

## MARITAL RAPE: A NEED FOR A NEW LEGISLATION IN INDIA

Darsini Priya GP, CHRIST (DEEMED TO BE UNIVERSITY)

### Abstract

*“Her friends used to tell her it wasn't rape if the man was your husband. She didn't say anything, but inside she seethed; she wanted to take a knife to their faces.” - F. H. Batacan*

*Marital rape or spousal rape is an unwanted intercourse by a man with his wife obtained by force or physical violence, or when she is unable to give consent. It is considered a form of domestic violence and sexual abuse in many countries. In the most famous, Late Justice J.S. Verma Committee the committee held that a marriage license should not be viewed as a license for a husband to sexually exploit his wife. A married woman has the same right to over her own body as any other woman in the country. Under the Indian Constitution, the Act of Marital Rape violates Art 21 as it is in violation of an individual's right to live with human dignity, right to sexual privacy and also right to bodily self-determination. Therefore in light of the above mentioned aspects, this paper would emphasis on the need of a marital rape law in India.*

**Keywords:** Rape, marital rape, spouse, criminal law

## **RESEARCH PROBLEM:**

Why is marital rape still not recognized as a crime in India? Whether or not to criminalize rape within a marriage has been debated for long in India. There was a recommendation given by the United Nations to India make it a crime for a man to rape his wife. Criminalizing marital rape was also one of the suggestions of the Verma Committee, a three-member panel appointed to strengthen India's sexual-assault laws in the wake of a brutal gang rape in 2012. The committee under Justice Verma put forth a suggestion which said that marital rape should be made an offence. According to his committee the laws in the IPC failed to differentiate between rape that occurred within the ambit of marriage and outside marriage. But under IPC sexual intercourse without consent is considered an offence. Be that as it may, a special case for the offense of assault exists comparable to un-consented sex by a spouse upon a wife. The Committee recommended that conjugal assault isn't an offense ought to be eliminated. Marriage can't be considered as a promising agree to every single sexual act. The then government, driven by the Congress party, had dismissed this proposition. A gathering of legislators who contradicted the move at the time contended it had "the capability of crushing the foundation of marriage, if conjugal assault is brought under the law, the whole family framework will be under extraordinary pressure." The public authority in the end passed another rape law, which didn't condemn conjugal assault in 2013. Susan Brown mill operator says, "The ancient patriarchs who came together to write their early covenants had used the rape of woman to forge their male power- how then could they see rape as a crime of man against woman? Women should be given significance in the general public as well as equivalent situation with men. However, regarding ongoing occasions it tends to be seen that the situation of ladies is weakening.

## **OBJECTIVES:**

The main Objectives are-

1. To know about Marital Rape.
2. To focus on identification of Marital Rape as different from rape.
3. To have a comparative Study between India and USA.
4. To examine the legal framework and different perceptions on marital rape.

The Justice Verma council had recommended that marital rape ought to be made an offense, a vital interest of ladies' privileges activists. As indicated by the panel the IPC ought to separate between assault inside marriage and outside marriage. Under the IPC sex without assent is precluded. Notwithstanding, a special case for the offense of assault exists comparable to un-assented sex by a spouse upon a wife. A board of legislators who restricted the move at the time contended it had "the capability of destroying the establishment of marriage, if marital rape is brought under the law, the whole family framework will be under incredible pressure." Women should be given significance in the general public as well as equivalent situation with men. However, regarding ongoing occasions it very well may be seen that the situation of ladies is weakening. As the ladies are as yet treated as the property of the spouse and he has all the rights to misuse her and no cures have been given. Despite the fact that a spouse's fierce and non-consensual demonstration of intercourse may qualifies a wife for bring activity for criminal attack, the consolidation of the head of risk for conjugal assault in our reformatory laws is absent. This at first sight disregards Article 14 and 21 of the Indian Constitution. Non-criminalization of conjugal assault is the significant worry in the Indian general set of laws.

