

Rape In Connubial Relationship: A Myth Or Reality

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“Marriage joins two individuals for life, so that they can pursue dharma, artha and kama. It is a union of two individuals as spouses, and is recognized by law.”

ABSTRACT

Women have been the recipients of violence since time immemorial. Even the periods of social transformation, wherein all forms of atrocities, whether rape, molestation, slavery or trafficking have been perpetrated upon them. Rape involves coercive, non-consensual sexual intercourse with a woman. But sexual intercourse of a married women by her husband without her consent is not a rape and never made a subject of criminal law, until in 1970's, the American activists started revolution against marital rape. India inserted the term 'marital rape' in 2013 Criminal Law Amendment keeping in purview the increasing trend of sexual violence in India. However, criminalising sexual intercourse of married women by her husband without her consent as 'marital rape' in Indian perspective raises several sensitive issues related to breakdown of family. It is felt that women must be protected from connubial sexual cruelty. In this backdrop, the authors plan to see the applicability of laws relating to marital rape in Indian perspective. The paper will be based on secondary data and few case-studies to see the executability of such laws.

1. Introduction

False allegation of marital rape has been increased in a few years. The major sufferer of the false allegation of marital rape is the husband who suffers from the trauma of being victimised by her own wife and her wife alleged and declared him before the society as the rapist not the protector. Now days the Indian scenario has been changed the women are using these type of allegation to fulfil her unlawful demand, for example to live separate from her in-laws, to fulfil her own demands. Criminalising the marital rape was the suggestion made by the Verma Committee, which had been amendments to India's sexual assault laws but they forget that there is other dark side too. They forget that the more stringent laws can violate the rule of natural justice. These types of amendments have ignored a huge violation of fundamental rights of freedom of married man too. There is need to analyse various legal framework and different perceptions on the marital Rape.

The term 'rape' or '*raptus*' is used to imply violent theft, be it of property or of dignity or self - respect of a person¹. In criminal law, 'rape' is used to denote 'sexual intercourse without consent of prosecutrix'. But sexual intercourse of a married women by her husband without her consent was never made a subject of criminal law, until in 1970's, the American activists started revolution against marital rape. And India inserted the term 'marital rape' in 2013 Criminal Law Amendment keeping in purview the increasing trend of sexual violence in India. However, in Indian perspective, criminalising sexual intercourse of a married women by her husband without her consent as 'marital rape' raises a number of issues related to breakdown of family and fake rape cases. Marriage in India is a sacrament and it is the beginning of a new life and a family. And in such case, physical relation plays an important role in strengthening the marital ties. Thus, criminalising physical relations without the consent would result in many issues like difficulty in proving the case due to lack of evidence, checking of authenticity of the suit, *etc.* Moreover, such attributes to a very personal emotion will extinguish the meaning of marriage.

However, it cannot be negated that there exist various instances of sexual assaults in marital life and at times, it is felt that women must be protected from such mis-happening. But the term 'rape' does not seem appropriate term to be associated within the concept of 'marriage'. Besides, there has been number of instances recently where women have misused rape laws like bringing false accusations against innocent persons and it becomes difficult to disprove

¹Julie Bindel, "Rape: A Burning Injustice" *The Guardian*, Aug. 13, 2013, available at: <https://www.theguardian.com/lifeandstyle/2013/aug/13/rape-defined-sexual-crime-history> (last visited on June 25, 2019).

such allegations. If the legislature wants to prevent sexual violence upon women by husbands, it must take alternate means like gender neutral laws and better evidencing system so that there are protections for innocent persons. In this backdrop, the authors plan to see the applicability of laws relating to marital rape in Indian perspective.

The main aim of the study is to analyse why the Connubial Rape in India should be or should not be criminalised.

