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CONSENT IN MATRIMONIAL RELATIONS – AN OXYMORON FOR INDIAN LEGAL SYSTEM *

ABSTRACT:

The concept of marriages in India revolves around consent but only at the superficial level. Let's start from the beginning from choosing the life partner to give consent on bed the whole affair gets finished without recognizing the implied or express consent on the part of women. Even if she is not ready or unhappy the same will be termed as Shyness of bride. That is how we portray ideal womanhood. However the data reveal the true picture of marital rape. According to the United Nations Population Fund, 1/3rd out of sample size of 9,205 admitted to have forced a sexual act on their wife. The study was conducted in 8 states in India. The report also said that 75% of married women were subjected to marital rape.

However recently some progressive judicial pronouncements have acknowledged the plight of married women by saying that rape will be a rape only, irrespective the relationship of victim and offender as wife and husband. As far as consent is concerned, India doesn't hold any progressive view in black or white letters. Indian Penal Code under section 375 leaves no scope for husband to get penalized for marital rape however if he establishes sexual relation with his wife under or of the age of 15 he will be charged under rape, fortunately after the judicial pronouncement passed by Supreme Court the age of wife is increased from 15 to 18. So the age of consent really makes difference to constitute rape under marriage. However this is still a little to strengthen the path of women empowerment as it has not remedied those who are above the age of 18 but undergoing several sexual abuses by their husband. The author shall be discussing under the paper the theory

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of consent and its legal ambit under matrimonial relations along with the scope, consequences and legal gaps of marital rape in India.

Keywords: Marriage, Marital Rape, Sexual Consent.

Consent in Matrimonial relations – An oxymoron for Indian legal system

Marriage has become a legitimate resource of physical hunger, consent is a latter issue.

Consent holds a very important role in defining and comprehending legal relations under law, however when it comes to matrimonial boundaries the relevance of consent loses its significance. In Indian society the patriarchy is imbibed in each and every custom beginning from the birth till death. Let's start from the beginning from choosing the life partner to give consent on bed the whole affair gets finished without recognizing or acknowledging the implied or express consent on the part of women. Even if she is not ready or unhappy the same will be termed as shyness of bride. In such a scenario getting significance of consent is extremely pricey thing to ask.

Marriage has been regarded as an integral part of social institution in India which is not regarded as a matter of choice but also a mandatory practice. Since life is full of questions, doubts, insecurities, conflicts, joys, sorrows, ups and downs so ancestors believed that man needs a companionship into these journeys of life, hence marriage as an institution was thought to be an apt answer to met out this need. As marriage recognized and acknowledged the basic instinct of human behavior that man is a social animal and can't live in isolation. Marriage is considered to be the union of two souls, for all kinds of futuristic rights and responsibilities to be carried on together. Marriage holds its significance in every country and all the times because it is considered that it completes a person emotionally, psychologically and physically.

However marriage being as an important institution doesn't holds equal parameters for husband and wife and reason for the same is because of patriarchy. Man has to be aggressive and female has to affectionate. The expectations of being aggressive forms its extreme i.e. lust accompanied by physical torture to over power or dominate the woman and this is the only way to celebrate his masculinity whereas women's vulnerability is being celebrated.

According to the United Nations Population Fund, 1/3rd out of sample size of 9,205 admitted to have forced a sexual act on their wife. The study was conducted in 8 states in India. The report also said that 75% of married women were subjected to marital rape.¹

To trace the history of marital rape the statement of Sir Matthew Hale, C.J., becomes relevant which has been given during 17th century. Hale 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, which she cannot retract.”*²

However, soon this view was changed when marital rape was for the first time discussed in appellate court of England in R v. Clarence³, though the defendant was not charged with rape but the case became a precedent for a wife to protect herself from non-consensual sex as opposed to Sir Hale’s statement. However for the first time marital rape was prosecuted in R v. Clarke⁴ where the court held that consent was revoked due to non-cohabitation. Fortunately, in the case of R. v. R⁵, it was stated that the marital rape exemption was illogical and it was held that “the fiction of implied consent had no useful purpose to serve today in the law of rape”. Consequently R’s appeal was dismissed and he was convicted for committing rape. That was the beginning of criminalization of marital rape in the English laws.

