

THREATENING THE SACRED INSTITUTION OF MARRIAGE- CRIMINALIZATION OF MARITAL RAPE IN INDIA AND ITS SOCIETAL IMPLICATIONS

Abstract

Rape, to be more specific marital rape is not a novice in the class; it has great history which is parallel to the existence of humans in the society. Its criminalization will hit the institution of marriage, the so called institution which forms the base of the superstructure of family. Hinduism even call marriage a sacred union of the male and the female granting it the status of a sacrament rather than a mere contractual relationship. However in today's progressing system, this sacred union is under the threat of being destructed by the fatal blows in the form of criminal law amendments. The art of criminalizing any act no doubt acts as a bliss for a section or a class but it does have a curse for others. One such example being the recent debate on the issue of criminalization of marital rape in India, which no doubt will benefit the female sect of the society but which will lead to great distress in the society but giving fatal blows to the essential institutions of the marriage as well as the institution of family. The argument might seem bit male dominant, but this is the sad and the harsh outcome. India being called "Mother Of Democracy" in the world, has had innumerable provisions which are women centric and women centered. No doubt the criminalization of marital rape will add more to this list but at the same time will cause billions of loss to it by shaking the underpinnings of the Indian society. The future course however seems blurry considering the recent judicial pronouncements and existing legal provisions on the same. The study is here to unfold the entire concept of marital rape(

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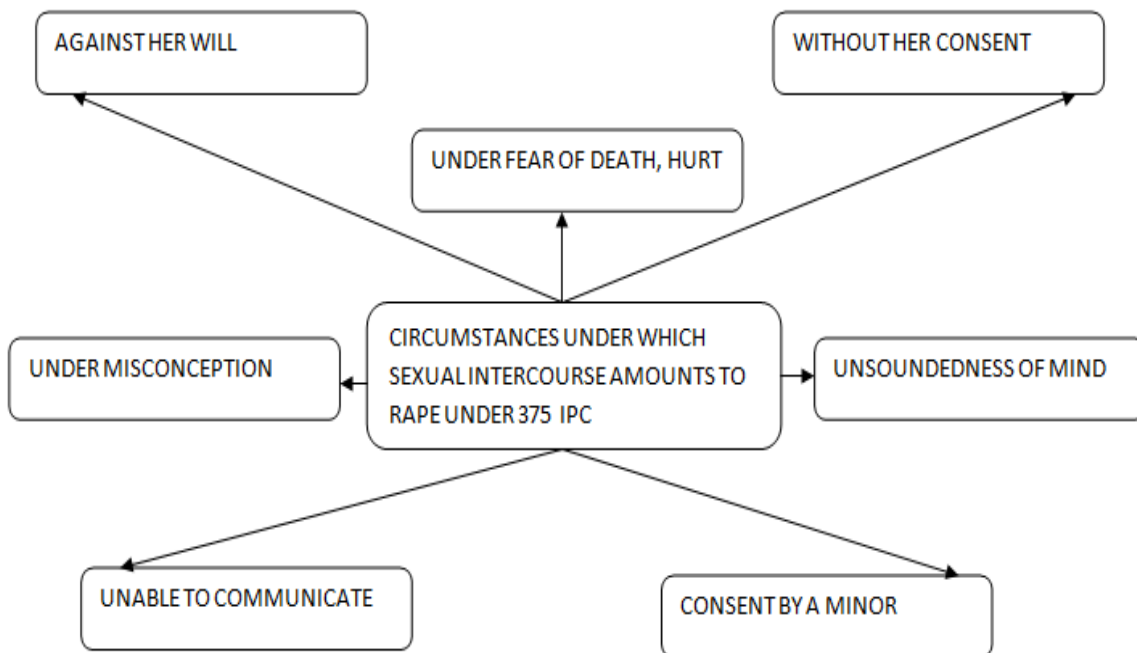
as to what it actually is?), classification of it, expected impact on the society and what is judiciary's take on the same.