### **THEORIES OF MARITAL RAPE:**

Several theorists have been adapted in favour and also against Marital Rape. The main theories are the Unities theory by William Blackstone, Equality Theory, Property Theory and Implied Consent Theory and Feminist theory which were brought to explain marital rape and its history of social and legal acceptance.

**Feminist theory** characterize marital rape as a method of social control and predominance over women by the method of a male centric family. The primary terms utilized by the Feminists were man centric psychological warfare and permit to assault, to allude to the social control of ladies by men. Male centric psychological oppression, as characterized by Johnson alludes to the methodic utilization of viciousness by men in an interminable exertion to control ladies. Finkelhor and Yllo declare that the marriage permit is a permit to assault, where men control and rule their spouses via constrained sex unafraid of repercussions because of the chronicled setting of marriage. The Feminist hypothesis is broadly acknowledged by numerous yet are not seen in a positive manner by a piece of

the general public. Indeed, even as we commend 70 years of Independence, the ladies in our nation are as yet not genuinely free and autonomous and keep on living under the domain of murkiness and dread. Accordingly, the women's activist hypothesis helps in advancing status of ladies in the general public.

**The unities theory**, was advanced by Blackstone and Sir William Hale. A marital unity for the most part discusses the non-existence of a women when she gets married. It implies that after marriage, the spouse's personality converges into the presence of her better half. This is called as Marital Unity Doctrine. Thusly, law doesn't give the wedded lady any autonomous character and it exclusively relies upon her better half. Hence, it shows that Women were considered as asset to their spouses, and this implies that ladies didn't have any rights in the marriage. In such a situation, apparently the spouse was viewed as the expert to the wife, and delighted in all rights over his better half. This contention set forth by Blackstone isn't conceding equivalent rights to the two people and isn't broadly acknowledged because of the improvements made regarding privileges of ladies in the general public.

**The Implied consent theory**, by Hale is one other motivation behind why conjugal assault isn't condemned. It expresses that marriage is comprised via an agreement and hence all the choices of the wedded ladies is chosen by her significant other by suggested assent. This implies that there is an inferred assent and agreement among a couple. The provisions of this agreement expresses that a women's irreversible agree to have sex with her better half, at whatever point he wishes. As indicated by the hypothesis of suggested assent, conjugal assault can never happen in light of the fact that all sexual contact inside a marriage is thought to be consensual. Under the agreement hypothesis, as expressed by Hale, when a lady weds, she shapes an agreement with her better half whether it is suggested or communicated. It consequently gives a privilege to the spouse to have sex with her significant other. Here the assent of the spouse doesn't make a difference as the marriage shows an inferred assent itself.

**Property Theory** is the hypothesis where women were considered as property: Another customary law root which was a structure block in the establishment for the marital rape exclusion was the possibility that a spouse claimed his better half as property. A spouse was not any more equipped for assaulting her better half since he could now take what he previously claimed. Since ladies were viewed as property, the custom-based law treated assault not as a wrongdoing against women, but

instead as an infringement of a man's property interest. This hypothesis influences the privileges of ladies by not having the option to move toward the court for the damage caused to her. This hypothesis explicitly denies ladies their privileges of equity. Women were viewed as properties in the antiquated occasions where as now via numerous advantages achieved for women and by tolerating them as equivalent from various perspectives, conjugal assault acts is a proviso where ladies are as yet denied from their privileges. They should presently don't be considered as property of men as they have their own autonomous limit and can likewise voice out their own need. Consequently the property hypothesis puts a square to nature of ladies.