Most of the common law countries like Australia, South Africa and Canada have followed the England system and have abolished marital rape law exemption. For instance, in Australia under Section 73(4)⁶ provides “No person shall, by reason of the fact that he is married to some other person, be presumed to have consented to an indecent assault by that other person.”

Similarly, in South Africa the concept of exemption on spousal rape has been repealed. Under Family Violence Act 1993 “Notwithstanding anything to the contrary contained in any law or in

¹ “Marital Law why is this not rape”, Shalini Saksena, The Pioneer, 21 June, 2015, Sunday edition

²Law Teacher, UK. (November 2013). Marital Rape Should It Be Grounds For Divorce Law Essays, Available at: <http://www.lawteacher.net/free-law-essays/family-law/marital-rape-should-it-be-grounds-for-divorce-law-essays.php?cref=1>, last accessed on 15/5/16

³ R v. Clarence, (1888) 22 Q.B.D 23

⁴ R v. Clarke, (1949)2 All ER 448

⁵ R v. R, (1992) 1 A.C.599, House of Lords

⁶ Criminal Law Consolidation Act, 1953, (Australian criminal law)

common law, a husband may be convicted of the rape of his wife⁷”. Even Canada also has repealed the exemption in the spousal rape in 1983.

The United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), of which India is a signatory, has viewed that this sort of discrimination against women violates the principles of equality of rights and respect for human dignity. Further, the Commission on Human Rights, at its fifty-first session, in its Resolution No. 1995/85 of 8-3-1995 entitled “The elimination of violence against women” recommended that marital rape should be criminalized. Beijing+5 held in June, 2000 in its 23rd special session of General Assembly has also emphasized upon the criminalization of marital rape in countries in order to bring gender justice⁸. 85th plenary meeting of UNGA took place on 20th of December, 1993 has also insisted to criminalize marital rape under Article 2 of it⁹.

Recently Helen Clark, chief of UNDP on her visit to India, remarked that “at the United Nations Sustainable Development Summit on 25 September 2015, PM Narendra Modi addressed the UNGA committing India to the goals which includes a target of eliminating ‘all forms of violence against all women and girls in the public and private spheres’. The reference to private spheres is what the UN believes must include the criminalization of marital rape, if India is to keep that promise.¹⁰”

The Concept of consent into marital rape in India revolves around two factors-

- Age
- State of Mind

So the victim either has to plead the age bar or state of mind for prosecuting the culprit.

India's age of consent for sex is 18 under the Criminal Law (Amendment) Act, 2013. In 1892, the marital rape and subsequent death of a 10-year-old girl, Phulmoni Dasi, caused the age of consent to be raised from 10 to 12¹¹. It is so strange that marriage is being seen as sacrament (Hindus),

⁷ Section 5 of Family Violence Act 1993, legislation at south Africa

⁸ Available at: <http://www.un.org/womenwatch/daw/news/unwvaw.html> , last accessed on 15/5/16

⁹ Available at: <http://www.un.org/documents/ga/res/48/a48r104.html> , last accessed on 15/5/16

¹⁰ Available at: <http://www.thehindu.com/news/national/interview-with-the-undp-chief-helen-clark-criminalise-marital-rape-says-undp-chief/article8349449> , Last accessed on 7/7/16

¹¹ <https://www.revolvy.com/main/index.php>? Accessed on 9th March 2018

Contract(Muslims) and somewhere down the lines the object is to provide sanctity to sex and off springs thereof, but no religion expressly talks about the sexual consent of wife. Though suppression of wife, domestic violence has been taken care of but the consent of wife has always been a neglected notion. The statement given by Maneka Gandhi Ministry of Women and Child Development, 2016 that criminalizing marital rape will destroy the marriage institution¹² shows the insensitivity of the government over women concerns where marriage is supposed to be protected even at the cost of human rights and dignity of women.

