

ISSUES IN MARITAL RAPE

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ABSTRACT

The men and women are two basic pillars of our society. Both men and women play a vital role in the development and growth of society. They are given equality on each ground but men have always possessed dominance over women because of which women lag behind in the hierarchy of the society. Women always face mortification by men. There are innumerable crimes being committed against women in our society which violate the various rights of women. Such crimes include but are not limited to acid attacks, dowry death, sexual abuse, domestic violence and rape. Rape is one of the most heinous crimes among them which is against the dignity and self-respect of women. When the rape or sexual abuse is done against a woman by her spouse, without her consent is called marital or conjugal rape but the partner rape has not been termed illegal as it is believed that wife should fulfill all the needs of her husband. Our law has not considered conjugal rape as a crime; hereby this research work has tried to create attention towards criminalization of marital rape. Also it has tried to present the situation of a married woman who are treated as an exception under section 375 of Indian Penal Code, 1860 through this research and detailed study.

RAPE

The term has been derived from a Latin term “*rapio*”, “*rapere*” which can be explained as to seize or ravishment. In literal sense it can be said rape is an act of ravishment of a woman without her consent, by force, fear or fraud.¹

The rape is a crime in which a person uses force to engage in sexual intercourse with another person without the will of that person. The victim of this force can be woman, children, man and also people of the same gender.

According to national crime records bureau, 2013 annual report, 24923 rape cases were reported across India in 2012. Out of which, 24,470 were committed by someone known to the victim or

¹ www.lawoctopus.com

can say 98% of the cases.² The rape involves insertion of an erect penis or an inanimate object into the female vagina or the male anus and heterosexual rape usually refers to an assault in which a male forces himself upon a female and homosexual rape usually refers to an assault in which male forces himself upon another male.³

TYPES OF RAPE

By way of relationship or characteristics of victim to the person who uses force to indulge in sexual intercourse, rape can be defined in following categories;-

1. **Date rape** - acquaintance rape can also be named to date rape. In such kind of rape, the use of force or fear to indulge in sexual intercourse or penetration to the victim by the person to whom the victim is known. Such rape commitment can be found where relationships of love, relationship of dating each other, neighbors, relationship of familiarity and done with intoxicating the victim by drugs or alcohol. Susan Brown miller, an American author and an activist wrote a book in 1975 “against her will: men, women and rape” and show that 84% of rape victim know the wrongdoer before the incident.⁴
2. **Corrective rape**- it can also be named as homophobic rape or curative rape. This heinous crime is to be done to convert a person in heterosexual by two or more persons. Mainly people of LGBT group people are the victims of this crime.
3. **Gang rape**- in such kind of rape, a single victim is a part of in sexual intercourse by use of force by more than two persons. In a study, it was found that gang rape offenders are unemployed, younger mostly. More drugs and alcohol are involved in it.
4. **Prison rape** - it can also be named as the jail rape. The rape of one confined person in jail by the other confined person. It involves same sex crime and affects 10% population of jail.
5. **Statutory rape** - it is a sexual activity or penetration in which over force or threat to the victim not used. This forceful sexual activity involves an adult to indulge himself in

² <https://en.m.wikipedia.org>

³ <https://www.medicinenet.com>

⁴ <https://legaldictionary.net>

sexual activity with a minor or the person of unsound mind or incompetent persons or the person who are unable to differentiate between right or wrong.