**Equality or Uniformity Theory**, this hypothesis set forth a similar view as that of the women's activist hypothesis. Not condemning conjugal assault clearly denies wedded women fourteenth amendment equivalent assurance rights. The state will not ensure wedded ladies against savage rape made by their spouses by not conceding ladies equivalent rights. The basic liberties infringement inborn in demonstrations of viciousness against women are presently all around perceived. However, conjugal assault is a specific type of gendered viciousness that has gotten away from both criminal law assents and common liberties recommendation in generally the entirety of the world's countries. This quiet in the law makes legitimate exemption for men who explicitly attack or assault women who are their spouses or personal accomplices, consequently legitimizing this specific type of viciousness against women. This is a basic freedoms issue that shouts out for change, both lawfully and socially. Consequently conjugal assault should be condemned.

## **LAWS:**

The word 'rape' is derived from the Latin term *rapio*, means "to seize". Rape in general means a forcible seizure. It means the ravishment of women or men against his or her will or without consent or when consent is obtained by fear, force or the carnal knowledge by force against his or her will.

## **Constitution:**

Article 14 of the Indian Constitution guarantees fundamental rights that "the state shall not deny to any person equality before the law or the equal protection of the laws within the territories of India". This article protects a person from State discrimination, but this is discriminated by the exception under Section 375 of the Indian Penal Code, 1860 where there is no protection to women when raped

by her husband. Thus, it is clearly seen that this exception provided under Section 375 of the Indian Penal Code is not reasonable classification and thus violated Article 14 of the Indian Constitution.

Article 21 of the Constitution has expanded its scope by way of judicial interpretations as “right to live with human dignity”. Marital rape clearly violated the right to live with human dignity of a women. Thus violates Article 21 of the Indian Constitution because it infringes personal autonomy of an individual.

### **Municipal Law:**

Section 375 of the Indian Penal code defines rape. It means, rape is an unlawful sexual intercourse between a man and a woman without the consent of women or against her will under any of the circumstances enumerated under the section will amount to rape.

The committee headed by Justice J S Verma looked into all possible amendments to criminal law to ensure quick trial and harsher punishments to the person accused of committing sexual assault of extreme nature on women. The committee was asked to submit a report within thirty days from the date of Notification. The committee in its Report proposed revision and substitution of sections 375, 376 and 376 A to 376 D if the Indian Penal code for making the law relating to sexual assault on women and girls more effective and deterrent. Most of these recommendations were given legislative effect.

Section 375 of the Indian Penal Code defines Rape and Section 376 provides for punishment for the offence of Rape. But, this act has failed to protect the married women who are subjected to rape by their own husband. The exception to Section 375 states that non-consensual sexual intercourse by a man with his own wife, if she is over fifteen years, does not amount to rape. It thus keeps outside the ambit of rape a coercive and non-consensual sexual intercourse by a husband with his wife above fifteen years of age and thereby allows a husband to exercise with impunity and his marital right of non-consensual intercourse with his wife. No court is empowered to take cognizance of the offence of sexual intercourse by husband upon his Prima facie satisfaction of the facts which constitutes the offence upon a complaint having been filed or made by the wife against the husband. This Act gives an exception to rape if done by her own husband. This puts forward an assumption that marriage is a

contract and women are being treated as property. They must be given individual rights and must be allowed to be independent.

### **International Laws:**

As ahead of schedule as 1993, brutality against ladies including conjugal assault was perceived as addressing a penetrate of women' central basic freedoms under global law in the U.N. Statement on the Elimination of Violence Against Women (DEVAW). The due determination standard was stretched out to apply to sex viciousness. The, DEVAW determines that all U.N.- part states have an obligation to seek after by every single proper mean and immediately an arrangement of wiping out viciousness against ladies. This incorporates due industriousness to forestall, explore and, as per public enactment, rebuff demonstrations of brutality against ladies, regardless of whether those demonstrations are propagated by the State or by private people. DEVAW certifies that viciousness against women comprises an infringement of the rights and key opportunities of women and debilitates or invalidates their delight in those rights and opportunities. Hence, it is the states commitment to rebuff demonstrations of sexual orientation viciousness get from the states commitment to forestall infringement of these essential opportunities.

