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MARITAL RAPE- IMPORTANCE OF JUDICIAL INTERVENTION**INTRODUCTION**

Even as we celebrate 74 years of Independence, the women in our country are yet not truly free and independent. They still live under the realm of darkness and fear. It is indeed a shady reality of India. Marriage is a bond between two souls where they promise each other to treat the other with love, affection and humanity. Both the partners involved share consent to have a right on each other. But this right has been misinterpreted for a long time now. Marital rape is defined as any undesirable sexual act by a spouse or ex-spouse, committed without consent or against a person's will, obtained by force, or threat of force, intimidation, or when a person is not able to consent. In proper perception, the husband cannot be held guilty of raping his wife on the basis of implied matrimonial consent to cohabit. As stated by *Justice Arjit Pasayat*, "*While a murderer destroys the physical frame of the victim, a rapist degrades and defiles the soul of a helpless female.*" However, despite of the increasing number of cases of marital rapes rapidly in our country, marital rape is still not defined in any statute or law.

RAPE LAWS IN INDIA

Section 375 of the Indian Penal Code defines rape as "*sexual intercourse with a woman against her will, without her consent, by coercion, misrepresentation or fraud or at a time when she*

*has been intoxicated or duped, or is of unsound mental health and in any case if she is under the age of 18."*¹

The section states that if a man commits any of the following acts will be found guilty under this act:

1. If a man has sexual intercourse with the women against her will or without her consent.
2. With her consent, when her consent has been taken by putting her or any person in fear of death or hurt, in whom she has a relation or interested in.
3. When the man already knows that he is not her husband, and the consent has been obtained because she believes that he is another man to whom she believes herself to be lawfully married.
4. At the time when the consent is obtained, if the women is under the influence of intoxication or by the reason of unsound mind in which she was not stable from her mind to give consent for the sexual intercourse.
5. With or without consent, when the age of the girl is under 16 years.

The law has been effective in the rape cases when the rapist is an stranger to the victim but there is exception in the section which is the major reason of the rapid increase of marital rape cases in India.

Exception to the Section 375, states that if a sexual intercourse has happened between a husband and his own wife, who is not below the age of 18, then it does not amount to sexual assault. The main loophole in the exception is that the consent of the partner doesn't matter here.

SITUATION IN INDIA

In India the concept of marital rape is the essence of what we call an "implied consent". *Marriage between a man and a woman here implies that both have consented to sexual intercourse and it cannot be otherwise. In the 42nd Report by the Law Commission², it was recommended that if the man had sexual intercourse with his minor wife then the criminal liability should be attached. But in the same statement committee refused to the recommendation which stated that when the wife attains the maturity then the husband cannot*

¹ Rape laws in India

<https://indiankanon.org/doc/623254/> (last visited on 24th July 2021 at 11:32am)

²42nd report by law Commission

<https://lawcommissionofindia.nic.in/1-50/Report42.pdf> (last visited on 24th July 2021 at 2:15pm)

be held liable for raping his wife, because they believed sex is the parcel of the marriage. Further, the addition of Section 376A IPC in 1983 stated that rape with the legally separated wife will be criminalized.

There are many NGO and Social activists which tries to help out women who are suffering through marital rape and they also consults Domestic Violence Act, 2005 but are still unsuccessful to prove marital rapes as a serious crime.³

Domestic violence in India is still an ineradicable problem. About 70 per cent of women of our country are still victims of domestic violence. National Crime Records Bureau's (NCRB) 'Crime in India' 2019 report⁴ was vexatious. In India, as per the report, in every 16 minutes a new woman is raped and in every four minutes she has to face cruelty by the in-laws.

An analysis of National Family Health Survey (NFHS) 2015-16 data⁵ indicates that an estimated 99.1% of the sexual violence cases are not reported and the average women of India is seventeen times more likely to experience sexual violence from his own husband rather than others.

In the world almost 150 countries have declared and recognised marital rape as a crime but India is still ineffective and is one of the 36 countries where the marital rape has yet to be declared as a serious crime. In 2013, the UN Committee on Elimination of Discrimination Against Women (CEDAW) advised the Indian government to criminalize marital rape⁶. After the Nirbhaya gang rape case in 2012, the JS Verma committee set up in the aftermath of nationwide protests also suggested to recognise and consider marital rapes as a serious crime⁷.

AGAINST CONSTITUTIONAL AND LEGAL RIGHTS

³ The Protection of women of domestic violence Act, 2005 (last visited on 24th July 2021 at 5:45pm)
<https://indiankanoon.org/doc/542601/>

⁴ NCRB 2019 Report (last visited on 25th July 2021 at 11: 10pm)
<https://ncrb.gov.in/sites/default/files/CII%202019%20Volume%201.pdf>

⁵ National family health survey 2015-16 (last visited on 25th July 2021 at 10:30am)
<http://rchiips.org/NFHS/NFHS-4Reports/India.pdf>

⁶ CEDAW (last visited on 25th July 2021 at 1:00pm)
https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/Ind/INT_CEDAW_NGO_Ind_17515_E.pdf

⁷ JS Verma committee (last visited on 25th July 2021 at 5:32pm)
<https://prsindia.org/policy/report-summaries/justice-verma-committee-report-summary>

1. **Violation of Article 14:** Everyone is equal before the law and within the territory of India. Marital rape is the absolute reason of the violation of the fundamental right as per the Article 14 of the constitution of India.

