



LAW MANTRA THINK BEYOND OTHERS

(I.S.S.N 2321- 6417 (Online))

Ph: +919310053923 Website: journal.lawmantra.co.in

E-mail: info@lawmantra.co.in contact@lawmantra.co.in

NEED TO INCLUDE MARITAL RAPE AS AN OFFENCE *

ABSTRACT

Now that everything is changing with each passing day, most of perceptions are not developing along. In this paper I have tried to touch the most sensitive issue of violence against women which is 'Marital Rape'.

Marital rape is defined as unwanted sexual acts by husband upon the wife, committed without her consent or personal will, within the institution of marriage. Section 375 of Indian Penal Code provides that sexual intercourse or sexual acts with one's wife above 15 years of age, is not rape. The provision has undergone recent change by the supreme court in case Independent Thought v. UOI (2017) which has now extended the anti-rape laws to sexual acts between spouses provided wife is not under age of 18 years since the Protection of Child Against Sexual Offences Act, 2012 protects girls between the ages of 15 to 18. There is an immediate need of criminalization of marital rape under the Indian Penal Code. This should not be restricted to just theoretical change, as the figures of this crime are rising alarmingly.

This paper includes effects of marital rape, its international and national perspective and rebuttal of the arguments against criminalisation of marital rape.

Key Words: Marital rape, Violence, Non-consensual.

* Ms. Khushdeep Kaur, Assistant Professor, Shri Guru Granth Sahib World University, Fatehgarh Sahib.

Introduction

Women in India remained subjected to violence through centuries. The problem is not new. She have been victims of humiliation, torture, exploitation for as long as we have written records of social organisation and family life. Today, women though are being gradually recognised as strong, significant and meaningful contributors to the life of men; still their condition is pitiable. Ideologies, institutional practices and the existing norms in society have contributed much to their harassment. Some of these behavioural practices flourish even today. In spite of the legislative measures adopted in favour of women in our society after independence, innumerable women still continue to be the victims of violence-physical, emotional, mental, or sexual including rape¹. Rape is a type of sexual assault usually involving sexual intercourse or other forms of sexual penetration carried out against a person without that person's consent².

Marital rape is the worst form of violence against the women committed by her husband within the four walls of one's home or within the confines of family. It is motivated by a desire to control and have power by the husband over his wife. It is the most common and repugnant form of masochism in Indian society, hidden behind the iron curtain of marriage. Rape is rape whichever it is Stanger rape, date rape, acquaintance rape or marital rape. Sadly the law in India, does not consider marital rape as an offence. Even if it does, the issue of punishment remains lost in a cloud of legal uncertainty³. The basic argument behind not accepting the marital rape as any other normal rape is that it restricts to the socially acceptable institution of marriage wherein it is believed that a woman gives irrevocable consent to her husband for sexual intercourse any time he demands.

Meaning and Concept

'Marital Rape' means unwanted or undesired intercourse by a man with his wife done by force, threat of force, or physical violence, or when she is unable to give consent. It is a non-consensual act of violent perversion by a husband against the wife where she is physically and sexually abused. Marital rape can be broadly classified into three categories⁴:

¹ Ram Ahuja, SOCIAL PROBLEMS IN INDIA, 3rd edn. 2014, pp. 264-277.

² [https://en.m.wikipedia.org/wiki > Rape](https://en.m.wikipedia.org/wiki/Rape).

³ Dr. Masood Ahmad & S.M. Aamir Ali, "Marital Rape: Contest or Consent", 44(1) Indian Bar Rev (2017), p. 169.

⁴ D.K. Gosselin, HEAVY HAND: AN INTRODUCTION TO THE CRIMES OF THE DOMESTIC VIOLENCE, 1st edn., 2000.

- **Battering Rape:** In this form of marital rape, both physical and sexual violence is present. Women meet with this violence in various ways. Some are battered in the course of sexual violence, or the rape may follow a physically violent experience where the husband wants to make up and pressurises his wife to have sex against her will. The majority of marital rape victims fall under this class.
- **Force-only rape:** In this form of marital rape, husbands use only that amount of force which is necessary to coerce their wives ; battering may not be peculiarity of these relationships. The assaults are typically followed after the refusal for sexual intercourse by the women.
- **Obsessive rape:** In this form of marital rape, assaults involve torture and/or "Perverse" sexual act and are often physically violent. This has also been labelled as sadistic rape in which pornography is frequently involved.