The Fourth World Conference on Women in Beijing in 1995 and the subsequent Beijing Declaration and Platform for Action emphasized that savagery against ladies under global law incorporates physical, sexual and mental viciousness happening in the family, including battering, conjugal assault and brutality identified with abuse and sex savagery should be overlooked by the state.

The Universal Declaration of Human Rights (UDHR) referenced that for a law to be acknowledged and to shield women from conjugal assault there should be a social change in the general public to a more extensive point. Furthermore, condemning rapes and assault in personal connections should be done to forestall all gendered viciousness.

In 2006, the United Nations set up the U.N. Team on Violence Against Women, and the U.N. Secretary-General delivered an inside and out investigation on all types of savagery against women. The investigation calls attention to that the most widely recognized type of brutality experienced by women around the world is private accomplice savagery that incorporates a scope of explicitly, mentally and actually coercive acts.



The World Health Organization (WHO) reports that accessible information demonstrates that in certain nations, almost one out of four women may encounter sexual viciousness by a private accomplice. The latest and broad WHO report on the pervasiveness and wellbeing impacts of gendered savagery shows that 42 percent of women who have been exposed to physical or sexual brutality on account of a cozy accomplice experienced wounds therefore. Other exploration proposes that around 40% of all assaulted women are constrained into sex at some time by their male accomplices. Hence, laws should be achieved to shield women from being explicitly attacked by her husband.

## ARTICLE REVIEW

In the Article Rebecca M. Ryan (1995) '**The Sex Right: A Legal History of the Marital Rape Exemption**', Wiley: American Bar Foundation, 20 [Online].

Available at: <https://www.jstor.org/stable/828736> it was said that in the nineteenth century, with the development of the philosophy of individual rights, 'right-less' status of spouse under the conjugal agreement got hazardous for the American Society. The characteristic law rationalists in nineteenth-century again supported the inconsistent status of a couple and re-established the conjugal status under common law. The imbalance of force among a couple was subsequently perceived as the impression of regular law, instead of a man-made direct. The conjugal agreement which can be characterized as the codification of regular law set foundation of marriage over the people. The eighteenth, just as nineteenth-century lawful researchers, thought about sexual intercourse as the essential part of the conjugal agreement. Furthermore, in this way ladies should likewise be given the option to give assent since they have equivalent rights conceded to them and that can't be removed by any individual not even the public authority.

In the Article **Wife rape by Keith Burgess-Jackson** Available online at: <http://www.jstor.org.library-christuniversity.remotexs.in/stable/40436004> it tells that there is no rhyme or reason to treat non-consensual sex between a couple uniquely in contrast to non-consensual sex between outsiders. There is additionally no legitimate legitimization to not condemn assault done by spouses. Since the damages of conjugal assault are at any rate as extreme as the damages of nonmarital assault, and since one principle capacity of the state is the anticipation of mischief to other



people, there is valid justification to condemn and rebuff conjugal assault. The laws ought to be more exacting and suitable by allowing rights straightforwardly to ladies by forcing disciplines for conjugal assault. The requirement for another law on rape should be perceived.

In the Article **Criminalizing Spousal Rape: The Diffusion of Legal Reforms Jennifer McMahon-Howard, Jody Clay-Warner and Linda Renzulli** Available online at: <https://www.jstor.org/stable/10.1525/sop.2009.52.4.505> it is depended on Event History Analysis Using Logit Regression of State Adoption of Strong Marital Rape Laws. This article rundowns and look at how different intra-and highway factors add to the section of solid conjugal assault laws. As this is the main investigation of military assault law reception that considers highway measures, it offer a huge commitment to the comprehension of the interaction by which solid military assault laws are passed. It additionally exhibit that states are bound to pass a solid military assault law when they have a high female workforce support rate and few past changes to their military assault laws. It fundamentally shows that the irresistibleness of a military assault law improves the probability that different states will receive a solid law and that imparting lines to states who have embraced a solid law diminishes the probability of reception. This spurs different states to receive a superior law for the country. Military assault doesn't not just apply to women underneath the age of 15 yet ought to be applied even to women who are over the age of 15 years since she can choose for herself and has her own individual limit.

