

“MARITAL RAPE”

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ABSTRACT

This seminar paper is the work to study the legal and psychological aspect of marital rape in India. As we know, rape is a very heinous crime against the body of a woman, and reputation is considered as one of the most important asset and richest jewel of a woman. No one have the authority to extinguish it as there is no compromise in such situations. But in India to have sexual intercourse even without the consent of wife is no crime. As in our country, this is treated as the right of the husband which he acquired at the time of marriage. The concept of marital rape is out of the purview of our criminal law, but in most of the countries marital rape is a crime. Marital rape is terrible as well as dreadful form of violence which generally takes place within savage relationships.

This paper also tries to highlights the seriousness of marital rape and how the societal influences make marital rape okay. Along with this it also mentions effects of marital rape on victim and societal views in respect of marital rape. With the help of case law paper also tried to put the view point of Judges regarding marital rape.

This paper points out how Exception 2 of Section 375 violates Article 14 and 21 of Indian Constitution as it distinguishes married and unmarried woman which is completely arbitrary and discriminatory. Also there are certain arguments which are generally raised in support of marital rape exception.

Basically the main purpose of myseminar paper is to make a case for criminalisation of the marital rape. So our analysis of this paper is based on Constitutional law, criminal law and family law. We know that the offence of marital rape occurs within the personal sphere but in some kind it is the duty of the State to penetrate through this personal sphere. If the State does not do so, then a woman has left no remedy when raped in that private sphere by her husband.

INTRODUCTION

Marital rape is described as having sexual intercourse with his wife without her consent. It is a form of sexual abuse or domestic abuse. In our country, we treat women as a goddess but the reality is somewhere different, because in our country even in 21st-century women faces a lot.

Do you think that marital rape criminalization is not worthy? I ask you why? In most of the countries of the world, forceful intercourse with a wife is rape which is a crime but India remains in one of the 36 countries, where rape with a wife by her husband is not a crime. Do we consider a woman a thing so one gets possession of her after marriage? In our society somewhere and somehow the thinking is the same. India is considered as a male dominating society because as per research still there are a lot of things that a woman faces and due to many reasons she even can't complain.

In our country, there are many cases where women consider sexual intercourse with her husband as a duty even though she doesn't want. And let me tell you any type of sexual intercourse which is done without the consent of the women is considered to be Rape in many countries, but in our country, the sexual intercourse by a husband with wife is not considered as a rape even though it was done without her consent because a woman is presumed to deliver perennial consent to sexual intercourse while entering into marriage.

The main problem regarding crime against woman like sexual and domestic violence within marital relationships are now growing from the second half of the 20th century.

The non-consensual intercourse by a man with his wife is only considered as domestic violence under the Protection of Domestic Violence Act, 2005 which merely provides a civil remedy to the victim

Rights of women's self-sexual fixation is an important right and enhancing the rights is recognized as a very important right. High Commissioner for Human Rights Navi Pillay in 2012, stated that:

"The Violations of women's human rights are frequently linked to their sexuality and reproductive role. In many countries, married women may not refuse to have sexual relations with their husbands, and often have no say in whether they use contraception. The first crucial step towards achieving substantive equality between women and men is to ensure that women have full autonomy over their bodies. Personal issues—such as how, when and with whom they desire to have sex, and how, when and with whom they desire to have children—are at the heart of living a life in dignity."

As per **Section 375 Exception 2 of Indian Penal Code, 1860** "Sexual- intercourse or sexual acts by a man with his wife, the wife not being under fifteen years of age, is not rape." But what about the other women who are facing this because IPC only criminalizes the act when it is done with below 15 years of wife and due to this the man get immunity from these acts. In Supreme Court and various High Courts there are number of writ petitions challenging the constitutionality of Exception 2 of Section 375 of IPC, 1860.

In a recent judgment **Independent thought v. Union of India and another** the issue regarding Exception 2 of Section 375 IPC was raised before the Supreme Court. This exception of IPC exempts a man who rapes his wife from punishment if his wife is above 15 years. But as provided in "The Protection of Children from Sexual Offences Act, 2012" that any sexual intercourse with any child below the age of 18 years is a criminal offence. However in this case the scope was only limited to the age of the girl child. Whether sexual intercourse between

husband and wife where wife's age is between 15-18 years, is rape. The judgment of this case is not comment on any issue of marital rape. So while deciding this case the apex court give crucial decisions. The Court held that there was an unreasonable classification between a married and unmarried child, a child is a child irrespective of her being married, unmarried, divorced or widowed. Therefore the Exception 2 which is arbitrary and unreasonable violates **Article 14** of Indian Constitution which provides Right to Equality. According to **Article 15** of Indian Constitution Parliament has powers to make special provisions for woman and child for their welfare, POCSO is one of such special legislations. "The Protection of Children from Sexual Offences Act, 2012" has an overriding effect over any other law. So this exception shows arbitrary and discriminatory as it made distinction between married and unmarried minor girl child. And most importantly under **Article 21** of Indian Constitution a girl child whether married or unmarried has right to live with dignity which is infringed by Exception 2 of Section 375 IPC by destroying her bodily integrity and her reproductive choice.