Keywords: Marital Rape, Constitution, Indian Penal Code, Criminal Law Amendment, Section, Male dominant, Marriage, Family, Law.



I. INTRODUCTION

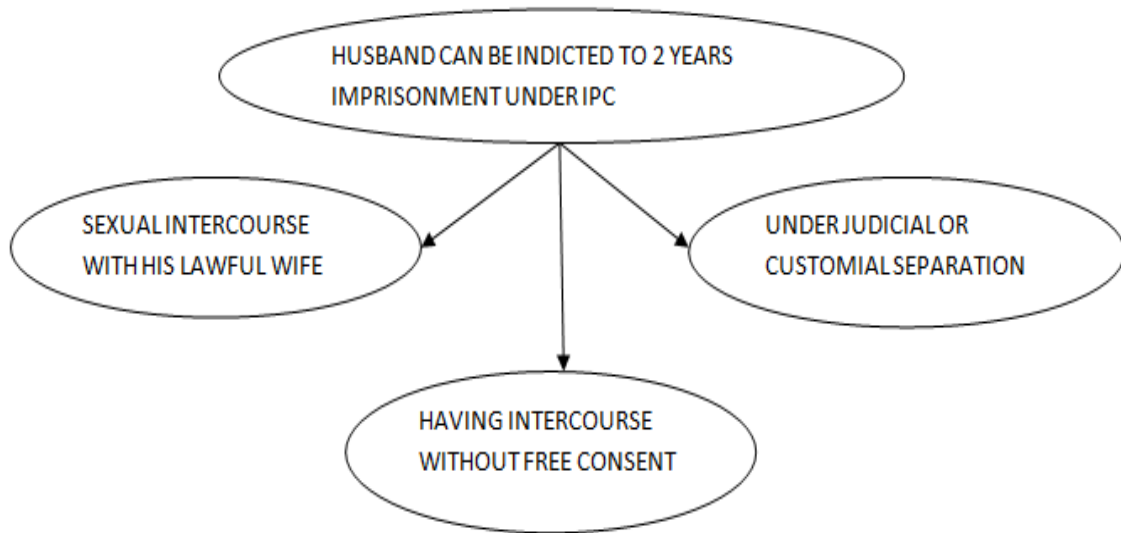
The story begins with the term Rape which is an offence against the body, recognized and made punishable in the Indian Penal code. It is such a heinous crime that it has been penalized in all the countries of the world with most stringent punishments ranging from death penalty to life imprisonment. It is commonly signified as the harsh ravishment of a person against his or her will that is by the use of force, fear, undue influence. So it can be said that rape is the extreme violation of the private person which can more appropriately be called an outrage. The term Rape as used in IPC basically restricts it to be an offence which is done by a man as against women. There are several characteristics which have been added to the definition of rape, which infact make it a fulfilled offence calling it the most heinous offence against the females. The term Rape and its constituents have been defined in section 375 of Indian Penal Code. Crux is that sexual intercourse by a man with a woman against her will and without her consent under seven circumstances.



