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**MARITAL RAPE IN INDIA**

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**ABSTRACT :**

Rape, which can be spelled in just four words has a drastic effect on society. Rape is one of the heinous crimes, which is seen in today's world. Whenever sexual intercourse is done without the consent of the victim, which is too involves force or threat, then it is said that rape is done. Rape is forced sex. Rape is all about sexual touching and making unwanted sexual touch. Rape is all about the penetration of the penis into the vagina of a woman without her consent. In the current situation, there is a rise in rape due to the mentality and thinking of the people. If we see Indian history then women were treated as property, no matter how you use it or by which way you use it.

Marital rape can be defined as the act which results in sexual intercourse with the spouse without consent. Marital rape does not involve physical violence. In simple words, we can say that having unwanted sex with a partner amounts to marital rape. Spousal rape is a form of trauma that can lead to physical and mental health conditions and sometimes it becomes worse than we think. It can lead to depression, stress, anxiety, panic attacks, etc. As we see the history marital rape was not considered an offence in India as society thinks that, it's the right of one partner to make sexual intercourse with another partner.

“It is considered that the concept of marital rape can be understood internationally, not in India because of factors such as education level in society, poverty, societal customs and values, religious beliefs, the mindset of society to treat the marriage as a sacrament etc<sup>1</sup> “. According to a survey in 2016, at least 100 countries considered marital rape as an offence that should be punished under law but it was a huge disappointment as India was not one of those countries.

Nearly one out of three women suffer from marital rape, according to the survey their age is between 18 to 49 years. The use of physical force during sex without her consent not only amounts to marital rape but also violates her dignity and rights. According to UNITED NATIONS POPULATION FUND, in India, over 75 % of women are subjected to marital rape.

**HISTORICAL BACKGROUND :**

Basically, in the ancient period, wives were considered to be dependent on their husbands in every aspect of their life. In the 19<sup>th</sup> century when India was still being ruled by British laws. The exception of rape laws i.e the clause of marital rape was also introduced in 1860. From this point, we can still say that we are governed by British laws.

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<sup>1</sup> Maneka Gandhi

Once in 1890, a case was seen where a 12-year-old girl was married to a 30-year-old man and while having sexual intercourse, the girl died due to excessive bleeding and trauma but a man was not charged with rape. The reason for not charging up for rape was the exception which was introduced in the Indian Penal Code, 1860 i.e having sexual intercourse with the wife is not considered to be rape, if she is above 10 years of age.<sup>2</sup> After this horrific act, the people demanded that the age should be changed to 12 years. After this case, the exception says that, if a man who is having sexual intercourse with his wife will not be considered rape if the wife is 18 years of age. This case brought many dangerous aspects of life, that the married girls were facing at that time.

It was hard to define the scenario of marital rape in India. India in the two conventions signed spousal rape as an act of violence against women but did not follow it. When the laws were made by the Britishers, at that time these laws were too followed in Pakistan and Bangladesh as they were not separated from India, and today date, where marital rape is not considered a sexual offense. According to the thinking of society, women were thought to be the contractual property of their husbands, and it's on then how they treat them.

And this type of backward thinking has affected India's criminal code. They only think that the criminalization of marital rape is a western concept and need not follow it.

Even the countries like Nepal and Bhutan have declared marital rape s rape and in Nepal, if the sexual offense is proven then the accused would be punished with imprisonment of 5 to 15 years in Bhutan, no gender is mentioned in rape laws. Even the soviet union was the firstcountry in 1992 to declare marital rape as rape and its criminalization.

It's shocking to see that still in modern times, this applies in India, where women are independent and do not depend on their husbands, and are able to raise their voices. But afterthe case of Nimeshbhai<sup>3</sup> the scenario has changed.

### **TYPES OF MARITAL RAPE :**

In the case of **Nmeshbhai Bharatbhai Desai V. State of Gujarat**, 2018 the court discussed thetypes of marital rape which was seen in society. These are as follows:-

#### **1. OBSESSIVE RAPE:-**

It is also known as sadistic rape. Here in this type of rape the accused is so obsessed with doing sexual intercourse that while doing this he becomes violent which involves vicious torture. The women experience extreme physical pain and mental torture. This type of infliction can be seen in the husband if he is being involved in pornography. During sexual intercourse, the husband tries to harm the wife. Harm can be brutal as we cannot think about it. In one of the cases where the woman reported that during intercourse her husband triedto pull out her vagina with the pair of pliers but no inquiry was done when she reached the hospital. This was seen in the case of Finkelhor and

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<sup>2</sup> Phulmoni's case

<sup>3</sup> Nimeshbhai Bharatbhai Desai V. State of Gujarat,2018 SCC GUJ 732

Yllo in 1885. Just to fulfill the pleasure husbands show aggression over their wives who are the victims.

## 2. BATTERING RAPE:-

This type of rape involves both beating and rape. It is the most brutal form of rape as it gives physical injury while performing the rape. Sometimes the wife has to face sexual barbarity when the husband wants to fulfill his pleasure without her consent or will. This type of rape is mostly seen in a society where the wife faces cruelty. Sometimes husband while making the wife semiconscious forces her to make up. The women who suffered physical beating and forced sex can be the best example of battering rape.

