
MARRIAGE –A SOCIAL CONTRACT FOR RAPE

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ABSTRACT

The purpose of this research is to study how marriage is a social contract for rape. This research will describe that how section 375 of I.P.C. Violates woman's human rights. Researcher will also determine the validity of the exemption clause mentioned under the section 375 of IPC. Critical analysis of the case laws pertaining to the marital rape will reveal discriminatory nature of the law that validates the marital rape of the wife by her husband. Violation of the Article 14 and article 21 of Indian Constitution by allowing the marital rape in India will be the subject matter of research. This research contains the comparative study of Indian law for marital rape with other countries with the help of case laws. This research will also emphasize on the various terms of United Nations convention on the elimination of all forms of discrimination against woman. This research paper provides an overview of the various personal laws in India related to marriage. Presence of the various intricacies in proving any type of atrocity with the woman prevent an aggrieved woman from seeking justice will be highlighted through this research. Researcher will also provide suggestion for the reform and safeguard of woman's right and dignity. At the end this research emerges out with the clear vision why it should be criminalized in India.

KEYWORD - *Marital rape, IPC, Constitution and Discrimination*

INTRODUCTION

Marriage is generally considered as 'sacrosanct' term in Hindu law and a contract in Muslims law. In Muslims law, marriage (NIKAH) consists of religious values albeit it is a law that is referred to religion. These all religious values enable a man to treat his wife in such a way that is inhuman and unethical in nature. It is an astonishing fact that cruelty against wife is a crime and is not allowed in accordance to law as well as society on the other hand any type of sexual act without the consent of wife is always considered as fair in the eyes of law and society.

Rape is defined under the section 375 of IPC it says that rape is a sexual assault or sexual intercourse with a woman without her consent. Which means any act facilitate by using force

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, coercion ,undue influence , or against a person who is incapable of giving valid consent , such as one who is unconscious, incapacitated , has an intellectual disability or below the legal age of consent is called as rape . The same should be applied in case of marital sexual intercourse against the will and consent of wife should be considered as rape and should be considered as punishable offence.

However it is an exception of rape enshrined under section 375 of IPC. Discriminatory nature of law is violating Right to equality and Right to live with dignity enshrined in the Indian constitution under article 14 and 21 of constitution. A bill was also proposed in parliament for criminalization of marital rape, it was turned down by the parliament. All these things depict the darkest face of the word sacrosanct and religious values as it preserves husband and provides license for rape to the whole male dominating community.

MARITAL RAPE

Marital rape or spousal rape is a sexual intercourse by a husband with his wife without his consent or by using force or coercion. Marital rape is defined as an exception in the section 375 of IPC. According to the exemption enshrined under the section 375 of IPC, any type of sexual intercourse by husband with his wife will not be considered as crime.

Marital rape is not a new thing it is existed in our society from a long period of time. Social taboos and indifferent nature of government toward the preservation of the right of married women are the main factor that encourages a person to do rape of his wife, as wife is considered as husband’s property. Adultery is somehow related to marital rape which makes a man guilty for having any sexual relation of a man with the wife of the other person without the consent of that person.

So Adultery is a symbol of such kind mentality which says that wife is the men’s property .In 1707 English lord chief justice john holt has describe adultery as “ *occupation of property and violation of right of husband* ”². This shows wife’s legal assessment to her husband³. The concept of reparatory marriage was also prevailing in the nineteenth century .If a person commit a rape of a girl or woman then he has to marry with that girl or woman⁴. All these things showcase the vulnerable condition of woman in society and the main reason behind these things was unequal economic power of wife to her husband. Wife was

² Kirkwood, M. K., & Cecil, D. K, *Marital rape: A student assessment of rape laws and the marital exemption. Violence Against Women*, 7(11), 1234-1253, . (2001).

³ www.criminaldefencelawyer.com/resources/criminal_defence.

⁴ www.criminaldefencelawyer.com/resources/criminal_defence.

economically dependent upon their husband. A study says that most of the husband and wife believed that forced sex is acceptable. Issue of marital rape has come to growing international attention from the second half of 20th century⁵.

Russell in her book “*rape in marriage*” says that USA had witnessed protest against marital rape and recommends to the legislature to make marital rape a criminal offence. In the case of *KIRCHBERG VS FEENSTRA*⁶ US’s Supreme Court had mitigated the consent of wife’s legal assessment to her husband. Court held LOUISIANA HEAD AND MASTER law, which gave sole control of marital property to husband, unconstitutional.

MARITAL RAPE IN INDIA

Marriage is considered as an important part of human life in India. In Hinduism it is a belief that husband is the god (PATI PARMESHWAR) for his wife and it is accepted that wife will satisfy every whim of her husband. It is the main reason among the various social aspects behind the existence of marital rape non criminalization of marital rape in India.