As far as consent is concern in a marriage India doesn't hold any progressive view in black and white letters. Indian Penal Code under section 375¹³ leaves no scope for husband to get penalized for marital rape however if he establishes sexual relation with his wife under or of the age of 15 he will be charged under rape, fortunately after the judgment passed by Supreme Court¹⁴ has increased this age bar from 15 to 18. So the age of consent really makes difference to constitute rape under marriage. However this is still a little to strengthen the path of women empowerment as it has not remedied those who are above the age of 18 but undergoing with several sexual abuses by their husband.

Recently a revolutionary judgment came by Delhi Family Court where Justice Dharmesh Sharma, ADJ while rejecting the plea to grant divorce to the husband said that Marriage is not a contract for sexual pleasure. In this case it was revealed by the evidences that husband used to force his wife for oral sex and used to insert foreign objects into the private parts of his wife denial of her

¹² <https://thewire.in/politics/activists-angered-by-maneka-gandhis-altered-stance-on-marital-rape> accessed on 23March, 2017

¹³ 375. Rape.—A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following de-scriptions:—

(First) — Against her will.

(Secondly) — Without her consent.

(Thirdly) — 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.

(Fourthly) — With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be law-fully married.

(Fifthly) — 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 stupe-fying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

(Sixthly) — With or without her consent, when she is under sixteen years of age. Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

(Exception) —Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.]

¹⁴ Independent Thought v. Union of India, WRIT PETITION (CIVIL) NO. 382 OF 2013

part he used to abuse her, mistreat her and finally filed a divorce petition too. Court not only bashed him for his inhumane behavior but also established the marriage has no place for force or abuses in the name of sexual desires in marriage¹⁵. This judgment is not only important to restore the faith in the saying that marriage is union of two souls but also a beginning to bring sexual abuse by husbands within the ambit of penal provision. So for cohabitation between married couples there should be willful consent.

Few months back Punjab and Haryana HC has expounded that “forcible sexual intercourse” in a marriage and adoption of unnatural means which are forced upon the other spouse are valid grounds to seek a divorce¹⁶. Decision has come about four years after Lower Court turned down the plea stating that it was for her to establish that her husband had committed oral and unnatural sex against her, and ruling that there was no medical evidence for it. High Court in its judgment stated that the nature of allegations was very serious but same cannot be proved by any corroborative evidence as the acts of sodomy or unnatural sex or oral sex forcibly committed during difficult periods can neither be witnessed by any other person nor proven by medical evidence. HC stated that Court has to be always cautious before accepting such allegations. The marriage can be dissolved in case it is established by evidence and circumstances that one of the spouses has indulged in unnatural acts¹⁷.

Additional Sessions Judge Dr. Kamini Lau, in one of the recent cases, has observed that “Non recognition of marital rape in India, a nation set upon the bedrock of equality, is gross double standard and hypocrisy in law which is central to the subordination and subjugation of women. We in India are yet to recognize the woman’s right to control marital intercourse as a core component of equality”. She emphasized that the woman has full autonomy over her body, recognition of marital rape and offensive sexual acts, and raising our voices against it is the first crucial step towards achieving substantial equality between man and woman. According to her

¹⁵ <https://www.latestly.com/india/information/marriage-is-not-a-contract-for-sexual-pleasure-delhi-court-44167.html>

¹⁶ Preeti Kumari V. NeelKanth Kumar, FAO-M- 419 of 2014, decision on 1st July, 2018

¹⁷ <https://www.latestlaws.com/latest-news/forced-sexual-intercourse-unnatural-sex-in-a-marriage-are-valid-grounds-to-seek-divorce-hc-read-judgment-here/> accessed on 4th June, 2018.

marital rape is offensive to morality and liberty and any kind of sexual perversity is required to be exposed, addressed and condemned.¹⁸

However, Justice Dhingra, said it is ‘dangerous’ to make marital rape an offence and “if it is really happening with a woman, she needs to speak up timely and not live with it for years and then complain, because in that situation it is considered an afterthought”. He also asked “How will it be proved that the woman’s consent was involved or not?” Echoing his opinion, Justice Sodhi said it is tough to prove that allegations made by a woman against her husband are genuine¹⁹.

Section 3(ii)²⁰ also covers sexual abuse against women under the domestic establishment however if we contemplate marital rape under that category then too it involves only civil remedy which is definitely insufficient.