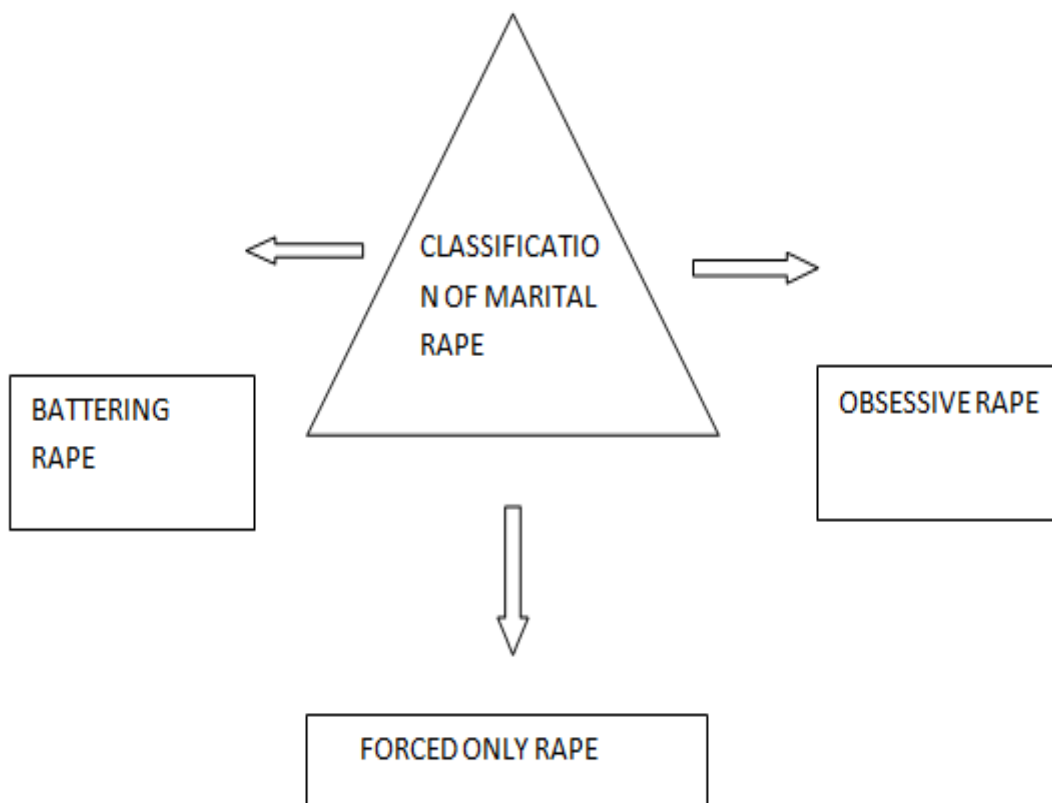
In all these circumstances the sexual intercourse will amount to rape. To be more specific sexual intercourse by a man against a woman combined with above mentioned specifications amount to rape under section 375 IPC. Now the concept of Marital Rape is required to be explored so that a line can be drawn between concept of Rape and that of Marital Rape. The term marital rape though not explicitly defined in the law, it has a mention in the exception to section 375 of the Indian Penal Code, 1860. From where it can be inferred that the unwarranted or forceful intercourse by the husband upon his wife and that too without her free consent is what amounts to marital rape in India. Exception two to section 375 IPC states that sexual intercourse by a man with his wife, the wife not being under fifteen years of age, is not rape. This simply means that a woman becomes the personal chattel of a man as soon as she gets married, hence she can not in any situation refuse to have sexual intercourse with him. This is basically based on the ancient Indian perspective where woman

before marriage is considered a personal property of her father and after her marriage gets vested in the name of her husband.

The basic idea of marital rape has three instances in Indian penal code namely



This concept of marital rape is wide and marital rape itself has been classified into three types namely – Forced only rape, Battering Rape, Obsessive Rape.