Effects of Marital Rape

Despite the historical myth that rape by one's partner is a relatively less important event causing little trauma, research indicates that marital rape often has severe and long-lasting repercussions for women. The physical effects of marital rape may include injuries to private organs, lacerations, soreness, bruising, torn muscles, fatigue and vomiting. Women who has been battered and raped by their husband may suffer other physical consequences including broken bones, black eyes, bloody noses and knife wounds that occur during the physical violence. Specific gynaecological consequences of rape include miscarriages, still births, bladder infections, infertility and the potential contraction of sexually transmitted diseases including HIV⁵.

Women who are raped by their partners are likely to suffer acute psychological consequences as well. There are numerous short-term and long-term effects of marital rape on women. Some of the short-term effects include anxiety, shock, intense fear, depression, suicidal ideation, and post traumatic stress. Long-term effects often include disordered eating, sleep problems, depression, problems in establishing trusting relationships, and increased negative feelings about themselves. Psychological consequences are likely to be long-lasting. Some marital rape survivors report

⁵ R. Thornhill & C.T. Palmer, A NATURAL HISTORY OF RAPE- BIOLOGICAL BASES OF SEXUAL COERCION 1st edn., 2000.

flashbacks, sexual dysfunction, and emotional pain for years after the violence⁶. These consequences should be pondered over and given a serious thought.⁷

International Prospective on Marital rape

The countries like Poland (1932), Czechoslovakia (1950), the Soviet Union (1960) were first to criminalise marital rape followed by Denmark (1960), Sweden (1965) and Norway (1971)⁸. The countries that have eliminated marital rape exemption provided to husbands are : Australia, Canada and South Africa. These countries have England system and have abolished the marital rape law exemption⁹.

England: In England, earlier as a general rule, a man could not have been held to be guilty as a principal of rape upon his wife, as the wife is generally unable to retract the consent for sexual intercourse with her husband, which is a part of the contract of marriage¹⁰. In spite of that, the marital rape exemption was abolished in its entirety in 1991. The House of Lords in *R. v. R.*¹¹ held that the rule that a husband could not be guilty of raping his wife if he forced her to have sexual intercourse against her will was an archaic and offensive common-law fiction, which no longer represented the position of a wife in present-day society, and that it should not be applicable any long. Likewise an amendment to the statutory law was made through Section 147 of the Criminal Justice and Public Order Act, 1994. The European Court of Human Rights also declared the same in the decision of *SW v. UK*¹².

South Africa: The exemption provided to husbands in South Africa with regard to marital rape has been repealed as well. Section 5 of The Family Violence Act, 1993 in South Africa provides that "Notwithstanding anything to the contrary contained in any law or in common law; a husband may be convicted of rape of his wife"¹³. Thus making marital rape a punishable offence.

⁶ R. Thornhill & N. Thornhill, THE EVOLUTION OF PSYCHOLOGICAL PAIN, IN SOCIOLOGY AND SOCIAL SCIENCE, edn., Bell, R. & Bell, N., 1989.

⁷ A. Browne, "Violence against women be male partners: prevalence, outcomes, and policy implications" American Psychologist. 48(10) (1993) p. 1077/87.

⁸ https://en.wikipedia.org/wiki/Talk%3AMarital_rape%2FCountry_lists.

⁹ *Id.*

¹⁰ Halsbury's Law of England, 4th edn., Vol. 11(1), para 495.

¹¹ (1992) 1 AC 599; (1991) 4 All ER 481 (HL).

¹² (1996) 21 EHRR 363.

¹³ <https://www.lawctopus.com/academike/marital-rape-need-criminalisation-india/>

Australia: Likewise in Australia Section 73(4) of the Criminal Law Consolidation Act, 1953 states "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".

United States: In United States researchers have estimated that 10% to 14% of married women experience rape in marriage. They examined the prevalence of different types of rape, and found that marital rape accounts for approximately 25% of all rapes¹⁴. Regardless of the prevalence of marital rape, this problem has received relatively very less attention from social scientists, practitioners, the criminal justice system, and larger society as a whole. In fact, it was not until the 1970s that the society began to accept that rape in marriage could even occur.