In the cases of marital rape, an exception is created which divides women in two classes, as per their age and marital status. It results in the weakness of women in front of their own husband as the husband doesn't even need consent of his wife because of the marital status.

2. **Defeats the motive of Section 375 of Indian Penal code:** The whole motive behind making of Section 375 of IPC is to protect the integrity of women and punish all those people who are part of the inhumane activity called rape.

- However, it becomes contradictory when the husbands forcefully have sexual intercourse with his wife, without her consent and are exempted from the punishment for the heinous activity. The consequences for the woman are same mentally and physically whether she is married or not.
- Moreover, it is more difficult for a married women because she is tied with the incapability of the laws which are not capable of providing justice to her and she has to go through this abuse daily in her married life.

3. **Violation of Article 21:** According to the Article 21 of the constitution of India no person shall be deprived of his life or personal liberty except according the procedures stated by law. The article ensures every citizen to live a healthy and a life full of integrity and respect. Here are the cases that accepted the crime of domestic violence and gave rights to women to make choices in sexual intercourse under right to privacy but yet marital rape is not considered as crime.

- In the case **Suchita Srivastava v. Chandigarh Administration**⁸, the judgement of the Supreme Court equated the right to personal liberty with making choices related to the sexual intercourse under article 21 of the constitution of India.

⁸ Suchita Shrivastav VS Chandigarh administration (2009) 14 SCR 989, (2009) 9 SCC 1 (last visited on 25th July 2021 at 8:00pm)

<https://indiankanoon.org/doc/1500783/>

- In the case **State of Karnataka v. Krishnappa**⁹, the Supreme Court stated that the sexual violence being an heinous act is an illegal intrusion of the right to privacy and integrity of a women. In the extent of the same judgement, it was held that, sexual intercourse without the consent amounts to physical and sexual violence.

In the above judgements of the Supreme Court has observed and recognized that all the women have right to abstain from sexual activity, irrespective of their marital status, because it comes under the purview of Article 21 of the Indian constitution.

INTERNATIONAL SCENARIO

The idea of marital rape in international context has developed over a period of time. In the year 1932, the first nation which took initiative and criminalized marital rape is Poland and many nations over a period of time followed this good initiative. Today almost 150 countries in the world take marital rape as a serious crime and this is a reason of great concern that India is not a part of it. The developed and powerful countries like China, USA, Australia, Japan, France and many more have considered and recognised marital rape as a serious crime. *In 1993, it was declared that any violence against women, including marital rape was recognized as violative of women's Fundamental Human Rights provided to her under international laws in the U.N Declaration on Elimination of Violence Against Women (DEVAW)*¹⁰. After its immediate adoption general assembly requested all the member nations of the UN to work and initiate a policy for the protection of women as soon as possible. DEVAW norms are not binding but they have very high persuasive value.

⁹ State of Karnataka VS Krishnappa AIR 2000 SC 1470, (2000) 4 SCC 75 (last visited on 25th July 2021 9:00 pm)
<https://indiankanoon.org/doc/635584/>

¹⁰ UN declaration on elimination of violence against women (last visited on 25th July 2021 at 10:00pm)
<https://www.ohchr.org/en/professionalinterest/pages/violenceagainstwomen.aspx>

REASONS WHY INDIA IS STILL BACK

The reason behind the marital rape yet not recognised and accepted as a serious crime in India is high illiteracy rate, poverty, religious beliefs and the sanctitude of marriage. These offences reinforce the man's "ownership" rights over the wife. Refusing to criminalize marital rape is just equivalent of accepting that sexual coercion against a woman, so long as it is within a marriage, will be endorsed by both government and society. If the control has to be given to the women of their own lives, then, they must have the right to say 'no' to their husbands without being penalized for it socially. The myth of the 'conjugal right' and the 'duties of wife' must come to an end because marital sex, like all other sex, must be with mutual consent.

Till the date, the best way in which law has protected woman being a victim of marital rape is by charging the husband with a offence of cruelty, which is very minor in front of this heinous crime. The punishment under which is three years of jail or a fine. In worst cases, she can seek protection and restraining order under domestic violence legislation. Its high time for our country judiciary to make our laws capable for making women stand as equivalent to man before a marriage or after a marriage.

CONCLUSION

By passing the much-needed legal reform, the judiciary in India can show the path towards equality by encouraging women to stand up for their own rights and immediately report a FIR against the violation they have faced and to bring a change in the view of the society about marital rape. It can be interpreted that making changes in the law of sexual offences can be sensitive and formidable task, and more so, in the country like India, where there is a synchronous presence of a varied and differentiated system of personal and religious laws that might come into conflict with the new amendments in the statutory criminal law so there is also a need to educate the masses about this crime and make them understand and accept the intensity of crime rather than their orthodox beliefs, as the real objective of making people see marital rape as a serious crime can only be achieved if the society accept and challenge the prevailing myth that rape by one's spouse is inconsequential.