

AN INSIGHT ON DECRIMINALIZED MARITAL RAPE: A COMPELLING STATE INTEREST

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ABSTRACT

The non-consensual intercourse committed by the husband with his wife is termed as marital rape and has been creating turbulences in the recent times. Matters relating to marital rape has been taken to the courts and it has also become a recently and the It is said that married women has their rights and they do not cease to exist after marriage also coupled with the importance of consent of the married women because of which it has been vehemently advocated to criminalize marital rape. The issue has been raised that with the existing rape laws in India infringes the Right to Life of a married women as enshrined under article 21 of the Constitution of India and thus contends that it the protection given to the husband in the Indian Penal Code must be removed. But in this paper the proposition of compelling state interest has been brought into the picture in which a balance has to be met so that no party to the matter faces a loss which is irreparable. The consequences of criminalizing marital rape to the deterrence of the husband has been pointed out to present a comparison of the danger to the wife in the status quo and the danger which shall be caused to the husband if marital rape is criminalized. Therefore it is an endeavours to iron out the creases which may be caused if marital rape is criminalized and provides a instance that can curtail the right to life in the larger interest of the society.

INTRODUCTION

Rape is a word which when is head of creates a very vilifying and intimidating thought in the head which is generally thought to be done by a stranger. It becomes hard to believe that rape can be brought in the context of marriage. The issue regarding marital rape is gaining credence and has been point of discussion in several social and legal circles. In this age of consent women activist groups are a raising a crescendo to criminalize marital rape and remove the blanket protection given to the husband which is provided under Exception 2 of Section 375 of the IPC.

Education and exchange of idea of concepts in context with the salutary principle of denuding and neutralizing all sorts of gender biases and proving equality to the fairer sex is seeping in our country. Women are also getting educated, they are working in corporate sectors and have come to the front because of which they are recognizing their rights and liberties. But at the same time a nelson's eye cannot be turned on to the narrative of the Indian society where people believe that it is the obligation and duty of the wife to serve to the needs of her husband and because of which mostly such issues are not even reported. It is also necessary to understand that the women have been misusing the laws to the detriment of their husbands. So applying the same changes and developments within the context of marriage if not filtered, would lead to disastrous consequences and could result in the decimation of the societal structure. Therefore in the backdrop of the din so created it is appropriate in context of time and circumstances that we understand that if Art. 21 has any meaning which needless to say is the most essential right and other rights and liberties flow from it but can it be crystalized to such an extent that it results in destabilizing the institution of marriage?

As marital rape has become a matter of grave importance in the present times and the contention that has been raised that marital rape is violative of article 21 which entails numerous aspects of right to life such as liberty, bodily autonomy and privacy but in this paper it has been contended that even if Right to Life is constitutionally tenable it can still be curtailed for the larger public interest and protect the institution of marriage.

COMPELLING STATE INTEREST

The exception 2 Section 375 of I.P.C does not infringe upon the Right to Life of married women, which is enshrined under Art. 21 of the Constitution. As the Right to Life which includes numerous facets of dignity, autonomy and privacyⁱ and are not absolute as they can be restricted under compelling State interest.ⁱⁱ In the case of *Gobind v. State of M.P.*ⁱⁱⁱ the Court stated that the Right to Life includes dignity and it deserves to be examined with care and to be denied only when an important countervailing interest is shown to be superior, or where a compelling State interest is shown. Also art. 21 ensures that no person can be deprived of his life or personal liberty except in accordance with the procedure established by law.^{iv} The State cannot deprive a person of his personal liberty unless it follows a due procedure to that effect.^v

The procedure prescribed by law for the deprivation of law conferred by Art. 21 must be just fair and reasonable.^{vi}

When there is a conflict of Fundamental Rights, there is a balance that needs to be drawn between the two rights in question. Conflicts like these are inevitable where there is a clash between two Fundamental Right as Right to Life has vast horizons and they are bound to clash in the name of competing interest. The Court in such cases of clash between fundamental rights has a clear stance of balancing such rights. There needs to be a balance which ensures paramount collective interest that is larger public interest should be ensured.^{vii} To have such a balance, a formula has been laid down in which firstly the facts and the circumstances of both such violations are to be considered. Secondly, the competing interests are to be measured and thirdly a balance is to be sought to creatively interpret the violations by ensuring that none of them is completely made extinct.^{viii}

On this touchstone it has to be seen that when it comes to comparative rights, the Right to Life of a married women and the Right to Life of husband, it is imperative to compare both the sides and then strike a balance.

