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# Marital Rape - Is it Rape?

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## ABSTRACT

***“I truly believe the only way we can create global peace is through not only educating our minds, but our hearts and our souls”- Malala Yousafzai***

*Women and men are the same human being with some different body structures and biological organs. This biological difference creates a great disparity towards women because of our patriarchal mindset and societal pressure. This disparity compelled women to become the vulnerable group in the society withholding physical and mental torture, domestic violence and victim of the most heinous crime rape. Our Indian Penal Code, 1860 penalize act against women through different sections. Almost every crime against women are penalized there in Indian Penal Code, 1860 except one of the brutal crime i.e., **Marital rape** which has no existence in our Criminal law system. Though in actuality it is widely pervasive in our Indian Society. The crime being not criminalized in our Indian legal system has become an opportunity for the offender. In our Indian society being married to man totally means the girl became woman who is an object or property for the man or to her husband. This article gives an overview of status of marital rape in our Indian society.*

## I. INTRODUCTION

The definition of rape provided under Section 375 of Indian Penal Code, 1860 which covers all forms of sexual assault involving non-consensual intercourse with a woman or against her will, or consent by coercion, misrepresentation, fraud or at a time when she has been intoxicated or duped or is of unsound mind and if she is under 18 which covers punishment as well enshrined under section 376 of Indian Penal Code<sup>2</sup>. While Exception 2 of Section 375 exempts non-consensual, unwilling or any kind of sexual intercourse between a husband and a wife over fifteen years of age from Section 375's definition of "rape" and thus provides immunity to these kinds of offences. At present, a wife has to give perpetual consent to have sex with her husband after entering into marital ties. In this 21<sup>st</sup> century where unwilling or sex between a husband and a wife is admitted as a criminal offense in almost every country of the world, India is one country in the short list of among 36 countries in the world who have not criminalized

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<sup>1</sup> Author is a student in India.

<sup>2</sup> S. 375 & 376, Indian Penal Code, 1860

Marital rape<sup>3</sup>.

## II. NON CRIMINALIZATION & STATUS OF THIS CRIME UNDER INDIAN CRIMINAL JUSTICE SYSTEM

As per National Crime Records Bureau's (NCRB) 'Crime in India' in the year 2019 has increased at so higher pace that 70 % of women in India are victim of domestic violence. According to National Family Health Survey (NFHS) 2015-16 data indicates that about 99.1 per cent of sexual violence cases go unreported and that the average Indian woman is 17 times more likely to face sexual violence from her husband than from any other. In this era of women empowerment and women specific laws it is really scary and oppressive thinking with the Indian legal system that marital rape is perfectly legal. The act of forcing wife into having sex without proper consent, is absolutely an unjust, unethical abnormal way to degrade self- dignity of woman.<sup>4</sup>

The JS Verma committee set up in the aftermath of nationwide protests over the December 16, 2012 Nirbhaya gang rape case had also recommended to criminalize this offence<sup>5</sup>. Our constitution provides equal protection of law under article 14 and personal liberty or right to live with dignity and right to privacy under article 21 which are our paramount fundamental rights but exception 2 of section 375 of Indian Penal Code is violative against these rights. It discriminates between married and unmarried women. In the landmark judgement of *Justice K S Puttuswamy (Retd.) V Union of India*<sup>6</sup> Supreme court clearly said forced sexual cohabitation is a violation of decisional privacy in one's sexual or intimate relations. This point must be decoded at broad level.

In a survey conducted by an NGO – **RTI Foundation**, found that every 1 in 3 married women in India is subjected to marital rape. It a huge statistics which is heinous at the same time still the law remains silent.

## III. RECENT BROAD APPROACH BY KERALA HIGH COURT

A division Bench of the Kerala High Court held marital rape a ground for divorce. The hon'ble

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<sup>3</sup> Anusha Agarwal only 36 countries have not criminalized marital rape, India is one of them, The Leaflet, November 2, 2020.

