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## MARITAL RAPE: DEFACTO NOT DEJURE

### MARITAL: AN INTRODUCTION

As we know the RAPE is the gravest kind of sexual offence against the women and the offence of rape directly affects the human right of the women and creates the inequality in the society. It is a social as well as politically burning issue in the society.

Marital rape or spousal rape is one of those heinous crime which directly harms the human dignity, freedom and it is also comes in the ambit of Domestic violence. Marital Rape is the silent tortured to the women because that broke women psychologically, mentally and emotionally in the same way the Rape does. Literal meaning of marriage is formal union of the man and women by the virtue of it they became husband and wife. The basic meaning of the Rape is forceful sexual intercourse. By the evolution in time this offence is came up as “Sexual Violence”.

The two terms came into existence by the doing of the forceful sexual intercourse with their own wives. These terms are “Marital Rape” and “Spousal Rape”. But the definition of the forced sex may not be considered as act of the criminal behavior.

The concept of rape, as recognized by the majority of laws, but it also revolves around the patriarchal value system. Represents traditional ideas of chastity, virginity, and marital relationships, as well female sexuality as a source of dread the statutory concept of rape in most countries is limited to non-consensual or forced vaginal penetrations, and it excludes a specific category of males – husbands, who cannot be charged with raping their wives<sup>1</sup>.

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<sup>1</sup> Dr. Vandana,” Marital Rape- Exemption under Indian Penal Code: Quest for Recognition and Liability”, ILI Law Review, vol 2 (2017)

In the other words we can define the forceful or unwanted sexual intercourse with their own wife when she does not give any consent for that sex or penetration. Or the consent of the wife is not a free consent or it may be obtained by the threat, assault.

But the marital rape does not come in the ambit of the rape. As per the definition of the rape it can be said that a woman cannot be rape by their own husband. But unfortunately, the huge numbers of the women are the victim of the marital rape and some of them keep their mouth shut because of the narrow-minded society. And some are not aware about the fact that it is a kind of rape and called as marital rape.

From perspective of the author martial rape is a gravest crime like rape because getting married does not mean the man got the license to rape their wife or they can make physical relation with his wife whenever and where ever they want because for having a healthy sex it is necessary that there is a willfull consent of both the parties. Also, if a women is a wife of a man it does not means she is his sex toy. Or she is his slave so she will do whatever she is asked for. As the article 14 the constitution of India grants equal status to everyone.

There was a greater emphasis around the turn of the century on improving the nation's physical condition and minimising the causes of abnormal mortality among the younger people. One of the MLA, requested for permission to bring a Bill in the Assembly in the year 1922 to rectify section 375 of the Indian Penal Code by raising the age of consent in both married and extra- marital instances.<sup>2</sup>

## **ARTICLE 14 OF CONSTITUTION EQUITY BEFORE LAW**

The state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.<sup>3</sup>

From the above given article, we may conclude that the constitution of India granted equal status to every person so every individual is standing upon the same footing irrespective of their gender. Hence, the woman has the right whenever she is physically, mentally and emotionally prepared to make physical relations then a couple can mutually plan for sex but no one can force the woman to established sexual relations.

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<sup>2</sup> Ibid

<sup>3</sup> INDIA CONST. Art 14

## **ARTICLE 21 OF THE CONSTITUTION - PROTECTION OF LIFE AND PERSONAL LIBERTY**

No person shall be deprived of his personal liberty except according to the procedure established by law.<sup>4</sup> By virtue of Article 21 of constitution guarantee that everyone has the right to live their life with full human dignity. So, even the husband did not have the right to infringe their dignity. So, the cases regarding the martial rape having the intensity that can harm the dignity but also it gives the mental injury and somehow in the martial rape there is an involvement of Domestic violence.

From the author's perspective this offence is one of the gravest offences because it gives physical and mental injury to the women. And the offence of martial rape should be tried in the preview of the article 14 of Indian constitution, article 21 of the Indian constitution, section 375 of IPC. Then only we are able to provide justice to the victim.

### **MARITAL RAPE- AN EXCEPTION**

Earlier in several countries the definition of the rape is sexual intercourse with a woman whose is not a wife of the accused without her consent. From this definition we can conclude unwanted sexual intercourse with their own wife does not amount to the rape. Hence, we say forced sexual intercourse with their own wife is permissible. Or we can say that getting married means a man get the license to rape their own wives.