Till recently, the general rule was that a husband could not be convicted of the offence of marital rape as he is entitled to have sexual intercourse with his wife, which is implied under the contract of marriage. In 1993, marital rape became a crime in all fifty States, under at least one section of the sexual offence codes¹⁵. However, it is remarkable that only a minority of the states have eliminated the marital rape exemption entirely, and it still remains in other states in one proportion or other. In most American States, resistance requirements still apply¹⁶. Importantly, the existence of any spousal exemption indicates an acceptance of the anachronistic understanding that wives are the chattels of their husbands and the marriage contract is entitlement to sex¹⁷.

New Zealand: The marital rape exemption was abolished in year 1985 in New Zealand, when the present Section 128 to the Crimes Act, 1961 was enacted. Sub-section (4) now provides that a person can be convicted of sexual violence in respect of sexual connection with another person in spite of the fact that they are married at the time the sexual connection occurred¹⁸. In *R. v. D.*¹⁹ it was held that the fact that the parties are married or have been in a continuing relationship will not warrant a reduction in sentence. Therefore, there is no distinction in principle to be drawn between sexual violation in marriage or outside of marriage.

¹⁴ National Violence Against Women Survey, NCJ 172837, Washington, DC: US Department of Justice.

¹⁵ National Clearinghouse on Marital Rape and Date Rape, 1996.

¹⁶ S.J. Schulhofer, *UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW*, 1998, p. 30.

¹⁷ Saurabh Mishra & Sarvesh Singh, "Marital Rape - Reality and Need for Criminalisation" PL WebJour 12(2003).

¹⁸ A.P. Simester & J. Brookbanks, *PRINCIPLES OF CRIMINAL LAW*, 1st edn., 1998, p. 552.

¹⁹ (1987) 2NZLR 272 (CA).

As per a report of "*The World's Shame: The Global Rape Epidemic*" published by Equity Now which surveyed lawyers from 82 jurisdictions across the world reveals that there are few countries that have criminalized marital rape. Most countries either did not clearly address marital rape as a crime, or saw it as a crime only if the people involved were separated. In at least 12 countries, marital rape is decriminalized, and in at least nine countries, rapists can marry the survivor to avoid punishment²⁰.

National Perspective on 'Marital Rape'

Most of the developed nations of the world have criminalised marital rape by the end of the 20th century but the existing laws in India still fails it to do so²¹. Ours is the country where the minister of Home Affairs gave a public statement that it is impossible to make marital rape as criminal offence in India and the concept of marital rape as understood internationally, cannot be acceptable in Indian context. The reasons given by him were the existence of various ground level socio economic problems such as poverty, the high rate of illiteracy in rural areas, and the religious belief of the very holy and sacramental nature of marriage in India²². However his statement can be strongly rebutted.

According to the National Family Health Survey (NFHS) conducted in 2005-06, a report was published which clearly mentioned the figures of sexual violence faced by their husband. More than 60000 women were surveyed out of which 36.7% of them reported physical or sexual violence faced by their husbands and 9.7% reported just violence²³.

Legal Provisions under Indian Penal Code

The substantive criminal law that stood on the statute book as Indian Penal Code (IPC) was drafted by Lord Macaulay almost a hundred and fifty years ago in year 1860. It was based on the customs and norms which were prevalent in the society in those times. However, it has failed to keep up

²⁰ A report by International Human Rights Organization Equity Now : *The World's Shame: The Global Rape Epidemic*, p. 13

https://www.equalitynow.org/sites/default/files/EqualityNowRapeLawReport2017_Single%20Pages.pdf

²¹ <https://timesofindia.indiatimes.com/entertainment/hindi/theatre/Pinjra-digs-deep-at-the-underlying-hypocrisy-surrounding-marital-rape-case-in-India/articleshow/54266592.cms> (last visited on Jan. 2nd, 2019).

²² <http://www.indiatoday.in> > India > North (last visited on Jan. 3rd, 2019).

²³ Government of India (Dec. 20, 2005), National Family Health Survey of India

http://rchiips.org/nfhs/sub_report.shtml -lists figures of married women who have faced spousal sexual violence (last visited on Jan. 3rd, 2019).

the advancements of the society which has resulted in certain obsolete, old and archaic provisions in operation till date.

The offence of rape has also been part of the code since its inception. Section 375 of IPC defines 'rape'. It provides that a man is said to commit rape if he has sexual intercourse with a woman under any of the circumstances given in the section²⁴. The expanded definition of rape now includes both sexual intercourse and other sexual penetration such as oral, anal, urethra within its scope²⁵. However, exception attached to the section provides that if a husband has non consensual sexual intercourse with his wife who is above 15 years of age is not rape. Thus, in India a wife cannot take recourse of criminal law if her husband rapes her. The wording of the exception clause is as follows:

*"Exception 2.- Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape"*²⁶.

