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LawPublicus calls for research papers, articles, short notes, book reviews & case commentaries, that are distinctive and unpublished.

With this thought, we hereby present to you

LawPublicus The Legal Portal

Is Marital Rape a Crime or Not?

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Is Marital Rape a Crime or Not?

By: Kajal Tyagi and Harneesh Kaur

INTRODUCTION

Marriage is said to be one of the most sacred oaths in a religious country like India. It is not only used by the men to abuse their wives physically and psychologically but it also provides them with an excuse to exploit their wives without their consent as stated in the exemption of section 375. This section exempts the marital rape of the wife who is above 16 years old as it is considered a private matter between the couple. Nobody, not even the same women try to think about the pain of those women who are forced against their will for sexual intercourse just to please their husband as it is considered one of the duties of the wife.

Our constitution does give the right to life and personal liberty in which the right to life ensures not only mere right of life but also a life with dignity and meaning but when the women are forced by their husbands, they are deprived of this right forcefully so as to satisfy the pride of the man.

On the one hand, section 13 (2)(ii) of the Hindu marriage act provides that not until the wife is under the age of 15 years she is not to be entitled to a divorce and will only be allowed divorce if she is forced and is under the fear of her life or the limbs; and on the other hand, it says in the same section but in sub-clause 1, it says that the divorce can be proposed by the wife if she is subjected to cruelty either mentally or physically.

The section above contradicts itself in more than one ways as it says that divorce can be allowed if the wife is subjected to cruelty and at the same time it also suggests that a wife cannot get a divorce if she is forced by her husband and is above the age of 15 years.

So this poses a question that if a girl or woman is above the age of 15 years then she is not allowed to divorce if she is forced by her husband as it is presumed that she is not forced by her husband. Why not think about the pain and torture she has to suffer just because she is treated as a trophy of some kind which gives the men the pleasure of being in charge as no matter how they abuse their wife in the name of marriage no one is going to say anything as it is a matter of the married couple.

And this is not the worst part, the worst part is that the women who suffered the abuse of their husband do the same to their daughter-in-law and train their daughters to be the same when they get married. This is the harsh reality of today's society which only knows to follow the customs from the past without questioning them whether they are in accordance to today's generation or not; and whether they are going to impact the future generation positively or negatively.

Well, now that we have completed the practical part, let's see the legal parts of the topic which will show us what the laws and our legal system say about marital rape.

MARITAL RAPE – IN THE LAWS

When we hear the word rape, we subconsciously think that the one perpetrator is a stranger but due to the thinking of society, we not even once try to think that that perpetrator might be a husband who forcefully raped his wife.

While the **legal definition** varies, **marital rape** can be **defined** as any unwanted intercourse or penetration (vaginal, anal, or oral) obtained by force, the threat of force, or when the wife is unable to consent.

This not only shows that marital rape differs based on the perpetrator but it also differs based on the sufferings of the victim.

THE CONSTITUTIONAL VALIDITY OF MARITAL RAPE

The crime of marital rape is not only against a woman but also against society as it does not affect only a single household, it affects all the women living in the society, no matter the status or job or any other thing which differentiates them. They are all the same women. We can see the example of perfect equality in the articles of the constitution which not only states that everybody is equal before the law but also provides that the law is greater and above anything else no matter he/she is of rank or post.

1. Article 14 of the Indian Constitution reads as:

“The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”

This article prohibits discrimination. It provides for equality before the law.

Marital Rape is violative of Article 14 of the Indian Constitution. The exception of Marital rape immunizes husband's action against their wives. Exception (2) of Section 375 protects unmarried women from those acts while victimization of married women continues.

2. Section 375 of IPC, 1860:

The main purpose of this section is to protect women and punish those people engaging in this inhumane activity of rape. The Criminal Amendment, 2013 doesn't state why there is the exclusion of 'marital Rape' in this section. Since this section is based on consent. It is always considered as the implied consent between husband and wife. It is also irrefutable that because of this exception (2) many married women are victims of marital rape and don't have any legal remedy. Exempting the husbands from the punishment is contradictory to the objective of this section. The consequences of the rape should be similar whether the woman is married or unmarried.

However, a specific form of marital rape is criminalized that is the non-consensual sex between husband and wife while they are living apart on account of judicial separation or otherwise. Section 376 B deals with this kind of situation.

3. Section 376B of IPC¹ states:

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

¹ Indian Penal Code (IPC) Section 376-B. Sexual intercourse by husband upon his wife during separation.; see at <https://tilakmarg.com/acts/indian-penal-code-ipc-section-376-b-sexual-intercourse-by-husband-upon-his-wife-duringseparation/#:~:text=%E2%80%944Whoever%20has%20sexual%20intercourse%20with,and%20shall%20also%20be%20liable>

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.

CONCLUSION

From all the above knowledge, it makes it pretty clear that marital rape should be legalized in India as only 36 countries are there in the world which have yet to legalize marital rape, and if India plans to become a developed country that can stand tall no matter the situation then, it is the duty of the country to treat the women as human beings not as some mythological goddess or some kind of belief to worship them. They just want to be treated as human, not like some kind of monument on display.

We should seriously think about the lives of our daughters and wives and start to think about what would make them happy not about what would the others think or say as no matter what the others say or think does not matter what matters is that the family of a person should support a person no matter what his/her decision is in their life which can make them happy.

This will not only help improve the thinking of the people but will also allow the women a chance to speak for their freedom and happiness in front of anyone.

So, have the courage to speak for yourself so that others can start thinking what you want might be right if you want something desperately and try to prove yourself right not for others but for yourself so you can stand proudly in front of the people who once mocked for standing up for yourself.

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