

Marital Rape

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Abstract

“Rape” is the basic yet the most severe violation of human rights of women is punishable by law and unanimously treated as a heinous crime across the globe. The supreme court of India has very clearly stated that "Rape is a deathless shame the greatest crime against the human dignity". Marital rape on the other hand is a rape which takes place within the confines of the institution of marriage. It is physical violence which is committed by one's own husband. As per section 375 of Indian penal code includes all forms of sexual assault involving non-consensual intercourse with a woman. However, section 375 of exception 2, exempts unwilling sexual intercourse between husband and a wife over 15 years of age from section 375's definition of "Rape" and thus immunizes such act from prosecution. As per current law a wife is presumed to deliver perpetual consent to have sex with her husband after entering into marital relations. While unwilling sexual contact between husband and wife is recognised as a criminal offence in almost every country of the world. "INDIA" is one of the thirty six country that still have not CRIMINALIZED marital rape.

Keywords: Irrevocable consent, criminalized, Rape

Introduction

The supreme court of India and various High court are currently flooded with writ petitions challenging the constitutionality of this exception and in a recent landmark judgement, The supreme court criminalized unwilling sexual contact with wife between 15 years and 18 years of age. This judgement has in turn led to an increase in other writs challenging the constitutionality of exception 2 as a whole. The exceptional clause is not just an accidental loophole in the law has its root in English legal system which can be traced from a judgement delivered almost 300 years ago by CJ lord Hale in the 17th century.

Even social constructivist theory suggests that social reality is because of the fact that men have dominated the law making and political sphere since ancient times. The rationale

behind keeping marital rape under exception is the notion of "implied irrevocable consent" which in simple words means that once a women get married, she has given her consent.

“Rape” is considered to be one of the basic yet the most severe violation of human rights of women which is punishable by law and unanimously treated to be a heious crime across the globe. The supreme court of India has clearly stated that “Rape is a deathless shame and the gravest crime against the human dignity” and therefore Marital rape on the other hand is a sensational issues which takes place within the confines of the institution of marriage. It is a physical violence which has been committed by one’s own husband. It is very clear and evidential that unwilling sexual contact between husband and wife is recognised as a criminal offence in almost every country of the world whereas “India is one of the 36 countries which have still not criminalised marital rape and thus this paper deals with the critical study on marital rape and how it violates the basic right as mentioned in Indian constitution along with suggestions and remedies to prevent women from these kind of social evils.

Sex is not a right

The character sketch of wives in today’s society is considered to be once own property by their husbands in the name of marriage in a tyrannical manner which is definitely considered to be a myth. Sex is not a right which could be alleged along with marriage and also it’s not a wives duty to become a sex toy after entering into the relationship, so called marriage. Just like that the society cannot assume or come up with a conclusion stating that a women gives up her right, to decide whether to have sexual intercourse with her husband or not? After her marriage sex should be based on Respect, consent, equality, caring, love, dignity along with clear communication “ no women wants to feel like she’s living with a rapist every night; And good men won’t be one among it.”

Forms of marital rape:

Inorder to understand the implication of Marital rape and seriousness of the issue one must first understand the various types of marital rape that has been broadly analysed by the social scientists namely:

- Sexual coercion by non-physical:- It is a social coercion where the wife is forced to have sexual intercourse and is reminded about her duties as a wife.
- Forced sex:- when a women is not willing to have intercourse and use of physical force is involved.

- Battering rape:- use of aggression and force against wife for brutal intercourse.
- Force only rape:- does not necessary to batter the wife but user force against unwilling wife.
- Obsessive rape:- involves sexual sadistic pleasure by husband.

Forced sex is also a rape

Rape is the correct description of forced sex or coerced sex. It is when the women doesn't give full consent or unable to give consent to have sex is considered to be rape. A social rule couldn't be changed just by the custom called marriage. Because a women agrees "I do" for marriage doesn't mean that she has agreed "I do" for sex too. Wherever, whenever, and however her husband wants it. Married sex should also be considered like all intimate ,love sex relationship is consensual. It should be experienced in a way where 2 people who love each other express love, care and communication tenderness. But it shouldn't be one among the following situation:

- Sex when the wife feels threatened
- Sex by manipulation
- Sex where the wife can't give consent in a situation
- Sex by taking a women hostage
- Sex when the women feels she has no choice.

If the sex occurred in the above circumstances then it is considered to be a forced sex.