However, there is no reason given for the exclusion of marital rape from the purview of the definition of rape. The exemption excludes rape committed in marriage, if the girl is above 15 years of age. But recently the hon'ble Supreme Court has struck down this part of the exception clause in *Independent Thought v. Union of India*²⁷.

The crux of the exception in the section is that once a woman is married she does not have right to refuse to sexual intercourse with her husband. On the other hand it gives right to the husband to have sexual access over her wife and provides them licence to rape them.

While the law does not criminalise rape in marriage, but a specific form of marital rape is criminalised when there is non-consensual sexual intercourse between the husband and wife when they are living separately under the decree of separation or otherwise²⁸. Section 376B IPC states:

"376B. Sexual intercourse by husband upon his wife during separation:

²⁴ The INDIAN PENAL CODE, 1860, Section 375.

²⁵ The INDIAN PENAL CODE, 1860, S. 375 as amended by the Criminal Law (Amendment) Act, 2013.

²⁶ *Id.*, S. 375, Exception 2.

²⁷ AIR 2017 SC 4904.

²⁸ The INDIAN PENAL CODE, 1860, S. 376(B).

Whoever has sexual intercourse with his own wife, who is living separately, whether under a decree of separation or otherwise, without her consent, shall be punished with imprisonment of either description for a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine.

Explanation.—In this section, "sexual intercourse" shall mean any of the acts mentioned in clauses (a) to (d) of section 375".²⁹

Thus exception 2 to section 375 indicates that there is presumption of consent to sexual intercourse when the husband and wife are living together whereas in section 376B there is no such presumption when they are living separately.

Historical background behind the exception clause

It is important to ponder over various legislative debates and reports of the Law Commission of India to understand the reasons behind the exception clause of 'marital rape' in India.

The Law Commission of India in its 42nd report recommended the inclusion of forcible sexual intercourse as an offence by the husband, when the couple is living separately under a decree of judicial separation or mutual agreement³⁰. In such a case husband cannot be charged of the offence of having sexual intercourse with his wife against her will and without her consent as their marriage technically exists which is not right and it was suggested to make it an offence in a separate section³¹. Further there was suggestion that non consensual intercourse by husband with the wife between 12 to 15 years of age, should not be called rape in the technical sense and the punishment for such offence may be provided in a separate section³². However, this report did not comment on the exception clause of marital rape i.e. whether it should be retained or deleted. The Law Commission of India in its 172nd report³³ was strongly faced by the validity of the exception clause. During the discussion rounds on the report the *Sakshi* a non-governmental organisation interested in the issues of women gave the view of deleting the exception clause of

²⁹ *Id.*

³⁰ Law Commission of India, 42nd REPORT ON THE INDIAN PENAL CODE, 1971.

³¹ *Id.*

³² *Id.*

³³ Law Commission of India, 172nd REPORT ON REVIEW OF RAPE LAWS, March, 2000.

marital rape as the forced sexual intercourse by a husband with his wife should be equally treated as an offence just as any other physical violence by husband against the wife is treated as an offence. However, the Law Commission did not agree with this argument as if it is done so it would lead to excessive interference in the institution of marriage³⁴.

It was in year 2012 when the horrific gang rape³⁵ took place in the very capital of the country, which led to widespread protests and agitations by public which forced legislature to make changes in the existing law on rape and make it more stringent and efficient to deal with cases of heinous sexual assault. Justice Verma committee³⁶ was appointed to suggest the amendments in the prevalent law which along with the other suggestions strongly recommended for criminalisation of marital rape. They recommended to delete the exception clause from the section and make also suggested that the law must specially state that a marital relationship or any other relationship should not be a defence for the accused while ascertaining that consent for the act existed or not³⁷. The report also discussed how the immunity granted in case the accused is husband of the woman originated from the outdated notion of wife being chattel of the husband and as such gives an irrevocable consent to the sexual needs of the husband³⁸. The committee also supported the view of the judgement passed in the case *C.R. V. UK*³⁹, which came to the conclusion that a rapist remains a rapist regardless of his relationship with the victim.