The Wife's Perspective

Marriage is an institution which presupposes the consent of the two spouses to live together and sexual intercourse is the basic ingredient of a happy marriage.^{ix} There is bound to be some friction. But never the less the same is not enough to dissolve the sacred bond of marriage,^x and to bring in criminality into marriage would be damaging. There is deep understanding, commitment, faith and trust which is the bedrock upon which marriages subsist. There are numerous times when on one side there is some disagreement and the other takes recourse to persuasion. Thus, at times being persuasive may not be misinterpreted on the touch stone of criminality. It is in this backdrop that it must be understood that having a healthy sexual relationship goes a long way in building a happy married life^{xi}, yet in instances of disagreement it does not necessarily makes the 'act' criminal. Having said that, it is not the intention to convey that in deserving cases that a person guilty of non-consensual sexual intercourse may go unpunished and thus the existing laws would provide succour to married women in distress.

The act of sexual abuse committed inside a marriage which is a domestic institution should not be termed as 'rape'. The Prevention of Women from Domestic Violence Act (PWDV Act),

refused to use the term rape for the act of sexual abuse against a wife. This clearly demonstrates the intent of the legislators that they did not want to term the act as rape inside an institution of marriage but still provided remedy for married women. In a relationship of marriage, if both the spouses have solemnized the marriage fully by their choice and by giving the consent to be married, it implies that the marriage includes an conscious decision to keep sexual relations with her husband as marriage without sex is insipid.^{xii} To this the Hon'ble Supreme Court in the case of *Vinita Saxena v. Pankaj Pandit*^{xiii}, while referring to the judgment of *Rita Nijhawan v. Balkrishnan Nijhawan*,^{xiv} where the Court observed:

“Marriage without sex is an anathema. Sex is the foundation of marriage and without a vigorous and harmonious sexual activity it would be impossible for any marriage to continue for long. It must be recognized that nothing is more fatal to marriage than disappointment in sexual intercourse.”

Before removing the protection granted to husbands, there is a need to look into the issue as a whole. A person when gets married be it wife or a husband loses his/ her right to perform the sexual act with anyone other than the spouse.^{xv} So when a person is getting married, he or she is giving consent to the spouse to have sex and if sexual assault is inflicted upon the wife then there are laws already in place.

There are two corresponding rights involved currently. On one hand there is a right to say no to a sexual intercourse to the spouse and on the other hand there is a right to have a conjugal relationship between the spouses. The two rights have to go hand in hand so that a happy marital relationship may sustain during the lifetime of the spouses but in no circumstance a husband should be branded as a “Rapist”. Any act or omission that has the capability to inflict harm, injuries or jeopardizes the health or has the tendency to cause abuse of physical, sexual, verbal and emotional in nature to the married woman then for this purpose section 3 of PWDV Act is provided. The meaning of physical abuse is defined as any act or conduct which has the ability to cause bodily pain, harm or danger to life or health. Also, sexual abuse is also defined as any conduct which is of sexual in nature that has the ability to abuse, humiliate, degrade or violate the dignity of a woman.^{xvi} Looking at the penal and relief aspect of the matter then the PWDV Act provides that the magistrate after giving a fair chance of hearing to both the aggrieved person and the respondent and then if the Magistrate is satisfied on a prima facie level that a