The objective of the current research are:

- 1) To study the magnitude of marital rape in India
- 2) To study the national and international legislative measures regarding marital rape
- 3) To suggest measures and remedies to strengthen the existing socio psychological & legal mechanism.

To study the national and international legislative measures regarding Marital rape

As per section 375 of Indian penal code the rape had been defined as " Rape includes all forms of sexual assault involving non-consensual intercourse with a women". However section 375 consist of exceptional clause 2 stating " unwilling sexual intercourse between husband and wife over 15years of age from section 375's definition of rape and thus immunizes such acts from prosecution". The supreme court of India and various High court are currently flooded with writ petition challenging the constitution of this exception and in recent landmark judgement, the

supreme court criminalised unwilling sexual contact with a wife between 15 years and 18 years of age. This judgement has in turn led to an increase in other writs challenging the constitutionality of exceptional clause 2 as a whole.

As per the current Indian law “ A wife is presumed to deliver perpetual consent to have sex with her husband after entering into marital relationship while unwilling sexual contact between husband and wife is recognised of the world. But India is one among the 36 countries which have still not criminalised marital rape.

Violation of Article 14 of the Indian Constitution

In spite of Article 14 of the Indian constitution ensures “A persons equality before law and equal protection of law within the territory of India”. Indian criminal law discriminates against female victims who have been raped by their own husband’s. During the period of 1860’s when the Indian penal code was drafted “ A Married women was not considered a independent legal entity and thus she did not acquire many of the rights”. But now the time has changed , Indian law now affords husband and wives a separate and independent legal entities and thus exception 2 violates the right to equality enshrined in Article 14 insofar as it discriminates against married women by denying them the equal protection from Rape and sexual harassment. Accepting these kinds of exceptional creates an inequality between 2 classes of women based on their Marital status. This exception makes possibility for the victimization of married women for no reason other than their Marital status while protecting unmarried women from those same acts hence exception 2’s distinction between married and unmarried women violates Article 14.

Violation of article 21:

Article 21 of Indian constitution states that “no person shall be denied of his life and personal liberty except according to the procedure established by law”. Later supreme court interpreted this clause and held that the rights enshrined in Article 21 include the rights to health, privacy, dignity, safe living conditions and safe environment among others. In the case of marital rape it’s evidential that all the above rights enshrined in Article 21 has been violated and yet the existence of exception 2 which fails to deter husband from engaging in acts of forced sexual contact with their wives. Adversely affects the physical & psychological health of women and abolishes their ability to live with dignity.

Therefore we come up with a conclusion exception 2 to section 375 of the Indian penal code is an “infringement” towards article 14 and article 21 of the constitution.

Causes or circumstances of Marital rape:

- Women married to a domineering men who view them a property.
- Women who are in physically violent relationships.
- Women who r pregnant.
- Women who are ill and or recovery from surgery.
- Women who are separated or divorced.
- Due to work pressure.
- And much more.

Are considered as certain circumstances or situation for Marital rape to occur.

To suggest measures and remedies:

- The term “consent” should be defined to draw line between consent and coercion.
- General neutral law should be framed and inequalities should be eliminated.
- Marital rape should be criminalised under Indian penal code and amendment should be made with certain conditions to avoid misuse of this section.
- Friends and family can be a great source of comfort and support.
- Shelters for temporary safe stay should be provided by government.
- Social service agencies could be formed.
- Legal aid program can be provided for the purpose of awareness.
- Consulting psychiatrist for free regarding this issue has to me formed by our government.
- Social support is necessary for gaining new legislation.
- Educational and prevention programs on local, state, and national level has to be conducted.
- Marital rape has to be considered as one of the important ground for divorce

Conclusion:

Marriage is considered as a coming togetherness of 2 individual with mutual respect for each other. It is considered to be one of the worst types of sexual violence occurring legally within the family in the name of custom “so called marriage”. The patriarchal mind set of the society has led the law to close its eye to the plightful misery of the abused wives and the law does not even recognises marital rape to be an offense against women and thus penalties aren’t provided. Therefore I conclude by stating it’s the individual persons discretion, whether to have

sex or not? Irrespectively who he is. Sex should be a pleasure for both and not a pain for one. Since Marital rape violates the basic right as per mentioned by our Indian constitution. Marital rape has to be criminalised in India. A married woman is definitely not a sex toy for her husband & marriage is also not a license for a men in order to have sex with his wife. And hence “No means No” for married women too!

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