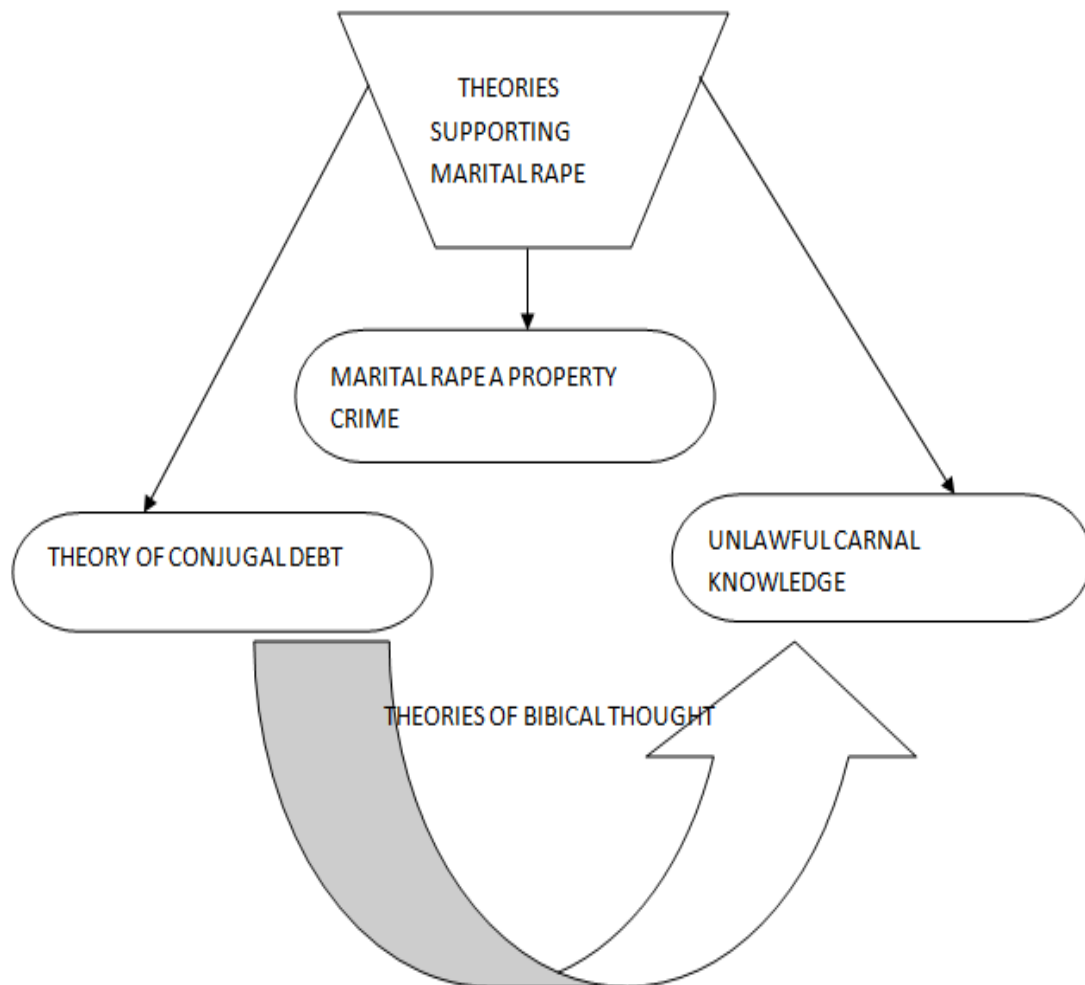


II. HISTORICAL BACKGROUND

It is immensely important to have a look on the historical aspect so as to make it clear as to what are the roots on which this entire structure of marital rape is built upon. The historical aspect of marital rape is as old as human history and existence of the institution of marriage in the society. It was back in 1900 BCE wherein Babylonia there was a common notion that a daughter or wife is a property of father before marriage and a property of husband after marriage hence making rape an exclusive crime of property either against the husband or the father.

III. HISTORY IN ENGLAND

The exemption as to marital rape is the gift of common law, to be more particular it is the sole contribution of Sir Mathew Hale of England as he held that husband can not be held guilty of rape upon his wife as wife hath given herself unto him, hence she losses all her rights to resist. Thus the immunity has been granted to rape being committed in the marriage even without the consent of women. This notion however is based on three theories namely theory of conjugal debt, theory of calling marital rape a property crime, theory of unlawful carnal knowledge.



These theories in one way or the other provide justification for granting an exemption to marital rape as it states any carnal knowledge outside the marital relationship as unlawful and carnal knowledge within marriage as lawful hence providing justification to man's sexual intercourse upon his wife. Thus the concept has been widely accepted and adopted all around the world. This notion was granted judicial and legislative recognition around the world including major countries namely- America, Australia, Canada, England, and Scotland.

