



## MARRAIGE, A LICENSE TO RAPE

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### Abstract

Section 375 of Indian Penal Code defines Rape, "A man is said to commit "rape" if he—

- A. penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
- b. inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
- c. manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any of body of such woman or makes her to do so with him or any other person; or
- D. applies his mouth to the vagina, anus, and urethra of a woman or makes her to do so with him or any other person,

Under the circumstances falling under any of the following seven descriptions:—

First. — against her will.

Secondly.—without her consent.

Thirdly.—With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly.—With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he

is another man to whom she is or believes herself to be lawfully married.

Fifthly.—With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome Substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.—With or without her consent, when she is under eighteen years of age.

Seventhly.—when she is unable to communicate consent.

Explanation 1.—For the purposes of this section, "vagina" shall also include labia majora.

Explanation 2.—Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1.—A medical procedure or intervention shall not constitute rape.

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.

From the above definition of rape defined in section 375 of Indian Penal Code we could clearly conclude that for sexual intercourse by her husband without the consent of wife is an exception of Rape under section 375 of IPC.



Consent is one of the major component of rape which forms the Fundamental Rights of women regarding sexual intercourse and any decisions regarding their body and if after marriage all such rights of women are taken away then the marriage itself is violation of fundamental Rights given in Constitution Of India.(Article 14 & 21).

This paper discuss that any forceful sex without the spouse consent will be considered as a rape and it also talks about, "Should Marital Rape be a Crime or not".

### Introduction

Rape is one of the most heinous and shameful crime that can be done by any human to other being. In all over the world it is considered as the most heinous and serious crime which are being controlled by various strict laws and punishments. Crime against women is very common all over the world especially in India.

Country like India where women are considered as 'Devi', incarnation of goddess but still the biggest irony is that in every 2 minutes one case of crime against women is reported in India according to National Crime Record Bureau.<sup>1</sup> These are the ones which are reported.

India has the lengthiest Constitution and thousands of statutes and Acts governing every kind of crime but still neglects the very basic crime of Marital Rape which not only harms women physically and mentally but also affects her pride and dignity which are her basic necessity of life protected by Article 21 of Indian Constitution.

Indiana University Press, 1990 had reported that, "more than 1 in every 7 women who have been married has been raped in their marriage" According to United Nation population fund more than two-thirds of Marital women aged between 15-50 in India have been subjected to forced sex, beaten, tortured along with a demand for dowry.

Many countries have enacted marital rape laws, repealed marital rape exceptions. Recently Indonesia and Turkey have criminalized the marital rape in 2005 and Mauritius and Thailand in 2007. Criminalization of marital rape denotes that it is now recognized as a violation of human rights.

It has been estimated that, marital rape is a punishable offence in at least 100 countries where India is not one of them. Plenty of legislations and enactments regarding dowry, cruelty, domestic violence female infanticide have been regarded as violence against the women.

Criminalizing the Marital rape was the suggestion made by the Verma Committee, which had suggested amendments to India's sexual assault laws. The Protection of women from Domestic Violence Act, 2005 has created a good remedy for various victims but the Act has failed to criminalize the Marital Rape. The law had ignored a huge violation of fundamental right of freedom for any married women, the right to her body or to protect her from any abuse. Various legal framework and different perceptions on the Marital Rape have been analysed further. The main aim of the study is to analyse why the

<sup>1</sup> Chaitanya Mallapur, Crimes against women reported every two minutes in India, Scroll. In, (5<sup>th</sup> Sep, 2015, 9.30 pm), <http://scroll.in/article/753496/crimes-against-women-reported-every-two-minutes-in-india>



Marital Rape in India have not been Criminalized.

### **Research Problem**

Research Question: Should Marital Rape be included in penal laws in India?

Problem: Consent regarding sexual intercourse even after marriage.

Comparison: Comparative study between India and other Countries

Outcome: To provide awareness regarding Marital Rape

### **Objective of Study:**

- To learn about Marital Rape
- To know the status of marital rape in Indian penal laws.
- To identify marital rape as a form of rape in Indian Penal Laws.
- Comparative study between India and different Countries.

Hypothesis:-

HO: Marital Rape is an exception of rape in Indian Penal Code.