A writ petition has been filed before Delhi High court for criminalizing marital rape as it is violative of Articles 14, 15, 19 and 21 of the Constitution of India²¹. The petition has been filed by RIT Foundation and The All India Democratic Women’s Association (AIDWA) and a marital rape victim joined as intervener. The case also has a victim whose husband has forced her for unnatural sex and he has claimed that section 377 of I.P.C is not valid for married couples and marital obligation theory overrides section 377²².

Though it happens to be a difficult task to establish evidences but the concern of women subjection can’t be waived off because of the unavailability of evidences.

Domestic Violence Act of 2005, did’nt consider marital rape as a crime but a domestic violence. However with the passage of time various social groups, NGOs and feminist organizations have put their opinion over considering marital rape into penal domain. 172nd Law commission’s report captioned as ‘Review of Rape Laws’ submitted in 2000 stated that it may amount to excessive interference in the marital relationship. Even J. S Verma committee report also did not recommend

¹⁸ Available at <http://www.indiacelebrating.com/social-issues/marital-rape/> accessed on 7/6/2017

¹⁹ Available at: <https://wizardlegal1.wordpress.com/2015/06/08/marital-rape-is-nevertheless-a-rape/>, Last accessed on 10/6/16

²⁰ The Protection of Women from Domestic Violence Act,2005

²¹ Available at <http://www.livelaw.in/criminalising-marital-rape-may-destabilise-institution-marriage-centre-tells-delhi-hc/> last visited on 30th Aug, 2017.

²² Extra ordinary Jurisdiction WP(C) No.284/2015 RIT Foundation v. Union of India.

criminalizing marital rape. While the issue of criminalizing marital rape was discussed in Rajya Sabha, the India's Minister of state for Home Affairs, Haribhai Parathibhai Chaudhary, stated that the marriage is a sacrosanct institution. He argued that 'the concept of marital rape, as understood internationally, is not suitable in the Indian context, due to illiteracy, poverty, social customs and values, religious beliefs and the fact that Indian society treats marriage as a sacrament'²³. However on December 4, 2015 while answering Avinash Pande who brought a private member Bill, said that government is planning to bring a comprehensive law to criminalise marital rape. So it is waiting till date.

In February 2015, a bench of the Supreme Court comprising AR Dave and R Bhanumathi reportedly refused to entertain the plea by a victim of marital rape to declare it as a criminal offence, the bench denied the argument as it a personal cause not a public cause and for this to order change of law is not possible.

Dr. GS Bajpai, a legal luminary while having an interview stated that obtaining unequivocal consent of one's partner must be a pre requisite of marital sexual intercourse.

In a case²⁴ where wife complaint for physical, mental and sexual abuse by her husband. It was proved that the husband had forceful sexual contact with her. She was compelled to remain silent. The court prima facie held it to be a case of domestic violence.

In another case²⁵, filed under section 12 of the Act, the wife alleged that the husband used to harass, torture and beat her for not bringing enough goods with her. She further alleged that the respondent used to have rough sex with her after consuming alcohol and used to abuse her when she lived in the marital home. The court held that domestic violence in different forms and measures was practiced upon the petitioner and that she was physically, sexually, mentally and economically tortured by the respondent.

²³ Ministry of Home Affairs (2015) Women Subjected to Marital Rape, Government of India, Press Information Bureau dated April 29, Available at: <http://pib.nic.in/newsite/PrintRelease.aspx?relid=119938>, last accessed on 25/5/16

²⁴ Heerawati v. Sh. Jugal Kishore Soni, CC No. 251/08 Saket Court, New Delhi.

²⁵ Smt. Rekha v. Sh. Ajay Kumar CC No. 307/1/10/12 Tis Hazari Courts, Delhi.

In *Kauser Parveen v. Syed Ghulam Rashid Ali*²⁶, the complainant had claimed that she was used to get beatings, abuses, sexual and mental harassment by the respondent husband. The court held that a case of domestic violence was made against the respondent. Though it did not mention what kind of domestic violence – physical, sexual, or mental, or all of them.