IV. HISTORY IN INDIA

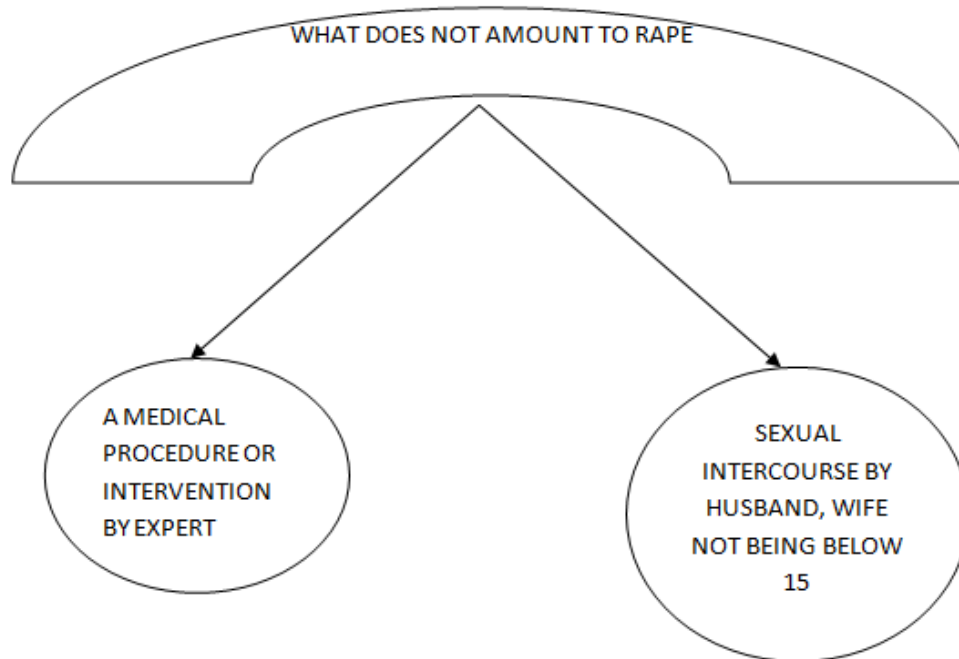
The history of marital rape in India is very old as the ancient Indian thought does not support the criminalization of marital rape because as per Hindu law marriage is a sacrament and both the spouses have counter obligations which they cannot get rid of at the behest of any legal provision. Religion and guarding personal laws have always been the talk of the town in Indian society as any change with regard to personal laws has the potential of creating an earthquake in the entire system of Indian society. As we know our institutions of marriage and family have always been the subject matter of personal laws in India, hence it requires great caution in its regulation. Hence it is not possible to raise the issue of criminalization of marital rape easily which directly pose a threat to the sacred institution of marriage. Even Indian judiciary has refrained from making any law on the same as there is danger of getting the freedom of religion violated.

However the Supreme Court has called it as a deathless, shameful act which amounts to the most ruthless offence against the dignity of humans. In Mandy Boardman case of 2013 it was stated that law holds really important place in the criminalization of rape. The case raises the importance as to how family stands in the resolution of any kind of violence between the spouses, be it sexual or mental.

It has been claimed in Indian system, that marriage is a private institution, so this marital association does not affect the right to privacy of the spouses. It is often claimed that women have always been at the forefront of discrimination and exploitation but it can be learned from the experience of judicial pronouncements that women today is not less than men in any aspect that too in the Indian society. Indian judiciary and legislature has even went to the extent of making comprehensive laws which are women centric in nature. Judicial pronouncements even established principles to provide shelter to the women who face the warmth of the society. Let us consider the judicial pronouncements in this regard to delve deep and see as to how marital rape no longer is required to be criminalized.



It was in the year 1975 when in *Tukaram v. state of Maharashtra*, supreme court said that if a woman does not resist from rape or sexual intercourse that will be considered as consent. But this decision was not considered appropriate and to clear the clouds the explanation two to section 375 was explained and it was held it is important to first know as to what does not amount to rape.



In *Sakshi v. Union of India*, 2004, it was held that a man is not under any circumstances be allowed to cause threat to his wives dignity. Hence, he is not allowed to threaten her so as to make her engaged in the sexual intercourse against her will.