However the observations and judgment of this case is relevant regarding girl child only but these observations of Judges can be considered in future regarding marital rape. For instance, Justice Lokur said in this case that right of a girl child to refuse to have sexual intercourse and also her bodily integrity and liberty has been taken away by this exception and this right is not only her constitutional right but also its international obligation under the **Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)**. With this he also observed that a woman cannot be treated as commodity. These all observation can be equally applicable to adult woman also. In this case there is also a strong disagreement that marital rape could destroy the institution of marriage.

BACKGROUND

The first report which deal with the issue of marital rape was the 42nd Law Commission Report. According to this report, the two important proposals were made. Firstly, it made that exception of Section 375(2) must not apply to those husband and wife which were judicially separated. The reasoning behind this was not so clear because the marriage between the two technically subsists, so he cannot be charged with the rape offence. It does not looks to be right. Secondly, it was regarding the non-consensual sexual intercourse of women aged between twelve to fifteen years. Basically this report underline the presumption of consent and the difference between the rape and marital rape. Although this report does not contain any comment whether this clause remained be there or deleted.

In the report of 172nd Law Commission, the various arguments were made in respect of validity of the Exception of Section 375 IPC. It was argued in this commission that when other unjustified acts of husbands were criminalised, then why the rape alone be protected by the provisions of the law. Though, the criminalisation of marital rape would lead to the "excessive intrusion or intervention with the institution of marriage".

A Committee constituted in 2012, under Justice J.S. Verma also put efforts and advocated to make the marital rape criminalised. This committee is formed to deal with more heinous offences of Sexual Assaults. The need for this was felt after the Nirbhaya Case. The Committee published the report and the Amendments were made in Criminal Law. Out of the suggestions given by the committee, one of the suggestion was that the marital rape ought to be

criminalised. The recommendations were made, firstly, it was recommended to delete the exception clause. Secondly, it was put forward that the law must specify that marital relations or any other kind of similar relations between the offender and victim is not a defence against the offences of sexual assault. These relation may not be considered to lessen the sentence for rape.

Again in 2015, this reasoning was re-acknowledged by the Ministry of Home Affairs in response to a Bill which is put forwarded by a Member of Parliament, the aim of which is to criminalise marital rape. For this it was stated that in Indian context the concept of Marital rape cannot be applied suitably because in India there is a mind-set of the society that marriage is treated as a pure sacrament.

This again came as a question before Home Minister in 2016, that whether marital rape be criminalised or not. For this Home Minister again gave response that this matter was being considered by the Law Commission and no conclusion was came out of it since the Parliamentary Standing Committee had decided against it.

After all the analysis of the reports of Law Commission and reasons given by the Government, there are three major points in the argumentation against Marital Rape.

- 1) The aim of protecting the institution of marriage because marriage is regarded as a sacrament.
- 2) The alternative remedies which already exists for a woman in other laws like Indian Penal Code Section 498-A, Domestic Violence Act and other personal laws dealing in Marriage and Divorce. By this they enforce idea that women already have these recourses, criminalisation of marital rape is not needed.
- 3) The Indian Cultural values, the criminalisation would hamper all the values of Indian culture.

CONSTITUTIONAL PERSPECTIVE

Marital rape is a violation of Fundamental rights mentioned in Article 14 and 21 of our Indian Constitution. In this report we are trying to say that lack of criminalisation of marital rape violates the woman's fundamental rights which are provided to a woman from our Constitution. Even though the marital rape crime occurs within the marital relation, but despite this it is the duty of the State to penalise marital rape because if the State does not do so, then the women has no remedy when she raped by her husband.

Article 14

Article 14 of the Indian Constitution provides that the "State shall not deny to any person equality before the law and equal protection of the laws within the territory of India".

Even after this provision mentioned in the Constitution the law discriminate against the victims of rape who are raped by their husbands. Right to Equality enshrined under Article 14 is violated by Exception 2 of Section 375 IPC as it discriminate woman who are married by denying them equal protection regarding sexual harassment and rape. We can say that this exception made two different classes of woman based on their marital status.

