ostracising her, in the name of practices such as "Chaupadi Pratha" where females are forced to live in a mud hut or any place away from her home be it cattle barn too. What impact does it leave in the mind of the young girls is never given due importance by the government to separate the Locke an phenomenon of public and private distinction. According to John Locke¹, unless there must be an attempt to diffuse these issues at home, government efforts would remain futile. A woman is more suppressed at her home than her workplace where she learns how to be handle her attire carefully being a woman. The state does not want to address these issues where it has to go into roots of the problem which they can but they prefer not to owing to the vote bank culture that would be detrimental to their government.

¹ Locke J, Two Treatises of the Government, p 116-127.

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In many cultures menstruating woman is considered to be powerful and sacred. It is a source of strength for a woman to experience the beauty of nature that the universe is created in a womb. Hinduism needs to adapt certain practices from Buddhism where menstruation is considered a natural excretion, nothing more or less. Guru Nanak had condemned treating women as impure during menstruation. A woman's blood is needed for creating a human being. Respecting a woman also includes respecting this natural phenomenon. It is unfortunate that the educated is surrounded by these superstitions which give rise to seeking right solution for the problem. Creating social awareness is the need of the hour with distinct and elaborate educative goals to be inculcated beginning from the childhood. Government needs to include all stakeholders to tackle the issues of basic human rights. It is not about females but a right to dignified life of an individual enshrined under Article 21 of the Indian Constitution. Shaktism² can help in empowering women and resolving the patriarchy that infringes the basic human rights of a woman.

Our Indian Constitution provides for uplifting the women and empowering them by providing a square based approach for advancement of women. Gender equality is enshrined in the Preamble, fundamental rights, fundamental duties and directives principles of the State Policy. Apart from this India has ratified various conventions and treaties for empowerment of women such as CEDAW, the best example being the Vishaka judgment for prevention of sexual harassment at workplace³. It is a question of fact that all these legal enactments are still an illusion or a reality needs to be studied and analyzed in detail.

III. UNDERSTANDING THE PUBLIC PRIVATE DISTINCTION:

In order to understand the solution and the problem itself, John Locke⁴ has explained that there exists a kind of dualism in working life of a woman the reason being her being born as a woman which can be disputed in the present context. This dualism is called the private public distinction. According to him even if we make the laws to protect the woman, there would still exist the private

² It is a doctrine of energy, power, the Goddess which indicates the supreme reality lies in the power of the women.

³ Vishaka and others v. State of Rajasthan AIR 1997 SC 3011.

⁴ Locke J, Two Treatises of the Government, p 116-127.

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sphere where she faces real subjugation, her family and sometimes her real self. At home and family, woman is still the same who has to do all the work being a woman. Thus giving her employment, enacting laws for her safety at workplace will not be useful when she is overburdened with the work she has to do in her private life. The assignment of woman in their domestic sphere naturally, the system of marriage where she has to leave her own home. We are not touching customs here but can there be a question of equality when she is not able to visit her own parents after marriage? Should the state not look into all these as a challenges which a woman faces even when she is independent, earning but more burdened with work?

The Honourable Supreme Court of India in the case of *Richa Mishra v. State*⁵ expressed their grievance over the situation of women in the country. Justice Sikri has stated that real empowerment can be achieved only through economic empowerment of woman now. Continuing discrimination of women also hampers the development of the country. The UNITED NATIONS DECLARATION ON THE ELIMINATION OF VIOLENCE AGAINST WOMEN⁶ does not include the present challenges that a woman of 21st century faces. To qualify as violence in the definition of “psychological harm or suffering “needs to be widened so as to include in itself the interpretation that physical proximity must not the necessary condition in order to make it an offence punishable in law. Only by doing these efforts gender should be made an issue of international law and its active participation by all the government to fight against the ills faced by a woman. In this light we shall discuss three important issues which needs to be taken up on an immediate basis: -

IV. NON RECOGNITION OF MARITAL RAPE AS A CRIMINAL OFFENCE:

India’s new plan – ‘NEW INDIA’ by 2022, which entitles empowerment of women as one of the imperatives seems to be a long road as the same administration defended grounds in the Supreme

⁵ AIR 2016 SC 379.

⁶ A/RES/48/104.