Similarly in the case of *Independent Thought v. Union of India*, 2017, and in *Nimeshbhai Bharatbhai Desai v. State of Maharashtra*, 2018, it was held by Justice J.B.Pardiwala, that the wife has a complete identity of her own and she is not a mere chattel of her husband, hence he when in a marital relationship does not use her as her personal property. He is obliged to fulfill his obligation of respecting the dignity of other human being.

So the Supreme Court of India has described it as the deathless shame and the gravest crime standing against the dignity of a human in the society.

Even the Law Commission of India in its 172nd report though refrained from commenting on the deletion of exception 2 to section 375 IPC stating that the same has the potential of creating mayhem in the society and destructing the institution of marriage. It was however stated that exception 2 of section 375IPC is violative of the article 14 claiming right to equality. Supreme Court at times has even claimed that right to life under article 21 includes the right to privacy, right to sanctity of females and right to make preferences as to the sexual intercourse.

V. CURRENT SCENARIO

The Supreme Court in *State of Karnataka v. Krishnappa and The Chairman, Railway v. Chandrima Das*, held that rape is an offence which stands against the humans as violative of their basic human rights. It states further that it acts as an unethical and illegal interference with the sanctity of others.

Furthermore, the Supreme Court in *Puttuswamy v. Union of India and The State of Maharashtra v. Madhukar Narayan*, held that sexual privacy stands as the basic fundamental being implicitly made a part of the right to privacy in the Indian constitution.

The Supreme Court in *Navtej Singh Johar v Union of India*, held that it is the duty of the court to break all the stereotypes against women in today's developed society as women are equal citizens in all spheres of life. It is further held that the judiciary is doing great to grant recognition to that aspect of women's life where their compromise is considered beyond any remedy.

In *Independent Thought v. Union of India*, held that criminalizing marital rape with a girl below eighteen years of age is a major step to protect her as it will grant recognition to her basic fundamental rights.

Most recently the Supreme Court in *Hrishikesh Sahoo and State of Karnataka & Ors, slp, 2022*, wherein the Karnataka High Court allowed the prosecution of a man raping his wife, is an evidence of the judiciary's encouraging behavior where it feels the need.

Former Supreme Court Judge Deepak Gupta in an online lecture on developments in fundamental rights in the last decade on criminalizing marital rape held that no to sex means no and it is a simple argument.

So from all these plethora of judgments it can be concluded that the judiciary has done a lot to preserve the sacred institution of marriage and family. No doubt, it has provided punishment in various cases however it never aims at causing distress to the society at large by criminalizing marital rape in India. It is somewhat clear from all the above judgments and provisions that marital rape should not be criminalized as far as today's society is concerned.