6. **War rape-** this practice was done mainly with girl or women to be converted into prostitutes by the soldiers or other people during war time period. During war time, it was a like a trend to treat woman as a slave or the object of sexual pleasure of the country with whom the war is in force.
7. **Deception rape or rape by deception-** when the elements like fraud or misrepresentation are used to take the consent of the woman to enter in sexual intercourse.
8. **Custodial rape-** in such kind of rape, the wrongdoer may be an employee of state for example public servant or police officer or hospital staff member. This can be done to the children in the institutional care like orphanages by the person who is appointed to take care of the children or other staff member of that institution.
9. **Punishment rape -** this can also be named as revenge rape or payback rape. When, for the acts of the victim or for the act of the members of victim's family, rape is done as a punishment to take revenge by one or more persons to give the lesson for that acts of the victim or the acts of her family.
10. **Serial rape -** when a person uses force to indulge in sexual penetration or sexual intercourse multiple times with a single person or with number of persons repeatedly over a long time period. For commitment of such heinous crime, children are targeted.
11. **Rape of children -** child rape is a kind of child sexual abuse. When such sexual activity done by a child or by adolescent to a child it is called **child on child sexual abuse**. When sexual activity committed to a child by a person who is adult or major who is either related to that child or not but a caregiver, it will come under the ambit of **incestual rape**.
12. **Marital rape -** it can also be named as conjugal rape or intimate partner sexual assault [IPSA] or partner rape. The suffering in such kind of heinous crime is long lasting trauma than the suffering of rape done by a stranger person. First to know about the marital rape, we should know about the term ***“de facto couple or de facto relationship”***.

The term de facto relationship is defined in **section 4AA of the Family Law Act, 1975** which states that the law requires that you and your former partner, who may be of the

same or the opposite sex, had a relationship as a couple living together on a genuine domestic basis.⁵

The kind of rape can be defined as when the force or threat is used to indulge in sexual activity or intercourse with the partner without the consent of whom, or can say unwillingly, with force is being used is called partner rape or husband rape or wife rape.

When the force is used to enter in sexual activity in de-facto relationship is called conjugal rape.

If we go back to the history, the women were to be treated as the property of the person with whom they would be married.

Patriarchal domination of society has come up time and again and has granted exemption to the husbands on bases of assumption that the wife has given herself to husband through marriage whereas modern leader in support of the victims of conjugal rape hold it also as a form of rape and considered that a marital status of the woman should have no bearing on the culpability in the crime of rape.

THEORIES OF CONJUGAL OR MARITAL RAPE

There are certain theories which are as follows:

1. **Feminist theory** - it is considered as a tool used to control the women in the hands of patriarchal society. The exemption is given to the husband regarding women as the property of the person with whom they get married or the husband as according to the earlier laws. It is considered as a power play by husband in opinions if feminists.
2. **Social constructionism theory**- since ancient days the men have dominated not only society but also the political system. Thus in opinion of this theory believer, law is considered to be in the interest of men and so the women are considered as the property of the person to whom they get married.

Conjugal rape was considered to be an offence of lesser degree as compared with rape. Some jurisdictions even considered rape in the marriage is not a rape at all.⁶

According to this theory, it is just a practice by a man to preserve their long gained power over the woman with whom they get married.

⁵ [www.familycourt.gov.au>wcm>fcoaweb](http://www.familycourt.gov.au/wcm>fcoaweb)

⁶ <https://blog.ipleaders.in>

3. **Sex- role socialization theory** - according to this theory, men are taught to be authoritative or commanding while women are taught to be pacific. Sex role socialists are of the view that marital rape is nothing but an expression of traditional views of sex roles.

TYPES OF CONJUGAL RAPE

The conjugal rape can be done in following methods

1. **Sexual coercion by non- physical means;** - in this form, verbal pressure is to be made on the women by remembering her duties on the repeated basis to indulge in sexual activity. The non-physical means can be misrepresentation or by way of fear of divorce etc. their degree are not as much serious or severe in comparison with physical degrees.
2. **Forced sex;**- in this kind of heinous crime, the consent of the unwilling woman are tried to be taken by way of use of force or threat to enter into sexual intimacy.