HA: Marital Rape is not an exception of rape in Indian Penal Code.

### **Marital rape:**

Marital rape is where both the parties are legally wedded and wife is forced to have sexual intercourse with his husband without her consent which is not considered a crime in India.

India is a secular country where people of every religion reside but even though in any religion or personal law there is no concept of marital rape. Hindu marriage is considered a sacrament not a social contract which is conducted by various rituals and is

considered to be as one of the sixteen “Samskar”.<sup>2</sup>

From ancient to Modern times there has been a lot of development in personal laws in India, like of Divorce. In ancient times there was no such concept of divorce, it was advised that if anything happens between the husband and wife they should solve it between themselves and shall not disclose anything about their relationship outside the four wall boundaries of their bedroom but with further development Divorce is one of the major rights of women after marriage.

Marital Rape on the other hand has not been recognised even in the 21<sup>st</sup> Century its status is same as that of ancient times this is due to the lack of awareness about such sensitive but important issue.

Now the question is whether the sexual intercourse happen without the consent of wife should be considered as rape? According to me it shall not be considered as in every condition its scope should be narrower as it is not possible every time that both the parties are in mood of sexual intercourse but even though they agree and give consent against their will so that it does not hurt the feelings of the other partner but where the sexual intercourse is done by abusing the wife physically or mentally or use physical force or become violent in refusal to sexual intercourse then it should be considered as crime and he should be guilty of marital rape.

So Penal laws regarding marital rape should be flexible and not so rigid it should have narrower scope and should vary from case to

<sup>2</sup> Justice M. Rama Jois, Legal and Constitutional History of India, 247, Universal Law Publishing Co., (7<sup>th</sup> ed, 2010)



case. Marital rape is violation of fundamental rights given by Constitution of India under Article 14 & 21 i.e. Right to Live with Dignity, Marital Rape robs them of that dignity and it harms them both physically and mentally which infringement of their right is.

### **Reasons for not including Marital Rape as a crime**

There are many reasons for not consideration of marital rape as a crime. The one of the major reasons is the patriarchal society there has been many development regarding gender equality and feminism but even in a country like India man is still dominating women in marital relations. In such condition it is difficult to reform such laws and recognition of women's rights regarding marital rape.

Constitution of India provides various rights like Article 14 and 21 which are very essential for living a good and healthy life and when such rights are infringed in any way it is the duty of the government and judiciary to protect such rights. In cases of marital rape Government is failing miserably, after Delhi Rape Case Justice J.S.Verma Committee Suggested to include marital rape in section 375<sup>3</sup> of IPC but government of India did not put any serious thought in it.

Thus, Indian law gives a license to husband to rape his wife by providing specified exceptions to section 375 of IPC so that is why even if a wife files a complaint against her husband he will not be charged of any crime. In many research it has been proved

and found that women in India whether she is literate or not is subject to marital Rape. In one of the survey conducted by National Family Health Survey<sup>4</sup> in the year 2005-2006, which was conducted among 124,385 women in 29 Indian states, found that 10% of the women reported that their husbands had physically forced them to have sex. In another study conducted by the International Centre for Women (ICRW) and United Nations Population Fund's (UNPFA) across seven states in India covered 9,205 men and 3,158 women aged 18-49 from each state in which One-third of the men interviewed admitted to having forced a sexual act on their wives.<sup>5</sup>

Even after having such a strong data and research report Indian Government is not considering the plight of the women just because of the losing of his power in Patriarchal Society.

"For generations, women have been given in marriage. Once married she is viewed as property that belongs to her husband and his family. A woman's right to her body is not recognized," says Ranjana Kumari of the Centre for Social Research.<sup>6</sup>

Marital rape is considered as a criminal offence in about 52 countries, including the United States, the United Kingdom, Canada, and France and neighbouring Bhutan.

According to Advocate Vrinda Grover, "Whenever there is a movement to increase a woman's access to justice, people who are afraid of women being empowered start talking about the misuse of law."<sup>7</sup>

<sup>3</sup> K.D.Gaur, Textbook On The Indian Penal Code,642, Universal Law Publishing Co. Pvt.Ltd,(4<sup>th</sup>.ed., 2009)

<sup>4</sup> Id.