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Court for not recognizing it as a criminal offence. As per the National Family Health Survey (2015-2016) 29% of the women with age group (15 and 49) years are victim of sexual or physical violence by their husbands. The lacuna lies in section 375 of the Indian Penal Code which states that -

“Sexual intercourse or acts by a man with his wife, wife being under 16 years of age, is rape “. This is an indirect provision which protects the marital rape to come within the definition of rape under 375 impliedly. However the age provision was recently modified by the Apex Court where a two judge bench in the case of Independent Thought vs. Union Of India⁷ stated that sexual intercourse with minor wife below 18 years of age will be termed as rape. However, it still did not go to the basic issue of completely recognising marital rape as an offence irrespective of age. It is pertinent to mention that almost 82 countries have recognized marital rape as legal.

This is direct contravention of Article 21 of the Indian Constitution which provides for right to life beyond mere survival. India has still been unable to recognize it as an offence in spite of condemnation by the international community of sexual violence in marriage. Right to integrity of a women and dignity is not only a fundamental but a basic human right which must be an imperative of every country.

V. ONLINE TROLLING:

Attack of women in the new technocratic society is rampant where the perpetrators find ways and means to be non- recognised where there is lack of legal provision to protect women. Using abusive remarks against women online, social media where they cannot express their freedom of speech and expression freely, targeting journalists not for their profession but for their sexism. The Information Technology Act, 2000 was passed and 17 years have GONE still many cases go unreported. Section 354D of IPC⁸ which has been introduced by the 2013 amendment needs special

⁷ AIR 2013 (W.P.382 of 2013)

⁸ It prescribes stalking as a criminal offence.

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mention here where a person tries to foster personal interaction even when she has shown clear disinterest shall be punishable.

It is important to recognize it as a separate offence and not as one of the sub- set of eve- teasing. Recently, IAS Topper Tina Dabi was aggrieved by her fake profiles defaming her in various ways via comments and using her pictures for the purpose of creating profiles when UPSC results were declared. She claimed that none of the comments were made by her and she requested all her friends to be aware of her fake profiles. It directly curtails a women right to express her opinion enshrined under Article 19⁹ and 21¹⁰ of the Indian Constitution.

Law related to voyeurism in relation to the internet has been defined under section 66 E of the IT Act¹¹. It provides detailed discussion of harassing a woman on the internet as an offence which affects the privacy of the woman. There is no check for the applications such as WhatsApp where the content goes viral within seconds and it cannot be forfeited because of the lack of inefficiency on the part of the legislation which is easily taken advantage of. Blocking is not the solution for this trolls as it is an offence to degrade the dignity of a person thus intrusion of her privacy. Uploading private content on social media is not an offence but putting up the content with addition or transforming it without the consent of the woman is an offence punishable in law. Most of the female actors have fake accounts which are handled by more than one person having a clear name with all the profile pictures updated timely and the real account holder having no idea about her account being channelized. The trolls are not taken up seriously saying that these trolls are not done with a specific intent and also it is a person's freedom of speech to express his opinion. All this contributes to the rape culture prevailing in our country.

⁹ Protection of certain rights regarding freedom of speech etc.

¹⁰ Protection of right to life and personal liberty.

¹¹ Punishment for violation of privacy.

LEX RESEARCH HUB JOURNAL [VOLUME I ISSUE I]**VI. LANGUAGE OF EVIDENCE USED IN TRIALS AS ABUSE OF WOMEN:**

Even though the sexual offences have been amended on various occasions, still there is no real solution because of the procedural lacunas that follow after that. The women is subjected to ordeals like examination that is medico-legal, questioning of her character even when it is clearly stated under Indian Evidence Act that the character of the prosecutrix will not be relevant in case of sexual offences. These criminal law amendments were brought after the Mathura Gang -Rape case- *Tukaram v. State Of Maharashtra*¹². Two major amendment were brought after this that was making previous history for determining the character of victim irrelevant and mandating in camera trials under section 327 of CrPC. There is certain kind of distinct character when it comes to rape trials. The following questions are taken into account: -

1. Was there any sexual intercourse between the accused and the victim or survivor?
2. Was such sexual act without the consent of the women?