<https://theleaflet.in/only-36-countries-have-not-criminalised-marital-rape-india-is-one-of-them> retrieved on 15-04-22

<sup>4</sup> The impunity of Marital rape, The Indian Express, 20 Dec 2020 10:37:07

<https://indianexpress.com/article/opinion/columns/the-impunity-of-marital-rape> retrieved on 15-04-22

<sup>5</sup> Nagendar Sharma, New Delhi, Hindustan Times, Jan 6, 2013 11:40 PM IST

<https://www.hindustantimes.com/delhi/finally-justice-js-verma-panel-to-decide-on-marital-rape/story-OA8DchmKvtNXWNSTy3eWUK.html>

<sup>6</sup> Justice K S Puttuswamy ( Retd) V Union of India (2017), AIR 2017 SC (4161).

court observed that treating a wife's body as something owned by the husband and committing sexual acts against her will is nothing but **'marital rape.'**

The Bench comprised of Justice A. Muhamed Mustaque and Justice Kauser Edappagath further observed that just because the law did not recognize marital rape under penal law, it did not prohibit the court from recognizing the same as a form of cruelty to grant divorce. Hence, marital rape was a good ground to claim divorce.

The court further opined that sex in married life was the reflection of the spouses' intimacy. In this particular case, the wife was subjected to sexual perversions against her will. A spouse in a marriage had a choice, a choice not to suffer, which was fundamental to the autonomy guaranteed under natural law and the Constitution. Law could not compel a spouse to suffer against his or her wish by denial of divorce by the court. The court said the licentious conduct or disrespect of bodily integrity by husband over wife is totally violative which diminishes the privacy as well which is very well connected to individual autonomy.<sup>7</sup>

This step by Kerala High Court is highly commendable and has given a ray of hope to stringent laws against this brutal crime. This will also encourage the women who are enduring mental and physical trauma still not raising their voice.

#### **IV. IS THE DOCTRINE OF COVERTURE PREVAILING OVER FUNDAMENTAL RIGHTS OF WOMEN?**

Law of coverture or doctrine of coverture – as per this doctrine a wife had not separate legal identity after marriage which is even given to a company in this 21<sup>st</sup> century. the 19<sup>th</sup> century reform has repealed the dominion of husband and submission of wife rule as per the conventional view but in reality it is still rooted in the archaic provisions of criminal legal system.<sup>8</sup> In the landmark judgement of decriminalizing adultery and only keeping this as a ground for divorce in *Joseph Shine V Union of India*<sup>9</sup> the Hon'ble Supreme Court took a very liberative approach and criticized the law based on doctrine of coverture according to which women as the personal property of men after marriage losing her individualism and individual legal identity. In the subject of marital rape this old doctrine has still the dominion existence and is still prevailing and snatching away the fundamental rights of every married women in

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<sup>7</sup> Poulomi Ghosh, Marital rape good ground to claim divorce says Kerala High Court, 6 Aug 2021 5: 11 PM IST <https://www.hindustantimes.com/india-news/marital-rape-good-ground-to-claim-divorce-says-kerala-high-court-101628251397471.html>

<sup>8</sup> Taiwo Ojoye, PUNCH, The Common Law Doctrine of Coverture, 26 August 2018 <https://punchng.com/the-common-law-doctrine-of-coverture>

<sup>9</sup> Joseph Shine V Union of India, 2018 SC 1676.

India.

## **V. CONCLUSION WITH FEW RECOMMENDATIONS**

**“Empowered women who reach tough or unconventional positions make choices, not Sacrifices”- Kiran Bedi.** In India we have many stringent laws regarding crime against women specific like Section 354, 375, 376 of IPC, Dowry prohibition act and many more though the crime are still happening but women have faith & right to go for seeking justice and when justice prevails the offenders are punished several times but when it comes to marital rape our law not recognize it even as crime. Rapes must be considered as rapes either to unmarried women or to married women by their husband only. We cannot deny the fact that there may come some false allegations against the husband as well but this cannot be an excuse to snatch the rights of majority of women victim. We must acknowledge it as a crime and amendment in section 375 of Indian Penal Code, 1860 is need of the hour just to avoid any kind of discrimination or inequality against wives. Marital rape is a huge stigma over one of our most organic and lively fundamental right that is right to live with dignity enshrined under article 21 of our Indian Constitution. Being Unequivocal and limpid the amendment must carry laws regarding Marital rape as well as rigorous Punishment can be incorporated against the false allegations made towards innocent accused i.e., husband. First and foremost all we need to come out with novation of thought that once a girl is married she becomes the self -acquired property of her husband. Our societal mindset needs to get rid of regressive orthodox thinking and stop objectifying women on the basis of patriarchal norms. We need the modification of laws but our thinking 1<sup>st</sup>.

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