<sup>5</sup> Id.

<sup>6</sup> Poulomi Banerjee, When no is not an option: Marital rape denies right over her body, Hindustan

Times,( May 25<sup>th</sup> May, 2015 ,1:40 am), <http://www.hindustantimes.com/india/when-no-is-not-an-option-marital-rape-denies-right-over-her-body/story-MJ3OIHpn9mtVfC3AXbbWOP.html>

<sup>7</sup> Id.



According to Frederika Meijer, UNFPA representative<sup>8</sup> "When women experience coercion and violence within relationships, it violates their fundamental right to live in safety, security and with dignity. An intimate relationship, particularly marriage, should be a space of mutual trust and respect."

Somewhere from this discussion we find that as India is a male dominating country, so if Marital Rape is included as Crime under section 375 of IPC then in that case, male will lose their power over women, which they don't want and that is the only reason for not including Marital Rape as crime.

Right to live with Dignity, are basic Human Rights of every human being irrespective of their sex both in India as well as in International Human Rights Law. And nobody has the right to curtail this right on the basis of sex, race, religion etc. But unfortunately repeatedly, Indian Government and Judiciary had failed to protect this right for women when question come of Marital Rape?

### **Interpretation of section 375 of IPC**

Section 375 of Indian Penal Code defines Rape, "A man is said to commit "rape" if he—

- A. penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
- B. inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
- C. manipulates any part of the body of a woman so as to cause penetration

*into the vagina, urethra, anus or any of body of such woman or makes her to do so with him or any other person; or*

- D. *applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,*

*Under the circumstances falling under any of the following seven descriptions:—*

*First. — against her will.*

*Secondly — without her consent.*

*Thirdly.— with her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.*

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<sup>8</sup> Id.



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*Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.*

*Exception 1.—A medical procedure or intervention shall not constitute rape.*

*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.”<sup>9</sup>*

Under section 375 exception no.2 IPC husband would be guilty of rape if the wife is 15 years of age or below, but there is no protection for a married women whose age is above 5 years or major, which is the most common scenario in modern time as child marriage is already an offence in India. Another important point to consider is that although marital rape is not recognised or mention in any Indian penal law but exception no.2 of 375 of IPC is similar to marital rape with a limitation of age. It also shows the biasness of law which only provides the protection for a particular group of women and which needs to be updated to current conditions. This kind of law which provides immunity of rape to husband shows that women does not have right over her on body and will which is a clear violation of fundamental rights and these law needs to be modified.

## **Comparative study between India and USA regarding marital rape**

### **Marital rape in USA**

Marital rape in USA is also known as spousal rape where the perpetrator is a victim spouse it is a form of partner rape and domestic violence and as of today all 50 states of USA has criminalised marital rape.

History of USA before 1975 has not witnessed any concept like marital rape but after several large movements regarding women’s right after 1993 USA started taking the case of marital rape more seriously. Since 1993 all 50 states of USA have enacted laws against marital rape almost all states have same laws regarding marital rape but only two states have slight difference in their laws, those two states are South Carolina and Virginia. In the South Carolina the marital rape should be reported within 30 days of event and in Virginia provides for marital or personal counselling in lieu of court proceedings.

### **Marital Rape in India**

Penal laws in India are such which does not considered marital rape as a crime. Indian Penal Code section 375 exceptions 2 clearly states that “sexual intercourse by a man with his own wife, the wife not being under 15 years of age is not rape”. In Saretha V. T. Venkata<sup>10</sup> Subbaih<sup>7</sup> case, it was held that, rights and duties in a marriage, is like a creation and dissolution and not the term of private contract between two individuals. The right to privacy is not lost by marital Association. Hence there is no punishment for marital rape and the remedy lies with her.

### **Role of Judiciary**

<sup>9</sup> Universal Criminal Manual, 547, Universal publishing house Pvt. Ltd, ISBN: 9788175349193.

<sup>10</sup> AIR 1983 AP 356



The need for a new law on sexual assault was felt. The earlier law which prevailed did not define and reflect the various kinds of sexual assault. In *Sakshi v. Union of India*<sup>11</sup>, the Supreme Court had recognised the inadequacies regarding the law relating to rape and had suggested that the legislature should bring about changes in the law.