It can be further sub-classified;-

- **Battering rape** - in this kind of rape, either a woman may suffer a violent aggression during sexual intimacy. It is a kind of domestic violence to force himself upon the partner for sexual intimacy. The victim of battery can be male or female in a heterosexuals or homosexuals relationship.
- **Force only rape-** in this, the unwilling wife suffers a force, as much as can be possibly made by her husband for sexual activity.
- **Obsessive rape** - in this kind of rape, a husband forces his unwilling wife for a sexual intimacy either by showing sadistic sexual gratification or corrupt act against her.

HISTORICAL BACKGROUND

We can observe that from the time period of an ancient era, a man was assumed to give respect and to deal with nobility. The concept of marital rape has arisen in this recent period but regarding this kind of rape, we have lack of laws to prevent the society from one more criminal activity which affects the society at large and also mislead the youth about the pious relationship of marriages. No remedy to a woman regarding it cannot be furnish or deliver by the common

law because woman is supposed to give everything to his husband, for whatever she is asked for as it is her obligation but on the other hand, husband is not tied by any duty towards his wife. Over the period of time, the law amended and criminalizes such kind of activities. The steps have been taken regarding protection against such crimes to woman in the developing and the developed countries. In India, still there is no consideration given to marital or partner rape as an offence. No laws in India to protect a married woman against sexual assault. There has been efforts made by the law commission or bills before the parliament but this heinous act has not been criminalized. The present scenario in India regarding marital rape but as such no formal criminalization has been declared as an offence.

Law against rape in India:

In 1983, Section 375 came into force and defined rape in Indian Penal Code, 1860 but due to having some loopholes in the law, it was again amended in 2013. Now first we look into the old provision of rape.

Section 375 states that a man will be guilty, if he has sexual intercourse with a woman under given below circumstances:-

1. When the sexual intimacy is to be done against her will.
2. When the sexual intercourse is to be done against her will.
3. When her consent is taken up putting her in fear of death or hurt of that person in whom she is interested.
4. When the woman gives her consent because she believes that person to be lawfully married.
5. When the woman give her consent in the intoxication state or in the state of unsoundness of mind, that she is incapable to understand the nature and consequences.
6. When the woman is below 18 years then the act is committed with or without her consent.

Explanation; - the necessary element is penetration for the commitment of rape in a sexual intimacy.

Exception;- when a man having sexual intercourse with his own wife will not constitute the commission of crime but the wife shouldn't below 15 years of age.

So, in the old provision, the wife was made exception that implies if a man uses force to enter his wife into sexual intimacy or sexual penetration or sexual intercourse without the consent of her, will not be rape but this is the general rule that the sexual intimacy will not be rape if the woman give her consent freely for such sexual intercourse.

This provision was amended in 2013 and new provision of section 375 states that ‘a man is said to commit “rape” if he –

Penetrates his penis into the vagina, mouth, urethra or anus of woman or make her to do so with him or any other person to any extent or 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:-

Firstly- 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 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 the consequences of that to which she gives consent.

Sixthly- with or without consent, when she is under 18 years of age.

Seventhly- when she is unable to communicate consent.

The loophole regarding marital rape has not been corrected even after the amendment made in 2013 but section 376-A of IPC illegalized some sort of force used to a woman by her husband. According to section 376-A if a wife is living separately and her husband if uses force her to indulge in sexual intimacy against her will then the husband can be imprisoned for two years and fined.

Present outline analysis of marital rape

As we observed from the types of conjugal rape that a husband may by use of non- physical means can uses force against the will of his wife to come into the sexual intimacy. Such non-physical means may include the fear of ending their relationship by giving her divorce. Divorce in our society is as not much acceptable. A divorcee maybe treated as a curse of a society.