In the article **Marital Rape: History, Research, and Practice by Jennifer A. Bennice and Patricia A. Re-sick** Available online at: <http://www.jstor.org.library-christuniversity.remotexs.in/stable/26636357> it was said that regardless of the expanded acknowledgment that the subject of conjugal assault has created in the previous twenty years, the writing here remaining parts scanty. This article gives a complete audit of the present status of the conjugal assault writing. Despite the fact that it was polished and acknowledged by the individuals before, by the progressions occurring in the current climate. It's about time that we understand conjugal assault is removing the privileges of ladies and furthermore there is as yet inferred male predominance in the general public if this demonstration isn't condemned. It is the obligation of the public authority to think about of privileges of people similarly. This audit features the reality of marital rape, regarding pervasiveness and post injury trouble, just as the impediments of surviving examination. At last, hindrances to treatment and suggestions for experts are talked about. Assault,

being a tremendous internment of pride of a woman in the haziness and a wrongdoing structure the court and the courts will undoubtedly react, inside the lawful boundaries, to the interest. It is an interest for equity and grant of discipline must be in consonance with the authoritative order and the watchfulness vested in the court.

## **COMPARATIVE STUDY BETWEEN INDIA AND USA**

The United Nation population fund states that more than 2/3<sup>rd</sup>. of the married women in India, who are aged between 15 to 50, have been beaten, raped or forced to provide sex with him. In the year 2005 nearly more than 6500 cases were recorded where women were murdered by their husbands or by their husband's family.

### **Marital Rape in the United States**

In the year 2006 United Nations Secretary General investigated top to bottom examination on all types of viciousness against women which is the marital rape or conjugal assault. It expressed that in any event 53 nations assault by spouse isn't viewed as an offense. In the United States, Marital assault has gotten considerably more condemned. In numerous nations the conjugal assault laws is equivocal and they are not satisfactory that the individual can be indicted for a conjugal assault or not. where without the law it could be conceivable to bring indictment for demonstrations of constrained sex. In nations where the laws on assault bar spouse where the nations have acquired the Penal Code which expresses that the sex by a man with his own significant other isn't assault.

## **JUDICIAL ASPECT**

The judicial aspects of India under section 375 of the Indian Penal Code clearly states that "sexual intercourse by a man with his own wife, the wife not being under 15 years of age, is not rape". Section 376 of the Indian Penal Code provides punishment for rape. According to this section, the rapist should be punished with imprisonment of either description for a term which shall not be less than 7 years but which may extend to life or for a term extending up to 10 years and shall also be liable to fine or both.

In **Saretha v. T. Venkata Subbaih AIR 1983 AP 356**, it was held that, rights and obligations in a marriage, resembles a creation and disintegration and not the term of private agreement between two people. The privilege to protection isn't lost by conjugal Association. Be that as it may, there is no discipline for conjugal assault and the cure lies with her. This Judgment gives women rights to take cure in her own ability and not by the method of legal executive. The laws ought to be more exacting and proper by allowing rights straightforwardly to ladies by forcing disciplines for conjugal assault. The requirement for another law on rape was felt. The previous law which won didn't characterize and mirror the different sorts of rape.

In **Sakshi v. Union of India AIR 2004 SC 3566, 2004**, the Supreme court had perceived the insufficiencies with respect to the law identifying with assault and had recommended that the governing body ought to achieve changes in the law. Subsequent to passing the criminal law alteration bill, 2013 assault was re-imagined as the most awful occasions where the parliament by a change attempted to expand the ambit of assault and the insight by making oral and butt-centric goes about as adding up to assault. The Domestic Violence Act, 2005 has given different common cures and different arrangements, for example, the cold-bloodedness and different issues are managed under. There are huge number of casualties under the conjugal assault situation is being expanded yet the assembly is oblivious to condemn such an offense. Women are uninformed of what the genuine situation is and the laws which are winning in the Indian correctional code for them.