case of domestic violence could be made out then he would pass an order in favour of the aggrieved party for protection from any act of domestic violence or aiding any act of domestic violence.^{xvii} It is also provided that protection order, interim and monetary reliefs are passed for recourse and if there is non-compliance on part of the husband then he shall be booked with imprisonment which may extend to one year or with fine which may extend to twenty thousand rupees or both.^{xviii} A husband or someone who is the relative of the husband inflicts cruelty on the woman, shall be punished and will attract imprisonment for a term which may extend to a maximum period of three years and shall also be liable for fine.^{xix} The meaning of cruelty for the purpose of this section is that any wilful act which is of the nature that can drive the women to commit suicide or cause grave injury or danger to life or to mental or physical health,^{xx} and it also includes harassment of the women where such an act is done to coerce her or any person who is related to her to achieve or meet unlawful demands.^{xxi} So there are sufficient laws existing in the current legal framework and the married woman has remedy available to her if she is sexually abused by her husband.

The Husband's Perspective

Assuming a hypothetical situation that if the exception 2 Section 375 of the IPC is held to be violative then this would have far reaching implications on the lives of the married couples and the institution of marriage as well. The fundamental wrong that the State would commit would be that it will interfere in the private lives. Moreover, privacy includes the preservation of personal intimacy, the sanctity of marriage life.^{xxii} Now in such private matters, if the wife initiates a criminal proceeding against the husband, it would be extremely difficult to test the veracity of the statement or allegations made by the wife.^{xxiii} It would be mired with a lot of imponderables as it would be difficult to weigh the evidence and this puts the husband in grave danger and he would be left to unfathomable injustice. The essential element which is required to constitute a crime is *Mens Rea*,^{xxiv} and in the absence of which, it not constitute a crime. *Mens Rea* which means guilty mind,^{xxv} is the mental element which determines that whether the intention was there to commit a crime or not and just the presence of *actus rea* will not constitute to a crime.^{xxvi}

If an illustration is drawn in which a husband asks his wife to have coitus with her and the wife at first instance denies it, but later the husband coaxed the wife and she submits for the act. It is important to point out that there is a difference between consent and submission^{xxvii}, a

submission is not consent but giving a consent includes submission.^{xxviii} The wife has the sexual intercourse with her husband after being coaxed or persuaded but later the wife after having the intercourse initiates a criminal proceeding against her husband for the offence of rape. The husband did the act of sexual intercourse with no Mens Rea or with no intention to commit rape with his wife because he had persuaded the wife and the wife's submission to the mind of the husband is perceived as a consent which is a result of the persuasion. But in no way it can be said that the man had an intention to commit rape with her wife and thus the husband cannot be charged for the offence of rape. In another scenario where the husband forces himself upon the wife and uses means like physical abuse to get the wife to have sexual intercourse with him, this would have the element of Mens rea and here the intention is present and for punishing the husband for such an act the existing laws are enough to provide remedy under PWDV Act and in section 498-A of IPC.

It also has to be seen that in such cases where a wife accuses her husband of rape and a matter of sexual intercourse between two spouses, which would in all probabilities occur inside four walls which implies that there will be no third person which means that there would be an absence of evidence and because of this it would be extremely difficult to make out an offence under Section 376 of IPC. In the case of *Nathunath v. State of Rajasthan*,^{xxix} where a minor girl was raped and there was no legal evidence to connect the accused with the rape. In another case where the accused was alleged to have kidnapped and raped the prosecutrix and there was no evidence to show that the accused had forcibly taken her from her parent's house and no reliable evidence produced to establish that at relevant time.^{xxx} In another case the accused was charged for committing rape but there was no evidence on record to show and prove that there was penetration.^{xxxi} In all these cases the Court absolved the accused because of lack of evidence. Under Section 114-A of Indian Evidence Act, it is given that if a woman files a case of rape, there will be a test to check whether there was a penetration or not and if yes, the woman has to say that she did not give her consent, then the whole blame shifts on the man to prove that he is not guilty. It is already a known fact that many laws and provisions in India are misused but the act does not carry any checks and balance and any stringent punishment for the person who misuses the law. But the gravity at which the matrimonial laws, and Rape laws are being misused has become a matter of concern and the judiciary has shown concerns by laying down guidelines in *Arnesh Kumar v. State of Bihar*,^{xxxii} and *Rajesh Sharma & Ors. v. State of UP*^{xxxiii}. The history of such grave misuse of laws which curtails the right to life and