So the present structure or the outline of laws regarding marital rape is as the conjugal rape has been recommended in Domestic Violence Act, 2005. According to the provisions provided under the Domestic Violence Act, 2005 that any kind of sexual abuse in a relationship of marriage or in the relationship of live in. the partner rape has not given any consideration in Indian Penal Code, 1860 whereas the hint regarding marital rape has given in Domestic Violence Act, 2005 which provides only the civil redresses to the victim. Section 375 of IPC debars or disbars the sexual abuse in the relationship of marriage outside the sphere of rape whereas a man will be punished if he uses force to his wife to enter sexual intimacy against her will who lives separately judicially as per the provision provided under section 376-B of Indian Penal Code, 1860 but under different personal laws divorce cannot be given for the reason of conjugal rape. The exclusion of a married woman in the provision of section 375 violates the fundamental right of the married women.

Article 14 of the Indian Constitution provides for equality of all persons before law and prohibits any kind of state discrimination.⁷

The exclusion of a married woman under the provision of section 375 of IPC, 1860 also violates the fundamental right given under Article 21 of the Constitution of India.

Article 21 of the Indian constitution provides for right to life and such life includes the right to live with dignity. Conjugal rape infringes upon the right of woman to live with dignity.⁸

⁷ <https://blog.ipleaders.in>

⁸ <https://blog.ipleaders.in>

FOR THE EXEMPTION OF MARITAL RAPE THERE ARE SOME TRADITIONAL AND MODERN THEORIES HAS BEEN PROVIDED WHICH ARE AS FOLLOWS:

Traditional theories;-

1. **Contract theory;** - as per this theory, generally a marriage is a type of contract in which the woman is obligated to give her consent to satisfy the sexual needs of her husband. This theory rejected the concept of conjugal rape.
2. **Women treated as property;** - the common law followed this theory. According to this theory, after marriage a woman becomes a personal property of the person to whom she is married and that person can use her as he wants to.
3. **Marital unity;** - this theory believers concluded that after marriage, the woman's identity merges with the person to whom she marries. They both are single body or a single identity after marriage.

Modern theories;-

1. **Possible abuse;** - conjugal rape criminalization is swarming with probable chances of mal-treat of the law by wives with intention to cause suffering to their husbands.
2. **Less serious;** - it is considered that the conjugal rape is not more serious than non-marital rape. Out of seven women at least one of them found to be the victim of sexual harassment by her husband, this is shown by the survey presented by programmers of the association called joint women.
3. **Difficulty in proving;** - it is very difficult to prove the conjugal rape as it is of personal kind in nature. A list of crimes has been provided which are of personal nature but punishable under Domestic Violence Act, 2005.

Conjugal rape and divorce;- the conjugal rape can be brought under the ambit of cruelty which has been defined under Indian Penal Code, 1860 as an act of the husband which influence the woman to commit suicide or cause any severe injury to her so the such an act can be ground for divorce.

The personal laws provide cruelty as a ground for divorce including the Special Marriage Act, 1954, the Dissolution of Muslim Marriage act, the Indian divorce act, 1869 and the Parsi Marriage and Divorce act, 1936.⁹

Poland was the first countries declaring it a criminal offence in 1932. After it, Australia, Ireland, US, Malaysia, Israel abolished conjugal rape.

CASE LAWS

Dileep Singh v. State of Bihar, the appellant was charged and convicted under Section 376 IPC for committing rape of a minor girl. The victim alleged that the accused forcibly raped her and later consoled her that he would marry her. Accordingly on account of the promise for marriage made by him, she agreed to have sexual relations with him. After she became pregnant, she revealed the matter to her parents but efforts made by the father to establish marital ties failed. She was then constrained to file the complaint. Although the trial court and high court convicted the accused, the Supreme Court set it aside. It said:

“consent given by a woman believing the man’s promise to marry her would fall within the expression ‘without her consent’ with clause (ii) to section 375 IPC, only if it is established that from the very inception the man never really intended to marry her and the promise was a mere hoax. When prosecutrix had taken a conscious decision to participate in the sexual act only on being impressed by the accused’s promise was not false from its inception with the intention to seduce her to sexual act, clause (ii) to section 375, IPC is not attracted and established”¹⁰