These two questions are the basis of rape trials in India as per the Evidence Act. In order to prove the abovementioned facts many other facts are taken into account like proving a fact to be legally relevant. But the evidence laws in India and the procedure thereof instead of being supported by logic is supported by the long practices followed by the advocates without the induction of respecting the human dignity of an individual. Section 8¹³ of the Indian Evidence Act even includes that previous conduct is relevant but is of little relevance because of the socio economic conditions of our country and also victim reacting to it differently. This can be taken as a different form by the accused that there was existence of implied consent when she had recourse to file a complaint but she did not. The immediate reaction of the victim (not considering the frivolous complaints) is that she has to make a decision whether she should file a complaint or not, what would be the reaction of the police officer making complaint. Though section 154 of criminal procedure code

¹² AIR 1974 SC 514.

¹³ Motive, preparation, previous and subsequent conduct.

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provides a long procedure that where the information is related to any of the sexual offences¹⁴ the recording shall be done by women police officer and in case the victim is physically or mentally disabled then the recording has to be video graphed and an instructor should be there to interpret what the victim wishes to convey.

VII. IN CAMERA RAPE TRIALS –A FAILURE:

The rationale behind in camera rape trials is that the prosecutrix should be free to talk in detail as to what happened to her without any kind of outside pressure. But the attempt of in camera rape trials fails when the people who would supervise this procedure lack efficiency to understand this concept. Whenever any rape trial takes place, in order to bring it within the ambit of law there are number of questions asked which are taken to be relevant. This includes the naming of the body parts of the victim, what was done by the accused when the victim was harmed and on which parts of the body. There are detailed questions asked as to how much penetration was there, for how long the accused ejaculated. There is a thin line between asking relevant questions and irrelevant questions to the crime and in the garb of pointing out the inconsistencies of rape victim, there are several questions asked which are not appropriate. Even though character as an evidence is struck out¹⁵ by the Indian Evidence Act, the procedural result of discretion that is left in the hands of professionals is lacking. Rape trials need separate group of experts that deal with the trial which is very much different from the normal trials. In the case of Madhya Pradesh v. Babulal¹⁶, the prosecutrix was asked about the trauma in detail, when she could not recall it her evidence was disqualified which resulted in breaking of the fulcrum and giving benefit to the accused. The act of rape is asked and expected that she has the graphic and minute details is flawed and needs to be re-looked where she should not be required to prove that the rape had taken place or not. The legislature as well as the court must ensure that rape trials are not turned into a pornographic trial

¹⁴ As amended by 2013 Criminal Laws Amendment Act.

¹⁵ Section 52-55 of Indian Evidence Act, 1872.

¹⁶ AIR 2008 SC 582.

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where the use of such language is a kind of procreation and enjoyment to the people who are present during the trial. The woman is seen as an object of sexual pleasure even after she has been traumatised. Sometimes it even happens that the lawyers who want to disprove the fact that rape did not take place become so adamant that they start to actively participate by rebutting all the evidences present before it. The lawyers must be trained in such a way that when it comes to rape trials or similarly sexually committed acts, to act in a way which is beneficial to the society as a whole and not to protect the accused in the best way possible even when he knew that the accused is the real perpetrator. The task of lawyer should not be inclined towards his professionalism and how easy he is able to prove a wrong fact. In the case of *Yad Ram v. State of Rajasthan*¹⁷ during the cross examination of the victim, she was asked to lie down on a bench in the court and demonstrate what happened to her when she was being raped. The question here crops up the need for such detailing which does not even take place in normal trials. The technique used in the procedure is completely flawed which does not lead to any kind of deterrence but aggravates the situation where the victim is seen as a poor woman and advocates thinking that it was her mistake.

VIII. CONCLUSION:

Thus the purpose for which in camera trials was introduced¹⁸ by the legislature leads us to the conclusion that the survivor is still traumatised with more power given to the state and the accused. The procedure of law must always be just, fair and reasonable in order to ensure justice.¹⁹ Fair trial also includes deep insight into the kind of offence that has taken place and the task of government is not to enact a law and the judiciary to interpret it with closed eyes but to take into consideration all the relevant facts together for the best of the society. Barring character evidence is not for the purpose of exclusion from the documentary evidence but also to ensure that during the whole procedure there was no sort of character that was included in it. India needs to strengthen

¹⁷ R.L.W 2008 (2) Raj.1659 (High Court of Rajasthan).

¹⁸ Facet of Article 21 of the Indian Constitution.

¹⁹ No person shall be deprived of his life and personal liberty except according to procedure established by law.

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its existing laws instead of bringing in cases where reportage is on a large scale. Human Rights angle is what would help in handling the criminal and the crime itself where restoration of society is the paramount.