Taking into consideration of the suggestions of Verma committee report the Criminal Law Amendment Bill, 2012 was drafted⁴⁰. In this Bill, the word 'rape' was replaced with 'sexual assault' with an endeavour to widen the ambit of it but the Bill did not carry any provision of criminalising marital rape⁴¹. However, the Standing Committee of the Parliament did not accept this recommendation as they asserted that if they did so, the "entire family system will be under stress and the committee may perhaps be doing more injustice"⁴². It also stated the family can

³⁴ *Id.*

³⁵ *Mukesh & Anr. v. State (NCT of Delhi) and Ors.*, Criminal Appeal Nos. 609-610 of 2017 SC.

³⁶ Justice J. S. Verma, Justice Leila Seth, Gopal Subramaniam, REPORT OF THE COMMITTEE ON AMENDMENTS TO CRIMINAL LAW, 23rd January, 2013.

³⁷ *Id.* 113-114.

³⁸ *Id.* '72'

³⁹ *C.R. v UK Publ.* ECHR, Ser.A, No. 335-C, Palmer Feminist Legal Studies Vol. V no.1 (1997) pp.1-7.

⁴⁰ CRIMINAL LAW AMENDMENT BILL, 130 of 2012.

⁴¹ *Id.*

⁴² STANDING COMMITTEE ON HOME AFFAIRS, 15th Lok Sabha, Report on The Criminal Law (Amendment) Bill, 2012, One Hundred and Sixty Seventh Report, 45, (December 2015).

itself deal with such issues and in criminal law sufficient provision already exists under section 498A of the IPC⁴³ under the concept of cruelty.

Recently in December, 2015 a private bill was introduced on this argument⁴⁴. During the ensuing discussion, the Home Minister stated that this was being considered by the Law Commission, and any decision would only be taken once the report comes out⁴⁵. In 2016, the Home Minister was again questioned about the existence of the marital rape exception and if the government was planning to criminalise it. Unfortunately the Home Minister replied that the matter was being studied by the Law Commission and no decision has been yet been taken to criminalise it since the Parliamentary Standing Committee had decided against it⁴⁶.

The judiciary in India also goes with the same attitude towards criminalisation of marital rape, and it is not confined to the legislature alone. Although there does not seem to be much cases in which the constitutional validity of the exception clause in section 375 has been explicitly upheld, there have been instances when courts have simply avoided this question⁴⁷, dismissed petitions to strike down this exception clause or have otherwise used the exception clause to avoid answering questions as to whether a husband raped his wife⁴⁸.

Exemption clause and Constitution of India

The exemption clause to Section 375 violates the Fundamental Rights enshrined in our Constitution. For instance, Article 14⁴⁹ provides for equality before law and equal protection of law within the territory of India and prohibits discrimination on basis of sex, religion, place of birth or any of them. But the exemption under Section 375 discriminates a wife when it comes to marital rape, thus violating her right under article 14 where classification should be based on

⁴³ The INDAIN PENAL CODE, S. 498A.

⁴⁴ The Criminal Laws (Amendment) Bill, 2014, 28 of 2014. (This Bill was a Private Member Bill proposed by Ms. Kanimozhi on the 28th of November, 2014. The status of the Bill is currently pending as of 1st December, 2017

⁴⁵ RAJYA SABHA DEBATES, Discussion on the Indian Penal Code (Amendment) Bill, 2015, 53, Session Number 237, December 4, 2015, <http://164.100.47.5/newdebate/237/04122015/Fullday.pdf>

⁴⁶ LOK SABHA DEBATES, Question on Marital Rape, 2016, Question No. 2872, March 15, 2016 <http://164.100.47.190/loksabhaquestions/annex/7/AU2872.pdf>

⁴⁷ Nimeshbhai Bharatbhai Desai v. State of Gujarat, 2017 SCC OnLine Guj 1386

⁴⁸ Raveen Rao Kallakuru & Pradyumna Soni, "*Criminalisation Of Marital Rape In India: Understanding Its Constitutional, Cultural And Legal Impact*", 11 NUJS L. Rev. 1 (2018).

⁴⁹ Article 14 : Equality before law: The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

'Intelligent Differentia'. There should be connection between the classification and the object which we are seeking to achieve⁵⁰. Thus if a married woman is subjected to an act of molestation or rape by a stranger, it is punishable under section 354 and 376 of IPC whereas if she is subjected to same acts by her husband it is no offence⁵¹. This is an anomaly which seeks to be addressed by making marital rape as an offence.