After passing the criminal law amendment bill, 2013 rape was redefined as the most horrific events where the parliament by an amendment tried to enlarge the ambit of rape and the perception by making oral and anal acts as amounting to rape.

The Domestic Violence Act, 2005 has provided various civil remedies and various provisions such as the cruelty and other matters are dealt under. There are large number of victims under the marital rape scenario is being increased but the legislature is ignorant to criminalize such an offence. The women are ignorant of what the actual scenario is and the laws which are prevailing in the Indian penal code for them. The Judicial decision of *Queen Empress vs U P Bhowari* and *Haree Mythee*<sup>12</sup>, it was held that, the wife over the age is of 15, and then the rape law does not apply in that situation. In this case the husband was punished because wife was of 11 years only. In the Kerala High Court, *Shree Kumar v. Pearly Karun*<sup>13</sup>, it was observed that, the wife does not live separately with the husband under the Judicial separation and being subject to sexual intercourse without her will the act does not amount to a rape. Hence, it was said that, the husband was not found to be guilty

of raping his wife though he was de facto guilty of doing or committing the act.

As per the Constitution of India, every law which is passed must be in conformation with the principles and ideas which are enshrined in the constitution. Any law which has been made failed to meet its required standards are considered to be ultra virus and it can be struck down or to be declared unconstitutional. Here, the exemption of Section 375 withdraws the protection of married women on basis of her marital status. Recently, the Supreme Court took another opportunity to inform the subordinate Court and high court that despite stringent provisions for rape, many courts in the past have taken a softer view while awarding punishment to perpetrators of such a heinous crime. The judicial trend, the court stressed, exhibits stark insensitivity to the need for proportionate punishment for perpetrators of rape<sup>14</sup>. This has warned them to be cautious as false charges of rape, motivated by personal or economic gains, are not uncommon. Persons accused of these kinds of sexual assault also need protection from the false or engineered accusation of rape loaded with ill-motives or designs<sup>15</sup>. False allegations of rape, like a rape victim, cause a great distress, humiliate and damages to the accused.<sup>16</sup> Rape, being a monstrous burial of dignity of a woman in the darkness and a crime form the court and the courts are bound to respond, within the legal parameters, to the demand. It is a demand for justice and award of punishment has to be in consonance with

<sup>11</sup> AIR 2004 SC 3566, 2004 (2) ALD Cri 504.

<sup>12</sup> (1890) 18 Cal 49

<sup>13</sup> 1999 (2) ALT Cri 77, II (1999) DMC 174

<sup>14</sup> *Shimbu v. State of Haryana* AIR 2014 SC 739, (2014) Cr LJ 308 SC

<sup>15</sup> *Radha v. State of Madhya Pradesh* (2007) 12 SCC 57, 2007 Cr LJ 4704 SC

<sup>16</sup> *Narendra Kumar V. State (NCT of Delhi)* AIR 2012 SC 2281, (2012) 7 SCC 171, (2012) Cr LJ 2033 SC



the legislative command and the discretion vested in the court.<sup>17</sup>

### **Conclusion**

From the above research we can conclude that Indian Judiciary, Legislature and Executives all have failed to provide proper protection and remedy to women regarding marital rape which still makes the women a property of husband who can exploit and use them without any consequences. Though if a husband is violent and have sexual intercourse without consent, he can be charged with criminal assault but not with marital rape as there is no law present in our penal laws. This prima facie violets Article 14 and 21 of Indian Constitution. Non-criminalisation of marital rape shows that India has a long way to go to achieve gender justice and equality.

My only suggestion is that it is 21<sup>st</sup> century and a new decade and India is almost a developed country so it is a high time to include such crime which has been neglected for so long into our legal system.

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<sup>17</sup> Shyam Narain V. State NCT of Delhi AIR 2013 SC 2209, (2013) Cr LJ 3009, (2013) 7 SCC 77.



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- MARITAL RAPE: WHETHER MARRIAGE IS A LICENSE TO RAPE? Through this paper I am going to highlight the negative impact of law on wife for not considering marital rape under section 375 of IPC and its suggestions.

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