In Uday v. State of Karnataka, accused expressed love and promised to marry the prosecutrix on a later date. Prosecutrix was quite aware that they belonged to different castes and proposal of their marriage would be opposed by their family members. Yet the prosecutrix started cohabiting with the accused consciously and became pregnant. On the charge of rape the court held that the consent given by the prosecutrix for cohabitation cannot be said to be given under misconception of fact. She had freely, voluntarily and consciously consented to have the sexual intercourse with the appellant not only on behalf of promise of marriage but

⁹ <https://blog.ipleaders.in>

¹⁰ (2005) 1 SCC 88 and <https://www.lawctopus.com>

because of their deep love for each other. Hence, the appellant was not held liable to be convicted under for an offence of rape under section 376, IPC.¹¹

In *Balwant Singh v. State of Punjab*, the victim aged 19/20 years was forcibly taken in a car by five accused persons and raped by each in a grove of canal bank. She was found lying unconscious under a banana tree near the canal bridge by her father. She was medically examined and the report specified that she was raped by more than one person. It was held by the court that the absence of injuries on the back of the prosecutrix does not make the prosecution case unbelievable. The accused were five in number and the prosecutrix was a girl of 19/20 years. She was not expected to offer such resistance as would cause injuries to her.¹²

In *Bishnudayal v. state of Bihar*, where the prosecutrix, a girl of 13 or 14, who was sent by her father to accompany the relatives of his elder daughter's husband to look after her elder sister for some time, was forcibly 'married' to the appellant and had sexual intercourse with her, the accused was held liable for rape under Section 376 of IPC.¹³

RECOMMENDATIONS

The United Nations recommended that conjugal rape must be criminalized in India. Conjugal rape is being a serious offence is not given as much attention by law in present scenario. It is considered that if a husband compel his wife of sexual intimacy will not be amount to rape. Many sexual offences have been illegalized in Nirbhaya gang rape case but the concept of criminalization of conjugal rape was not regarded completely. Women are expected to be silent even if such a heinous crime is being suffered by them because of the reason that once a woman is married, she will only be identified by the name of the person to whom she marries in the society otherwise she will not have her own identity. Society compels the woman to live with her husband even after suffering such crime. Looking at the current scenario, criminalization of conjugal rape has become an urgent need. Woman should be attentive to the available rights and remedies to them. Following suggestions can be made;-

¹¹ <https://www.lawctopus.com>

¹² <https://www.lawctopus.com>

¹³ AIR 1981 SC 113, <https://www.lawctopus.com>

1. Each circumstances and facts of the case must be inspected by the court to determine if the victim has influenced for not augment herself against such heinous harassment.
2. Public should be made aware regarding conjugal rape.
3. The criminalization of conjugal rape must be done by making amendment in Section 375 of Indian Penal code, 1860 which talks about the rape.
4. The punishment provided under section 376 of IPC should be provided for conjugal rape as well.
5. Under all the personal laws, divorce can be provided in case of conjugal rape.
6. The husband should be prohibited to take invocation on the ground of lack of resistance in a case of conjugal rape on the part of wife.

CONCLUSION

In India, there is a concept of sacramental marriage in which a woman is supposed to provide everything for whatever they will be asked for, by her husband including sexual intimacy even if they also not want to. The main obstacle in giving identification to conjugal rape is this outmoded rule. We cannot be able to stop this distortion of conjugal rape without any legal provision. Judiciary can give identification to conjugal rape as a crime on ethical and moral basis and should make the wrongdoer liable. It is the utmost need that some steps should be taken by the legislature and law to married woman who silently bear such evils. The husband is free from any exemption because of the dominance which he possessed in the society even after being a culprit. If, in India, woman loses their right over their body after getting married and started to be treating as a property of the man to whom she get married then the Article 14 of Constitution of India will remain in the state of dormancy. Article 14 and 21 under Constitution of India are provided to all irrespective of gender so, those rights should not be violated even not of married woman.

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