Likewise, Article 21⁵² guarantees right to personal life and liberty. However the exception clause under section 375 takes away the personal liberty of a woman to have her say in the marital relation. One of the facets of Article 21 is "right to live with human dignity"⁵³ but by not criminalising marital rape there is clear violation of fundamental right of Indian woman. A rapist not only causes physical injuries, but leaves behind a scar on the highly cherished position of a woman, i.e. her dignity, honour reputation and chastity⁵⁴. Such cohabitation not only becomes immoral but also unconstitutional.

In *Bodhisatwa Gautam v. Shubra Chakraborty*, the hon'ble Supreme Court has held "Rape is a crime against basic human rights and a violation of the victim's most cherished fundamental right enshrined in Article 21 of the Constitution"⁵⁵.

Article 21 of the Constitution of India also talks about bodily self determination where the individual has exclusive right to take supreme decisions about one's own body. However, when it comes to marital rape, the very right is snatched away as it is assumed that the wife gives a lifelong consent for sex with her husband in marriage though whatever circumstances she may be in-physical, emotional, mental or psychological⁵⁶. This explicitly shows the infringement of her basic Fundamental right of life and personal liberty that is seized by the institution of marriage. Therefore these inconsistencies should be removed by criminalising marital rape.

⁵⁰ State of West Bengal v. Anwar Aki Sarkar, AIR 1952 SC75,80.

⁵¹ Prof. Kshitij Naikade & Dr. Garima, "Issues & Challenges Related To Marital Rape in India" Vol. 7 Issue 4 *IJHSSI* (April 2018).

⁵² Article 21: Protection of life and personal liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law.

⁵³ Francis Coralie Mulin v. Administrator, Union Territory of Delhi (1981) 1 SCC 608.

⁵⁴ Ratanlal & Dhirajlal, THE INDIAN PENAL CODE, 34TH edn. (2016) p. 863.

⁵⁵ 1996 AIR 922, 1996 SCC (1) 490.

⁵⁶ Prof. Kshitij, *Supra* note 51.

Arguments Against Criminalisation of 'Marital Rape'

Marriage is the very foundation of a civilised society⁵⁷. In India marriage is regarded as a sacrosanct event in an individual's life⁵⁸. It is religious duty among Hindus. The rig Vedic mantras, the Brahamanas and the smriti Texts have highlighted the importance of marriage as a sacrament or a 'samaskara'. So it has been considered as an important institution of society. It is with this object of preserving the very sacramental institution of marriage that the rape committed in marriage is not criminalised. The archaic understanding of the role of women in marriage was to take her as a property of her husband⁵⁹. However this situation of treating the woman as a property of their husband has undergone significant change after the codifications of different laws and by providing equal rights to both man and woman in these laws. One such example is in case of woman's right to property and right to divorce which reaffirmed her position as an equal partner⁶⁰. Thus considering women as a chattel does not stand good in law. The second argument with regard to this is that a woman gives perpetual consent to sexual intercourse by her husband with the very proposal of marriage, she has no right to refuse to the sexual desire of her husband. Sir Mathew Hale, C.J., gave a statement in 17th century. Hale wrote:

"The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by mutual matrimonial consent and contract, the wife hath given herself in kind unto the husband, which she cannot retract"

Marriage is not contracted completely for the purposes of maintaining sexual relationship. Although it is one of the essential parts of it yet unwanted or forcible intercourse by the husband as right over her wife without her consent is clearly the violation of fundamental rights enshrined in Article 14 and 21 of the constitution of India. Fundamental rights of a person cannot be put at stake simply to protect the institution of marriage and by not criminalising marital rape. Hence the exception clause is arbitrary and unconstitutional.

⁵⁷ C.N. Shankar Rao, SOCIOLOGY OF INDIAN SOCIETY, 1st edn., (2004) p. 101.

⁵⁸ Satyajeet Desai (ed.), PRINCIPLES OF HINDU LAW, 21st edn., (2013).

⁵⁹ R. Lisa Eskow, *The Ultimate Weapon?: Demythologizing Spousal Rape and Reconceptualising Its Prosecution*, 48(3) Stanford Law Review (1996) p. 680.

⁶⁰ The Hindu Succession Act, 1956, S.6. The amendment gives equal property rights to women in joint family.