Many laws and acts in India were taken from English law or given by the Britishers. IPC was drafted in the juncture of British rule which has not given the independent legal identity to the woman, she was considered as property of her husband⁷. It results that she did not possess many of the rights now guaranteed to her as an independent legal identity, including right to file a complaint against another under her own identity.

In prior time woman has no right to file a complaint as an independent legal identity according to the Doctrine of merging⁸ the woman’s identity with that of her husband. British common law at that time justified it by saying that a wife having given consent for all time by entering into the contract of marriage. India is a member of a group of 36 countries in the world which has not criminalized marital rape.

Rise Institute of USA in his research that 2/3rd of Indian married woman surveyed between the age of 15-49 beaten by force to provide sex according to report of 2009 1/5th of the man surveyed said that they have forced their partners for sex according to the report of 2011. Section 375 of IPC has an exception that is an excuse for marital rape. This exception results

⁵ Pdfs.semanticscholar.org.

⁶ Supreme.justia.com

⁷ www.indialawjournal.org/archieve/volume2/issue_2/article-by_prinkya.html

⁸ www.indialawjournal.org/archieve/volume2/issue_2/article-by_prinkya.html

as to victimization of married woman for no reason other than their marital status⁹. As many people believe that’s how we are protecting the sanctity of marriage. However this type of sanctity violates married woman’s right to protect her body.

Violation of Article 14

Section 375 discriminate between married and unmarried woman as it protect an unmarried woman from any type of sexual abuse but it allows husband to do the same thing with his wife. According to the Harvard Human Right Journal, the discriminatory nature of law is the violation of Article 14. SC. in the case of **Buchan choudary v state Bihar**¹⁰ said that any classification made under the Article 14 of the constitution should be followed by reasonable nexus.

The exception 2 of section 375 thwarted the purpose of this section as exempting husbands from punishment is entirely contradictory to that object. Any kind of rape leads to same affects whether it is against a married woman or unmarried woman .This exception encourage a man to forcefully enter into sexual intercourse with their wives ,as they know that their act are not discourage or penalized by law . But no rational nexus can be depicted between the classifications created by exception and underlying the object of the act, thus it violates Article 14 of constitution.

Violation of Article 21

Article 21 of the Constitution enables an individual to enjoy its personal life and liberty. It has been held by Supreme Court that the Article 21 that is about right to life and personal liberty, include the right to health, privacy, dignity, safe living conditions and safe environmental among other.

In the case of **State of Karnataka v. krisnappa**¹¹- S.C. concluded that “*sexual violence is a sordid act which is an intrusion on the woman’s right of life and personal liberty*”. SC in the case of **Suchita srivastava vs. Chandigarh administration**¹²- S.C. said that right to life includes the right to make choices related to sexual activity with right to personal liberty, privacy, dignity and bodily integrity under Article 21 of constitution. **KS PUTTASWAMI VS UNION OF INDIA**¹³ – S.C. interpreted the right to privacy as a fundamental right of an

⁹www.indialawjournal.org/archieve/volume2/issue_2/article-by_prinkya.html

¹⁰ Casemine.com/judgment/in

¹¹ Casemine.com/judgment/in

¹² Uniteforreproprights.org/suchita_srivastava_anr_v_chandigarh-administration

¹³ Indian kanoon.justice-k-s-puttaswamy_uoi.org

individual under the Article 21 of constitution it contains the right to make intimate decision pertaining to the sexual intercourse.

Right to life also includes the right to live healthy and dignified life, it is not just related to right to exist. All these things suggest that rape is a violation of right to live with dignity that is Article 21 of constitution. So the things that are affecting the unmarried woman will also affect the married woman in same way. It suggests that any type of forcefully sexual intercourse is the violation of Article 21 of the constitution

Section 498(A)

In the year 1983 a new amendment were made to protect married woman from cruelty by her husband and relatives. The word cruelty means any willful conduct which is of such nature as it likely to derive the woman to commit suicide or to cause grave injury or danger to life, limb, or health of woman¹⁴. Central Government in the case of **RTI FOUNDATION VS UNION OF INDIA**¹⁵ – submitted that criminalizing marital rape may detest the institution of marriage. Deleting the exception (2) under the section 375 will not be useful as the man will be punished for rape under the section 375 of IPC. It cannot same in the case of marital rape.

It had been argued that Section 498(A) A and domestic violence act has witnesses a widespread abuse, as the study says that the most of the complaints that were filled by married woman under Section 498(A) and Domestic violence act were false. Research says that the women get misrepresented by policeman and lawyers to lodges a wrong complaint of dowry thus facilitating the myth that this provision is misused.