The Judicial decision of **Queen Empress v. Haree Mythee (1890) 18 Cal 49**, it was held that, if the wife is above the age is of 15, then the rape laws does not apply in that situation. In this case the husband was punished because wife was of 11 years only. This should be applied even to women who are above the age of 15 years because she can decide for herself and has her own individual capacity.

In the **Kerala High Court, Sree Kumar v. Pearly Karun 1999 (2) ALT Cri 77**, it was seen that, the spouse doesn't live independently with the husband under the Judicial partition and being dependent upon sexual intercourse without her will the demonstration doesn't add up to an assault. Consequently, it was said that, the spouse was not discovered to be liable of assaulting his significant other however he was accepted liable of doing or submitting the demonstration. The spouse for this

situation was not held blameworthy on the grounds that there could have been no appropriate arrangement to give discipline to conjugal assault. According to the Constitution of India, each law which is passed should be in conformity with the standards and thoughts which are cherished in the constitution. Any law which has been made neglected to satisfy its necessary guidelines are viewed as ultra vires and it very well may be struck down or to be pronounced illegal. Here, the exception of Section 375 pulls out the assurance of wedded women on premise of her conjugal status. Accordingly, women should be given equivalent rights as given under Article 14 and 21 of the Indian Constitution.

The Supreme Court in **Shimbu v. State of Haryana AIR 2014 SC 739** took another opportunity to inform the subordinate Court and high court that despite stringent provisions for rape, many court 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. This has warned them to be cautious as false charges of rape, motivated by personal or economic gains, are not uncommon.

It was also held in **Radha v. State of Madhya Pradesh (2007) 12 SCC 57** that people blamed for these sorts of rape likewise need assurance from the bogus or designed allegation of assault stacked with sick intentions or plans. Bogus charges of assault, similar to an assault casualty, causes an extraordinary pain, mortifies and harms to the blamed. Assault, being a gigantic entombment of respect of a lady in the haziness and a wrongdoing structure the court and the courts will undoubtedly react, inside the legitimate boundaries, to the interest. It is an interest for equity and grant of discipline must be in consonance with the administrative order and the watchfulness vested in the court.

## CONCLUSION:

It has been inferred that Indian laws have neglected to give a legitimate assurance to women however prior. As the women may be as yet treated as the property of spouse and he has all the rights to abuse her and no proper remedy is given. Despite the fact that a spouse's fierce and non-consensual demonstration of intercourse may qualifies a wife for bring activity for criminal attack, the fuse of the head of risk for conjugal assault in our corrective laws is absent. This by all appearance's disregards Article 14 and 21 of the Indian Constitution. Non-criminalization of conjugal assault is the significant worry in the Indian overall set of laws. To ensure the safety of women, the Judiciary

should take activities to protect them. Married women should be able to express their consent and should not be exposed to rape or viciousness. By, looking at the above explained theories, laws and case laws the idea of women being treated as property and marriage being considered as an agreement should be changed. Thus, this segment has a tight view in managing rape and as such till now there is no legitimate arrangement which ensures the safety of ladies.

#### REFERENCES:

1. Article 14 of the Indian Constitution, Article 21 of the Indian Constitution.
2. Section 375 of Indian penal Code, Protection of Women from Domestic Violence Act 2005, Criminal Law (Amendment) Act 2013
3. Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)
4. Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (CAHVIO),
5. Marital Rape: History Research and Practice by Jennifer A Bennice,
6. Criminalizing Spousal Rape by Jennifer McMahon
7. The Sex Right and exception to Marital Rape by Rebecca M. Ryan