The second argument which favours for keeping the exception clause is the existence of sufficient remedies in law. The most relevant provision that is often cited as the best alternative for criminalising such an act is under section 498A of IPC which defines cruelty. However, there is notable difference between cruelty and rape. The act of rape is far more horrific than in cruelty. In *State of M.P. v. Madanlal*, it was held that rape is a crime against the body of a woman which is her own temple. It suffocates the breath of life and sully the reputation. And reputation, needless to emphasise, is the richest jewel one can conceive of in life.⁶¹ Further the maximum punishment for the offence of cruelty under S.498A is only 3 years whereas in case of rape the maximum punishment is life imprisonment⁶². So there is a considerable difference between the punishments of the two offences which shows cruelty cannot be in any manner dealt with offence of marital rape. So there is no point in treating marital rape as cruelty merely defined under S.498A rather there is need for criminalisation of marital rape.

The next argument against criminalisation of marital rape is that it would be difficult to prove marital rape and its criminalisation would only increase the burden of already overburdened judiciary. It may be showed that criminalisation of marital rape cannot be ignored on the mere assertion that it would be difficult to prove it. Rape is always proved on the basis of circumstantial evidence because the act is usually committed in isolation and it can also be proved in cases where women are known to the perpetrators. Likewise marital rape the woman would have been subjected to sexual abuse repeatedly and it would not mean that she is raped only once. So there can always be medical examination of the victim and the other ways to prove it can be through witness testimony, the wife may record the husband's guilt with electronic equipments etc.⁶³

Thus from the above discussion it is clear that the arguments against criminalisation of marital rape stands to be disproved with the firm reasons. The legislature should take steps towards criminalising marital rape as an offence. By excluding marital rape, the law is taking away the right of the women over her own body and sexual activity. Refusal to accept marital rape is also a

⁶¹ Criminal Appeal No. 231 of 2015.

⁶² The Indian Penal Code, 1860, S.376(1).

⁶³ "Marital Rape Laws will be Misused by Women" Is A Flawed Argument: Here's How the Accused Can be Punished, available at: thelocalindian.com (last visited Jan. 5th, 2019).

serious form of marital rape where the law and the society is supporting and providing legitimacy to sexual coercion and exploitation. The addition of section 376-A is a progressive step where the law seeks to prosecute the husband who uses force to have sexual intercourse with his wife who is living separately under the decree of judicial separation or otherwise. This is a clear acceptance of the fact that since the wife is showing her disapproval towards her spouse by staying separate, she has definitely taken away her consent towards engaging in sexual acts with her husband. Likewise, the provision should also be broadened to also include the women who do not leave the husbands house and choose to stay in the same household but refuse to participate in any sexual activity.

Marital rape, to a certain extent has been mentioned, although not clearly in the Domestic Violence Act 2005. The act condones any form of sexual abuse in a live in or a marital relationship⁶⁴. The definition of sexual abuse takes into consideration only the life threatening or grievously hurtful abuse which can be physically shown or proven. This at least acknowledges the fact that a women, in spite of being in a marital institution, retains her individual identity and status where she is not to surrender to as any kind of physical overture, even if it is her husband⁶⁵.

The question is not about being married or being a prostitute rather it's about respecting the rights of females. This can be better understood by Article 10 of Declaration on the elimination of Discrimination Against Women, 1967 which directs to take necessary measures to ensure women whether married or unmarried are equally treated with men. One should not be allowed to infringe the rights to equality and respect of the women, irrespective of the circumstances⁶⁶.

Conclusion and suggestions

The idea of marital rape is an anomaly even today. It is believed that a girl gives irrevocable consent for sexual intercourse with her husband at his will once she has consented for marriage. Most of the cases of rape go unreported in India due to various reasons. The National Family Health Survey shows that, majority of sexual violence is committed by husbands in India. The data collected by NFHS shows that out of total number of rapes 97.7% of rapes were committed by the spouse. Consequently there is need of substantial changes in laws related to sexual offences to remove the inequalities and the immediate need of criminalisation of marital rape under Indian

⁶⁴ Domestic Violence Act, 2005, Section 3.

⁶⁵ Prof. Kshitij, *Supra* note 51.

⁶⁶ *Id.*

Penal Code in India. However, merely declaring marital rape as an offence will not serve the purpose until the judiciary and police comes forward to help resolving the issues. There is need to educate the society about this crime and the objective with which marital rape is to be criminalised. Lastly, consent for sexual intercourse is right of every women be it married or unmarried and the non-consensual act should be penalised regardless of the relationship of the accused with the victim.