When an aggrieved woman approaches the police intimidate her to add the allegation of dowry demand by insisting that without it, it is not possible to register her complaints under section 498(A)¹⁶. Same thing was found in case of lawyers, when a aggrieved woman approaches to lawyer than they used to misrepresent her by saying that without filling case of dowry she will not be eligible for registering any complaint under Section 498(A).

SC. In case of **INDEPENDENT THOUGHT VS UOI**¹⁷ – concluded that any type of sexual intercourse by a husband with his wife below the years of 18 will be considered as criminal

¹⁴ Article_flavia_Agnes economic and political weekly june6,2015

¹⁵ SLA (civil) No. 23250 of 2008.

¹⁶ _flavia_Agnes economic and political weekly june6,2015

¹⁷ Writ petition (Civil) No. 382 of 2013

offence after this judgment any of the objection were not ascribed to government, it means that criminalizing sexual offence against the married woman below the age of 18 years will not diminishes the value of marriage and with other will break the institution of marriage.

India has not yet come up with any law that can criminalize marital rape in real sense.

Report of 172ND Law commission, VERMA COMMITTEE and Private member bill in context of marital rape

In 2015 private bill introduced in RAJYA SABHA sought deletion of exception 2 of section 375 of the IPC .In which KIRAN RIJUJU said, it is very difficult to explain and describe the marital rape as there is no measure available to define consent on marital rape .MR. RIJUJU further said that this bill have such compatibility to affect the sentiments of house. KIRAN RIJUJU was somehow correct on his statement as research says that situation of marital rape occur within the confines of the home and therefore are often no witness to the crime.

But on the basis of this statement we cannot neglect such issue especially when UN COMMITTEE ON ELAMINATION OF DISCRIMINATION AGAINST WOMEN recommended that Indian government should criminalized marital rape in India.

Justice VERMA Committee which consists of three members assigned to review sexual crimes also submitted its report in which it has criticized government, public and even police for its apathy and has recommended changes in laws related to rape¹⁸ . It recommended minimum punishment of 7year in case of acid attack on woman .It also said that marriage should be registered in presence of magistrate. Woman entitles life of dignity and security and woman should have right to save her autonomy. It had also found so many loopholes in the functioning of police and public servant in rape cases.

Parliamentary standing committee has observed that the entire family system will be under great stress if marital rape is brought under the law.

In case of **SAKSHI vs. UNION OF INDIA** ¹⁹, SC had directed to amend rape laws for this 172nd law commission has submitted its report in which exception to section 375 not deleted. Report said that marital rape has still not recognized in Indian legal system.

¹⁸ www.ndtv.com/recommendations_of_the_justice_verma_committee

¹⁹ Prsindia.org/tags/sakshi_vs_unoin_of_india

CONCLUSION

Marriage is a social contract that is perpetuating in our society throughout the past times. Wife is always considered as an asset of his husband, it means that husband has full domination on his wife. This type of mentality has given a rise to the new theory “*INSTITUTION OF MARRIAGE*” which says that any law which makes marital law as criminal offence will breach the institution of marriage.

Many laws in India has been taken from the British Common law which had not given woman as an independent legal identity²⁰. It renders marital rape as an general practice in marriage. Research says that both husband and wife believe that marital rape is acceptable. British common law had defined marriage as men’s right to sex²¹ may be that was the reason for the exception in case of forced sexual intercourse with wife in the section 375 of IPC.

Main reason behind the existence of marital rape in India is the financial dependency of wife on husband, social ideology, government and cultural practices in the country²². Section 375 of IPC has defined rape as the any type of sexual intercourse which includes force or threat to woman. The definition of rape has same affects to a married woman so it should also be applicable in case of rape to married woman. Supreme Court in many cases has determined rape is a violation of liberty, privacy and bodily integrity of a woman. It means it violate Article 21 of the Constitution. It also violates Article 14 of constitution. Supreme Court says that any type of classification should follow reasonable basis.

Exception in the section 375 discriminates between married women to unmarried women. It also made distinction of right of husband and wife. But the classification has no reasonable nexus; It means legality of marital rape is the violation of right to equality. Research has found that most of the cases registered under Section 498 of IPC was false but is also found that police and lawyers misrepresent brutally violated woman to file false case of dowry in Section 498 of IPC.

Marital rape was introduced in the parliament throughout the private member bill for this law commission has submitted his report and it has not given marital rape as recognition of

²⁰ Makkar. Sarthak, Marital Rape: A Non- Criminalised crime in India, Harvard Human Right Journal

²¹ Criminaldefencelawyer.com/resources/criminaldefence/crime-penalties/marital-rape.htm

²². Pdfs.semanticsholar.org

criminal offence. But some of the studies says that they have asked males, if they drug raped a girl and would not get caught would they do it, majority say yes .

Now it is confirmed if we have not make any law with proper implementation then we cannot preserve the idea of equality.