From these cases it is clear that sexual violence in marriage is a reality. In all these cases the concerned district court recognized sexual violence similar to domestic violence because of the nature of the law under which the complaints were filed. In none of the cases the concerned court thought of considering forced sexual intercourse as “rape”. Even in a case²⁷ where the wife was not aware of the respondent her husband was suffering from a venereal disease. In this case the husband had venereal disease that was not disclosed to her before marriage, he had sexual intercourse with her a few times. After wife came to know about the disease, he tried to make forceful sexual contact in spite of her opposition. The court held the act domestic violence. Such an act is even against the right to health guaranteed under the constitution²⁸.

In every case courts gave orders of protection or maintenance. In none of the cases the respective district courts punished the respondent with the imprisonment as it's a civil law and imprisonment is only in cases where respondent breaches protection order under the Act. The Domestic Violence Act is a substitute for a criminal provision for non-consensual sexual course in marriage is a civil remedy for a criminal act.

Criminal law by not recognizing marital rape sends a signal to the society that non-consensual sexual course in a marriage isn't a crime. As a result of this a husband who rapes his wife does not consider himself as a wrongdoer instead he thinks his act as a way of his conjugal right. This is clear from a study which revealed that the husbands felt that their wives were obligated to provide them with sex as per their husbands' desires. This was also evident in a study coursed by Diana E. H. Russell to examine the reasons why men rape their wives. While interviewing she came across many women like Mrs. Kearney whose husband have forceful sexual intercourse with her

²⁶ CC NO. 292/08 Mahila Court, Saket Court, New Delhi.

²⁷ Smt. Sunil Kumar v. Rakesh CC No.227/1 Saket Court, New Delhi.

²⁸ Article 21 provides for right to life which includes right to good health. Regional Director, ESI Corporation v. Francis de Costa (1993) 4 SCC 100.

by calling it as his sexual right: “I was protesting and pleading and he was angry because he said I was his wife and had no right to refuse him”²⁹. Recognition of marital rape may change these social norms and thereby bring a change in social behavior by the process of self-consciousness via the act. It is pertinent to mention that there can be, good as well as bad social norms and law plays a vital role in undermining bad social norms and enhancing good ones.

Marital rape clause, in any statute can affect people’s sense of understanding a particular behavior as right or wrong. Even wives may not conceive it as behavior because law does not consider it to be. This also affects wives’ sense of self where they accept the act to be a part of wife's duty and not as a violation of their person even when they felt it not right. When law prohibits or penalizes a particular act then along with it influences individual’s freedom to judge a particular act as a right or wrong. If we look at marital rape in absence of law relating marital rape may lead to situations where women who were actually sexually assaulted by their husbands may not consider themselves to be victims because law does not call it a crime.