liberty of the husband and also affects the entire family. Section 114-A of Indian Evidence Act states that only a testimony given by the wife, the husband can be put behind bars or alternatively he is pressurized for huge sums for out of Court settlements, therefore such laws have become a sword rather than a shield. Thus, by removing this exception 2 of Section 375, the sword is likely to become more disastrous. Also, the charges of rape do not come alone even if they are false, they bring along social stigma and taboos that get attached to the name of the husband.^{xxxiv} The propensity of rape laws to be misused is high and if the exception is removed it will act as if the dam of protection to man has broken down and the water of false accusations against men would flood in. So when such is the scenario where misuse of law especially the rape laws is easy and already a matter of great concern and by criminalizing marital rape it will add up to more misuse of law and this will render the husbands in a detrimental position where they would not have any recourse and would face grave injustice. This right in itself is the gift of law and may by law be forfeited or abridged.^{xxxv}

Therefore, in this light where criminalizing marital rape will amount to violation of one's right to dignity that will be tarnished if the husband will be dragged to Court for raping his wife which might be a frivolous case to begin with as the tag of a "rapist" attracts a lot of social stigma. Even if the husband gets absolved of the rape charges, it will still damage the position of husbands to the extent that the damage would be irreparable. Thus, on these multi-dimensional levels of problems the husband will face that will arise because of criminalizing marital rape would put the husbands in a detrimental position and they will face the most amount of injustice and his right to life will be violated. Moreover if we see that on the other hand if the right to life of the wife is being violated it can still be curtailed under the exception of compelling State interest^{xxxvi} because the wife still has laws to protect herself. So, in such cases where two corresponding Fundamental rights are existing then the Constitutional Courts need to weigh the balance in the interest of society as a whole, which will promote and instill the rule of law.^{xxxvii}

CONCLUSION

The fact that other countries which includes mostly western nations have recognized marital rape as a crime does not mean that India should also criminalize marital rape and follow other

nations blindly. It is integral for us to look into the social fabric and structure of India as this country has unique problem like lack of literacy, lack of financial independence of women or wife for that matter, patriarchal mindset of the society, vast diversity, poverty, etc.^{xxxviii} and these should be considered before criminalizing marital rape. The criminal law falls under concurrent list,^{xxxix} and are implemented by States. There is vast diversity in terms of culture and mindset of people in different States. It is necessary to know the opinion of the State government in such matters so as to avoid any complications at later stage. As the Hon'ble Apex Court recently decided the matter of Sabrimala Temple where the Court permitted the entry of women in the temple.^{xl} The judgement with all due respect was just and aimed to recognize the rights of women but still women themselves are not willing to enter the temple and a few who entered are being condemned and are being ostracized by the society. Sometimes the things are right and are they should be done but in respect to the time and circumstances they are not appropriate and hence should not be done. Therefore, criminalizing marital rape cannot be construed in isolation. It has to be fully comprehended with keeping in mind its nature and impact, every legislative provision must be understood as a discourse about social structuring.^{xli} It has to be seen from the prism of preservation of social subsistence of relationship specially marriage which has very deep and wide ramifications regarding not only the two spouses but also the children born from the wedlock and the families of the two spouses. Therefore, the endeavour should be to save and preserve the existing social values which includes the institution of marriage and for some deviant behaviour new law should not be given birth which would extrapolate to be counterproductive and which would lead to more destruction and mischief rather than the elusive object which is sought to achieve.

If the Courts where the problem of marital rape has been raked up holds the exception to be unconstitutional and remove the protection given to the husband then the amount of injustice the husbands will face would be a damage beyond repair. As married woman would have laws to still protect them but husbands will have nothing and will be rendered remedy less. Therefore if the court criminalizes marital rape and exception is removed then it would be detrimental for the husbands and it would lead to an alteration in the IPC and that would be rendered counterproductive.

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