From the author's point of view the above definition creates the in-equality between the two genders and it is directly an infringement of the human rights and fundamental rights of the women. Because Article 14 of the constitution provides insight about Equality. But if sexual intercourse without the concept of the wife is legal then it is the direct infringement of Article 14 and Article 21 of the Indian Constitution which talks about Equality and Dignity.

The traditional mindset as per the patriarchal society is that it is an irrevocable consent of doing sexual intercourse. That means if she is married then she is giving her irrevocable consent of her husband that he can have sex anywhere and anytime he wants. Hence a husband cannot be held the guilty of the Rape.

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<sup>4</sup> INDIA CONST. art 21

## **CONSENT IN PHYSICAL RELATIONSHIP**

The concept of the Marital Rape revolves around the consent. If in the intercourse the freewill and consent are not present then it turns into Rape. The contemporary view is in sexual relationship between man and woman, 'consent' is taken as a means to distinguish between human existences from that of animals.<sup>5</sup>

'Sexual expression is so intertwined with one's personality that it's inconceivable to imagine sexuality without the consent of both sexes.' No other connection between a man and a woman is more based on mutual consent and free will, as well as being more intimate and personal. Nothing could be more demeaning to a person's dignity and horrible to their spirit than a positive sex act."<sup>6</sup>

No man can be held accused of the martial rape if sexual intercourse is performed by the mutual consent and contract the wife hath given up herself this kind unto her husband which she cannot retract. In the research it was found that more than 2/3rd of the married women in India, who are between 15 to 50 age group, have been beaten, raped or forced to provide sex with their husband. In the year 2005 nearly more than 6500 cases were recorded where women were murdered by their husbands or by the abetment of in- laws family.<sup>7</sup>

## **LEGAL PROVISIONS RELATED TO RAPE AND MARTIAL RAPE**

### ***SECTION 375 OF INDIAN PENAL CODE***<sup>8</sup>

The above section 375 of IPC provide the insight about the Rape and it defined rape as the when a man commit the sexual intercourse with the women against her will, when she haven't attain the age of 18 years, concept obtain by the man is malicious or from the undue influence,etc.

From the above section we can conclude that if the sexual intercourse has been done with the consent and the consent is obtain without taking any undue advantage of the victim then it could not be come under the ambit of the rape although the women should attain the age of 18 years.

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<sup>5</sup> Sexuality and Reproductive Decision making in Matrimonial Laws, ch 9, para 18, pp 9

<sup>6</sup> Utkarsh Krishna, Analysing Marital Rape through less of Constitutional Jurisprudence, the pioneer (2019),

<sup>7</sup> G.V Akshaya and M. Kannappan, A Study on Marital Rape in Indian Legal Scenario, International Journal of Pure and Applied Mathematics, vol 119 No.17 (2018),pp 1089-1100

<sup>8</sup> IPC, Section 375, Act no.45 of 1860,IN

The UN Convention on the Elimination of all sort of Discrimination against Women (CEDAW), to which India is a signatory, has said that discrimination against women contradicts the principles of equality of rights and respect for human decency.<sup>9</sup>

Various civil remedies and provisions, such as cruelty and other concerns, are ban under the DVA, 2005. The number of victims of marital rape is increasing, yet the legislative remains oblivious to the need to restrict such an offence. Women are unaware of the current situation and the regulations that apply to them under the Indian penal code.<sup>10</sup>

## **CASES**

### **State of Maharashtra vs. Madhukar Narayan Mandika,<sup>11</sup>**

The right to privacy over one's body has been mentioned by the Supreme Court. In this instance, a prostitute was found to have the right to decline sexual intercourse. What's more, all stranger rapes have been criminalized, and all females, excluding husbands, have been granted the right to privacy over their bodies, implying the ability to decline sexual intercourse and withhold consent.

### **Vishakha vs. State of Rajasthan<sup>12</sup>**

This right to privacy was likewise extended in the workplace by the Supreme Court. Similarly, we can argue that there is a right to privacy in sexual encounters even within a marriage.