## 1. FORCE ONLY RAPE:-

This type of marital rape comes under the category of power rape in which the husband uses his power upon the wife so that she should be agree for having sex with him. Here beating does not come into existence.

### LEGAL STATUS OF MARITAL RAPE IN INDIA :

According to the report of the National Crime Records Bureau, nearly 70% of women face domestic violence in India. In today's world, marital rape can be one out of the violence caused.

If we see the case of **SAKSHI V. UNION OF INDIA, 2004** where the question was raised, why the physical violence done by the husband considered a punishable offense but sexual intercourse without the consent of the wife is not considered as an offense? Here the supreme court upheld the existing definition given under section 375 of the Indian Penal Code where the definition of marital rape was not given and said that there would be no alteration in section 375.

In the case of the **STATE OF MAHARASHTRA V. MADUKAR NARAYAN MARDIKAR<sup>4</sup>**,

here the supreme court said that prostitute has the right to refuse sexual intercourse as they have the right to privacy over their body. But this was not applied to the wives as there was a huge difference while having sexual intercourse with husband and stranger.

In the case of **SREE KUMAR V. PEARLY KARUN<sup>5</sup>**, here the High Court observed that though there was a decree of separation but the wife was not living separately from her husband, so the sexual intercourse done by her husband without her consent or will, will not be considered as an offence under section 376( a) of the Indian Penal Code.

Again in the case of **INDEPENDENT THOUGHT V. UNION OF INDIA AND OTHERS, 2017**, the child rights organization, filed a writ petition by challenging exception 2 of section 375. But the decision of the supreme court was notwithstanding as the court

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<sup>4</sup> AIR 1991 SC 207

<sup>5</sup> 1999(2) ACT cri 77,ii 1999 DMC 174

said any husband who had sex with his wife whose age is between 15 to 18 years will be considered as rape not an exception under section 375, IPC.

But the judgement was for the particular age group but what about the victims of marital rape. According to the views of Justice JP Pardiwala, in **NIMESH BHAI BHARAT BHAI DESAI**

**The STATE OF GUJARAT**, wives are not a slave and the husband who is having sexual intercourse with her should not consider her as his property. Wife should be treated with dignity over her husband and that dignity cannot be coerced into having sexual intercourse. By criminalizing marital rape, the message would be delivered to society that marital rape is not the privilege of husband and these crime against women cannot be tolerated anymore.

But the Supreme Court in its decision said that the Medical Termination Of Pregnancy Act recognizes the act of the husband of forced sexual intercourse with the wife will be considered rape under the words of Justice Chandrachud. The marital rape got its significant judicial recognition on **September 29, 2022**. In this judgement, the supreme court upheld the Right of abortion for single women for an unwanted pregnancies up to 20 weeks and 24 weeks. This decision was too linked to married women as they have to also deal with unwanted forced pregnancies.

But marital rape is not considered as an offence under exception 2 of section 375 of the Indian Penal Code. It can be a historic judgment if marital rape is declared an offence under the Indian Penal Code.

#### **IS THE CRIMINALIZATION OF MARITAL RAPE NEXT? :**

By seeing the present situation in India, it can be difficult to determine whether marital rape will be criminalized or not, as it can be a challenging task for the parliament to set the criteria for it. While setting the law they have to see every pros and cons. Some of them are as follows:-

#### **PROS OF CRIMINALIZING MARITAL RAPE :**

1. Exception 2<sup>6</sup> of section 375 of IPC violates Article 14 as it discriminates between married and unmarried women.
2. POSCO act and Juvenile Justice Acts talk about the laws which consider that the person below 18 years is a child but exception 2 only considers marital rape as rape if the woman is below 15 years of age.
3. Section 498(a) of IPC, does not focus on making marital rape a crime.
4. Marital rape is a crime against humanity and is considered as heinous violation against a women's body.
5. By criminalizing marital rape women's can seek direct judicial remedies.
6. In the case of **SUCHITA SRIVASTAVA V. CHANDIGARH ADMINISTRATION, 2009**, the Supreme Court under article 21 has given

<sup>6</sup> Sexual intercourse with wife cannot be considered s rape by husband, unless the wife is below 15 years of age.

the right to choose for sexual activity for both man and women. According to J.S. Verma Committee , exception 2 of section 375 ,IPC should be removed.

#### **CONS OF CRIMINALIZING MARITAL RAPE :**

1. There is an offence named cruelty which is given under section 498 (a) of IPC and Domestic Violence Act .
2. Misuse of law can be done
3. Harassment against men will be increased.
4. The purpose of section 375 exception 2 of Indian Penal Code would be defeated .

#### **CONCLUSION :**

Marital rape comes under the category of non – consensual sex with the spouse . Due to patriarchal mindset of the society , the men always think that the women's are their private property . In the present time , law provides a separate identity for man and women then why cannot provide a separate law for marital rape . This question remains a question only ? Only by getting judicial recognition , nothing can happen it should be criminalized too because at last only women suffers , man can too suffer but the ratio of women is higher than that of man. Legislation should make the laws and set the accurate criteria so that its misuse is not done and can be implemented properly . Nobody has a right to force one of the spouse. There are many laws on women harassment but the cruelty still continues.

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