As we know, when Indian Penal Code was drafted woman was not considered as independent identity, she was considered as chattel or the one who does not have any rights even for her

own. But according to the changing situations of the society, there is a need to bring amendments in our laws because now our provisions can afford husband and wife as separate legal identity. As a result, to provide safeguards to woman from violence or sexual harassment, laws have been legislated since the turn of the century like “The Protection of Domestic Violence Act” and the “Sexual Harassment of women at Workplace (Prevention, Prohibition and Redressal) Act”.

Article 21

This Article provides that “no person shall be denied of his life and personal liberty except according to the procedure established by law.”

In a case *State of Karnataka v. Krishnappa*, Supreme Court held that, sexual violence is an unlawful interlope to the right to privacy of a woman which is guaranteed by Article 21 of our Indian Constitution. In the same case it was also held that non-consensual intercourse amounts to physical or sexual violence. In a most recent case *Justice K.S. Puttuswamy (Retd.) v. Union of India*, the right to privacy is recognized as a Fundamental Right which includes to make choices regarding intimate relations. Forceful sexual intercourse with any girl is violation of her fundamental right whether married or unmarried. These judgments do not differentiate between married or unmarried woman.

So the above mentioned points clearly show that Exception 2 of Section 375 IPC violates the Article 14 and 21 of Indian Constitution.

PERSPECTIVE ON CRIMINALIZATION OF MARITAL RAPE

Various Arguments against Marital Rape

There are many theories which existed regarding marital rape. The society has many justifications for marital rape and also made number of presumptions in respect of criminalization of marital rape. A theory which existed to justify this is theory of unity. The idea behind this theory is that, after marriage the identity of wife is merged with her husband and the law does not give any independent identity to the women from her husband. Therefore she does not have any personality of her own. However, these justifications are no longer at forefront because now law recognised women as equal citizens as men.

1. Sufficient legal resort against Marital Rape already exists

These proponents state that the gap created by the exception of marital rape has been filled by the other laws like Domestic Violence Act 2005, Section 498A Indian Penal Code & Hindu Marriage Act.

2. Cultural Relativism

In this fight one more argument which is put forth is that the prevalent culture in India is not in position to adopt the concept of criminalization of marital rape. The proponents believe that the social customs, religious beliefs & the belief in marriage as a sacrament, cannot create an environment that is not favourable for criminalization of marital rape.

3. Implied Consent

The proponents put forth the argument that there is implied consent of wife for matrimonial relations & husband cannot be guilty of rape for the lawful act. Some proponents also believe that the wife cannot retract as the marriage is also a kind of contract & in this contract she gives her implied Consent. Even still today in India, this consent of implied consent exists to justify the marital rape.

4. Marital Rape is rare

The proponents augmented that marital rape cases are very rare in our society. According to many national surveys & reports around two-fifth of married women faces some kind of abuses by their partners. In simple words as per these reports, one out of every ten women revealed that they faced some kind of sexual violence either in the form of being physically forced to have intercourse or sometimes they are also being forced to perform some kinds of unwanted sexual acts.

5. Repealing the marital rape exception will lead to misuse by wives

The advocates of marital rape exception forefront that the repealing of exception will give the wives an opportunity to misuse the laws & liberty to bring rape charges against their husbands to settle unrelated fights. They also augmented that even at present in our society the women misuse the laws which are authorized for their protection.

Arguments for criminalization of marital rape

It has been argued in number of cases by courts as well as non-governmental organisations that supports marital rape exception. As we discussed earlier that this exception is argued to be violation of many Indian laws, constitutional guarantees. Also it violates a number of India's international law obligations.

1. In contravention of other national laws

As we know under Indian national laws husbands can be held accountable for number of offences like hurt, grievous hurt, assault with intention of outraging her modesty, sexual harassment, stalking & voyeurism. If all these acts are criminal acts even in a marital relationship then why it is not possible to criminalize marital rape. Even now it is contradictory to purport that criminalizing of marital rape is not possible in India.

2. Violation of Constitutional Guarantees

As in this seminar report, we have discussed earlier also that the exception 2 of Section 375 IPC, violates the rights & protections which are guaranteed by our Indian Constitution, specifically Article 14, 15(3) & 21.

3. In Contravention of International Law Obligations

India has ratified a number of International Conventions like Convention on the Elimination of All Forms of Discrimination against Women, the International Covenant on Civil and Political

Rights and International Covenant on Economic, Social and Cultural Rights. India is also a member of Universal Declaration of Human Rights. The marital rape exception somehow in some manner infringes women's right and also discriminates her under International law.

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