### **The Chairman, Railway Board vs. Chandrima Das<sup>13</sup>**

It was held by the Hon'ble court that rape is much more than just a breach of a person's general rights; it is also a violation of fundamental rights which is guaranteed by the grund norm of the country. Rape is a crime not only against a woman's person, but also against society as a whole. It is a crime against basic human rights, because it infringes on the victims' most prized right, the right to life with human dignity contained in Article 21 which encompasses the right to liberty.

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<sup>9</sup> Aishwariya Mishra, Law on Marital Rape- A much needed reform in Indian System, Mondaq, (2018), <https://www.mondaq.com/india/crime/691482/law-on-marital-rape-a-much-needed-reform-in-our-legal-system>

<sup>10</sup> G.V Akshaya and M. Kannappan, A Study on Marital Rape in Indian Legal Scenario, International Journal of Pure and Applied Mathematics, vol 119 No.17 (2018),pp 1089-1100

<sup>11</sup> AIR 1991 SC 207

<sup>12</sup> AIR 1997 SC 3011

<sup>13</sup> MANU/SC/0046/2000

## **Sree kumar vs. Pearly Karun<sup>14</sup>**

The Kerala High Court concluded that the offence under Section 376A of the Indian Penal Code will not be prosecuted because the woman is not living separately from her husband under a declaration of division or any custom or use, regardless of whether she is exposed to sex by her better half without her consent or knowledge. In this case, the spouse was forced to have sex against her will by her husband when she went to live with him for two days as part of a settlement of separation proceedings between the two parties. As a result, the husband was found not guilty of raping his wife, despite the fact that he had done so.

### **CONCLUSION-**

From the entire study we can conclude that any kind of intercourse which is performed by the married couple but without the consent of the wife or without the free consent or the consent of wife obtained under any pressure, threat or assault by the husband is termed as the marital or spousal rape. As we know that the article 14 of the constitution of India provides the equality of the status to all as a fundamental right but by the virtue of this act of the husband wife's fundamental right is being infringed. And this which creates as gender imbalance in the society. Even if the woman is a wife of man then also the man or his husband could not make the physical relation with her without her consent.

As per the point of view of the author if a husband forcefully makes the physical relation with his wife then also, he should be treated as other accused of the rape and punishment should be same because getting married does not mean that a man got the license of rape his wife. She is his wife and has the same human rights and fundamental rights like a man. She is not a sex toy so even being a husband no one can force her to give them a physical satisfaction she is the better half not the slave.

So, if in any sexual intercourse between the spouses the free consent is not present then that intercourse should be treated as the marital rape or can be comes under the ambit of the domestic violence.

Author thinks the people who do these kinds of crimes are due to the lack of knowledge about the laws or because of their narrow mentality they think that this is their right. Or may be due to the lack of the knowledge they do that kind of act.

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<sup>14</sup> 1999 (2) ALT Cri 77

It is proven in the survey that women tolerate the violence because of the fear of the society. And in some cases, the family advice to tolerate that just because she is a girl and this create gender biasedness in the society.

Even after 75th years of Independence and after several amendment in criminal law there is no penal provision for the Marital Rape. In an era of law reforms, it is critical to take measures toward criminalizing marital rape so that we can take a step forward on the road to real development. In a country like India, because neither the country's lawmakers nor the Indian legal systems are prepared to bridge the gap between marital rape and other crimes, such reform is a long way off.

It is believed that in India, marital rape should be criminalised, as this may be accomplished by taking a rights-based approach to torture against women. Although Indian women's organisations have succeeded in raising public awareness and passing domestic abuse legislation, marital rape has not been fully criminalised by eliminating the distinction between marital and stranger rape.

No doubt Supreme Court and various High Courts of India has given various guidelines relating to the martial rape and considered it as contradictory with Article 14 and 21 of the Indian Constitution

In the recent judgment of Kerala High Court it was held that the marital rape is a sufficient ground for Divorce. But from the point of view of the Author as the honorable courts of India it is an infringement of Human as well as the fundamental rights of the victim. And the only remedy left in the victims is that she can only get a divorce from her husband as it shows the darkest side of Indian laws and society's mindset.

As per the author it is the correct time at which Martial Rape is being criminalized. Man and society have mistreated women in the past and continue to do so today. It is necessary to recognise her as a person, moving out of the way of outdated image of her being a mere property, and to treat her with the respect and decency she deserves. Marriage has been viewed a licence to legalise unwilling sex by patriarchal power institutions. There is a complete denial of a woman's self-worth.