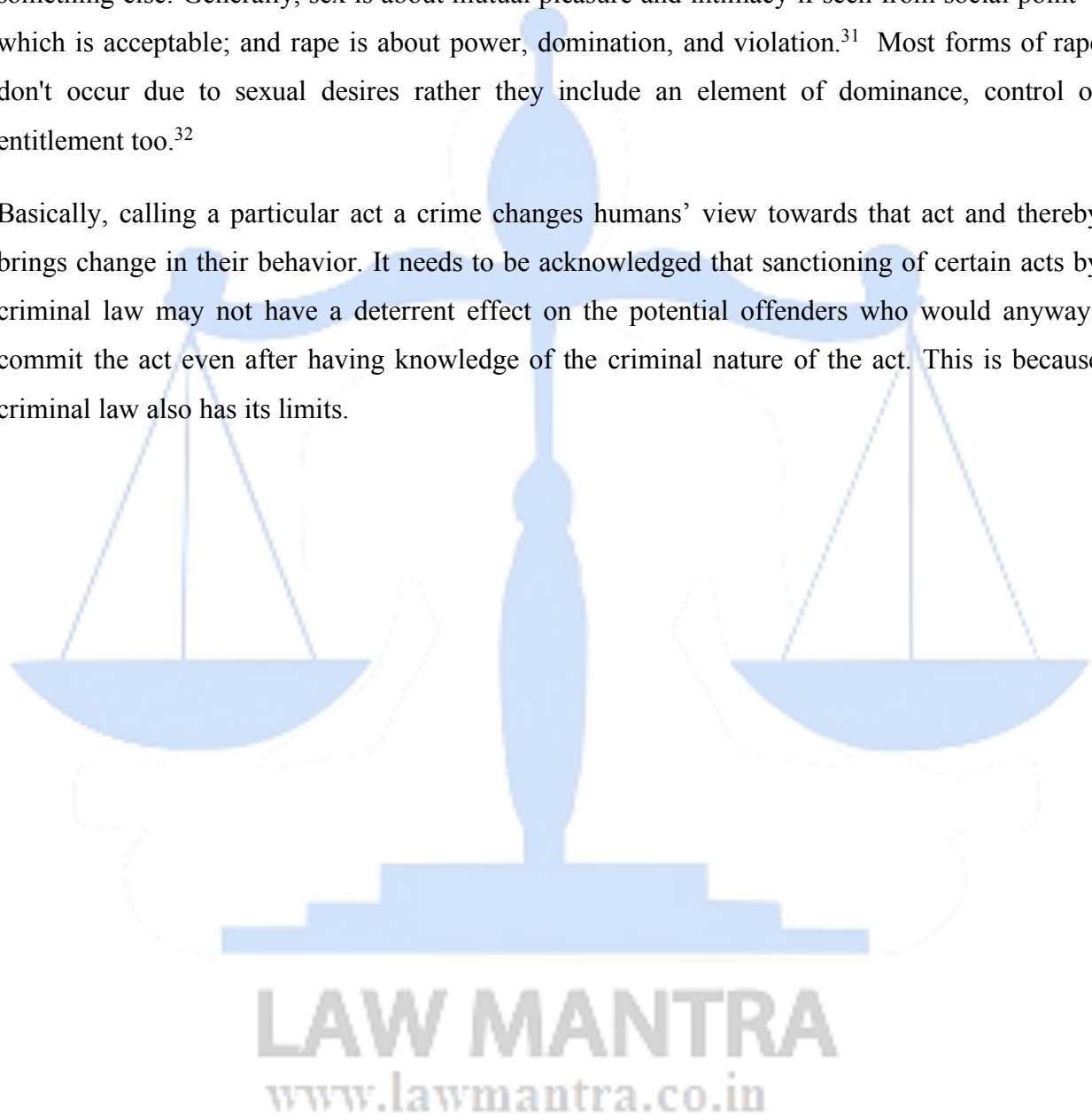
Law also has another effect which relates to the beliefs of people. When a particular person does some act prohibited by law then the inference of people about the character of that person is influenced by his course. For instance a person engages in caste discrimination with the law such discrimination influences people’s inference of the character of that person who indulges in those acts. This may not have been the case earlier when laws relating caste discrimination were absent. These inferences by other people in turn may change the way one behaves because it affect one’s reputation. Most people desist from engaging in a criminal act because they fear loss of status or damage to their reputation and not because of fear of punishment. To call the act of rape simply an act of cruelty or domestic violence and not rape is reducing the reputational cost attached to it. Calling the act “rape” is important because there is a relatively greater stigma attached to it.

The thought of women sexuality, sex and rape influences people’s capacity to appreciate the idea of marital rape and thus, many of them deny its existence. There is a difference among sex and rape. Sex might be about various things naturally however socially it is translated to appear as

²⁹ DIANA E. H. RUSSELL, RAPE IN MARRIAGE 123-138 (1990).

something else. Generally, sex is about mutual pleasure and intimacy if seen from social point³⁰, which is acceptable; and rape is about power, domination, and violation.³¹ Most forms of rape don't occur due to sexual desires rather they include an element of dominance, control or entitlement too.³²

Basically, calling a particular act a crime changes humans' view towards that act and thereby brings change in their behavior. It needs to be acknowledged that sanctioning of certain acts by criminal law may not have a deterrent effect on the potential offenders who would anyways commit the act even after having knowledge of the criminal nature of the act. This is because criminal law also has its limits.



³⁰ Katharine K. Baker, If for the time being we leave its biological function – procreation, *What Rape Is and What It Ought Not to Be*, Vol. 39, No. 3 JURIMETRICS 233-242 (1999).

³¹*Id.*

³² SUZAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* (1993)