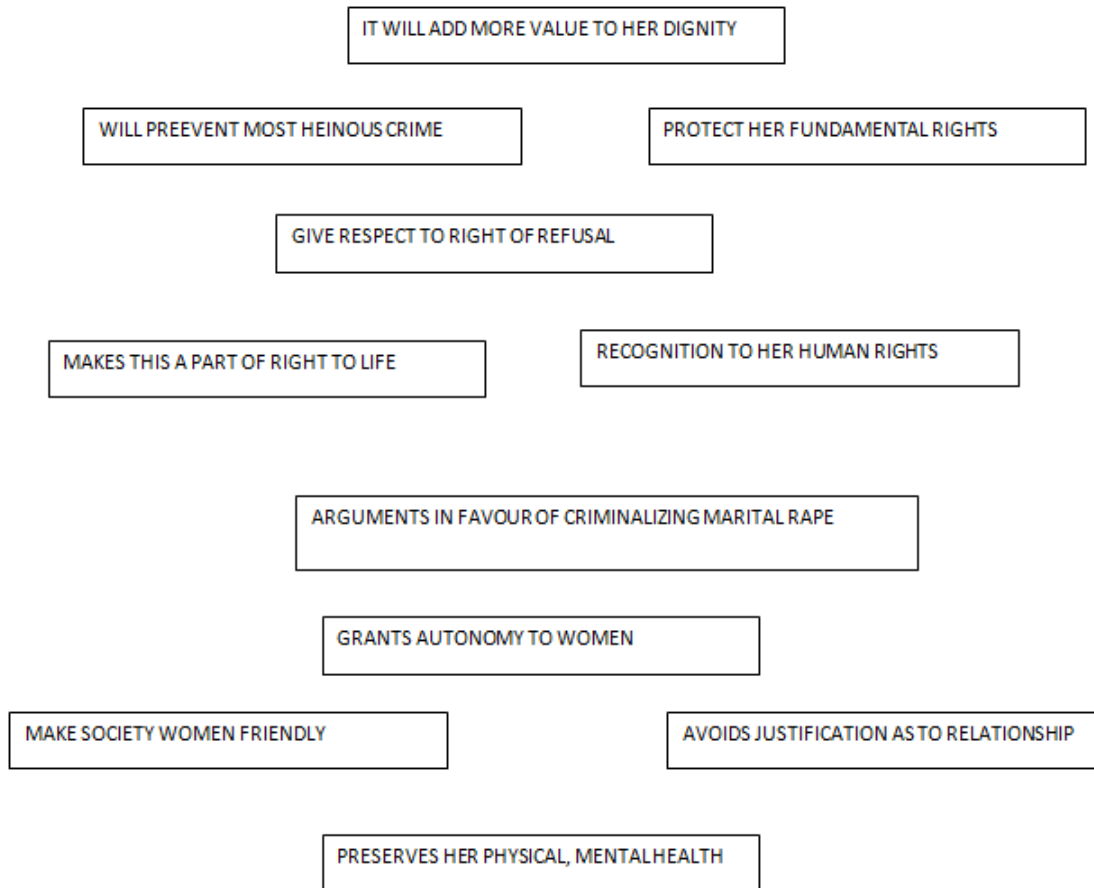
VI. ARGUMENTS IN FAVOUR

Marriage not a license- supporters say that marriage is not a license to do whatever one wants, so the husband does not get any right to coerce his wife.

Ensures protection of her fundamental rights- it states that marital rape is violative of article 14 and article 21 of the Indian constitution hence, it must be criminalized.

It renders section 375 IPC meaningless- it is often claimed that exception 2 is anti-main text of section 375 IPC, as 375 can not by any means achieve its aim by exempting husband from punishment.

Stand against men centric ideology and society- it immunizes men from actions their spouses and hence promote more violence in the society.



VII. ARGUMENTS AGAINST CRIMINALIZING MARITAL RAPE

The union government claimed that criminalization of marital rape will hit hard the institution of marriage and the institution of family in the society.

It will create anarchy in the state and the basic fundamentals underpinning our society will get shook.

It will not be that easy for women to report the same, it can even cause more threat to her security.

It is very difficult to know whether the sexual intercourse was consensual or not, so it can create problem.

It is nearly impossible to prove the consent of the parties to their sexual intercourse.

It will lead to birth of more new offences in the society, which will inversely impact the young generations to come.

The children of any such marriage can have a scar on their psyche because of their father being convicted of such an offence.

VIII. CONCLUSION

Thus, it can simply be stated that no doubt , there are still some issues which are being faced by women in their day today life. However the criminalization will not take all the sins away, as if it is done, it would shake the underpinning of our society that is the institutions of family and marriage. No doubt, there is great need to recognize the grievances of women, but from the above discussed things it can be claimed that Indian government and all its organs have performed immensely in doing away with the curses against women in the society. The promising nature if Indian legislature and judiciary makes it crystal clear that condition and status of women is on the rise and will continue to be so in the future as well. Let us establish our trust in such prestigious institutions of our nation , so that they leave no stone unturned in brandishing their efforts in this direction and that too without causing any loss to the society at large.

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