2. Marriage: Its Position in Indian Culture, Nature & Purpose

Marriage in India is a serious and a sacred affair and this can be evidenced from the austerity of all the rituals of a marriage. According to HMA², 1955, a Hindu marriage must be solemnised according to customs, rituals and according to Hindu rites. And some of the rites include *Mehendi*, *Kanyadaan*³, *Mangalsutra*⁴, *Saptapadi*⁵ around the sacred fire, etc. Each ritual has its own importance and austerity in a marriage. Even the Muslims in India have adapted the Indian traditions while keeping the concept of *Nikaah* in its heart. The Muslim marriage too consists of *Salatullishtikhara*⁶, *Mangni*⁷, *Mehendi*⁸, *Nikaah*⁹, etc. Even the Christian wedding in India has witnessed the impact of Indian culture upon it when they observe the *Roce* Ceremony similar to that of *Mehend* before the ultimate marriage. The marriage starts with wedding vows in front of the priest, family and friends and completes with exchange of wedding rings/bands. Whatever the religion or region is it, marriage is always considered a lifelong affair and a sacrament. Had this not been the case, marriage would not have solemnised in presence of religious priests, be it around the holy fire or at a banquet hall or in the Church.

The main aspiration behind the institution of marriage is procreation of children and extending one's genetic lineage behind even after his/her death. For the procreation of children and strengthening the ties of marriage stronger, sexual relationship plays an important role.

²The Hindu Marriage Act, 1955 (Act 25 of 1955).

³Literal meaning of the term is the donation of the bride/daughter to the groom by her father, entrusting him with her future happiness and prosperity.

⁴ A holy thread tied around the neck of the bride by the groom.

⁵The Seven Steps around the Holy Fire representing Seven Vows of the newly wedded couple

⁶Once a match is fixed, the *Imam* or anyone from the family performs a special prayer or *salat* seeking Allah's consent for the union and asks His blessings for the intended couple.

⁷The official engagement ceremony between the bride and the groom amidst families, relatives and friends.

⁸This is an elaborate occasion for the bride before the marriage with *hennapaste* and turmeric paste in order to make beautiful.

⁹This is the official wedding ceremony presided over by the religious priest or *Maulvi*.

Besides procreation, physical relationship or sex is essential for many reasons in a healthy relationship, like intellectual, emotional, physical and societal benefits. Thus, when one enters into the bond of marriage, he/she gives consent impliedly to having physical relationship with one another and there remains no question of seeking permission before having sex with one another. Hence, Sir Mathew Hale, Chief Justice of England has rightly opined that, "The husband cannot be held guilty of a rape committed by himself upon his lawful wife, for the wife has given herself in kind unto the husband, by their mutual consent and contract, which she cannot retract."¹⁰

3. Judicial Aspect of India Related to Marital Rape

Sexual inter course by a man with his own wife, the wife not being under fifteen years of age, is not rape under section 375 of Indian Penal Code. Section 376 of 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 seven years but which may extend to life or for a term extending up to ten years and shall also be liable to fine or both.

In *Saretha v. T. Venkata Subbaih*¹¹ case, it was held that, rights and duties in marriage are like creation and dissolution and not the term of private contract between two individuals. The right to privacy is not lost by marital association. Hence there is no punishment for marital rape and the remedy lies with her.

In *Sakshi v. Union of India*¹², the Supreme court had recognised the inadequacies regarding the law related to rape and had suggested that the legislature should bring about changes in the law.

In *Queen Empress v. Haree Mythee*¹³, it was held that the wife over the age of fifteen, then the rape law does not apply in that situation. In this case the husband was punished because wife was of eleven years only.

In *Sree Kumar v. Pearly Karun*¹⁴, it was observed that the wife does not live separately with the husband under the Judicial separation and being subject to sexual intercourse without her will the act does not amount to rape. Hence it was said the husband was not found to be guilty of raping his wife though he was de facto guilty of doing or committing the act.

¹⁰ Dr. Vandana, "Marital Rape- Exemption under Indian Penal Code- A Quest for Recognition and Liability" 2 *ILIR5* (2017), available at: <http://ili.ac.in/pdf/vandana.pdf> (last visited on May 25, 2019).

¹¹ AIR 1983 AP 356.

¹² AIR 2004 SC 3566.

¹³ (1890) 18 Cal 49.

¹⁴ 1999 (2) ALT Cri 77.

As per the Constitution of Indian, every law which is passed must be in conformation with the principles and ideas which are enshrined in the Constitution (especially Part III). Any law which has been failed to meet its required standards are considered to be ultra vires and it can be struck down or to be declared unconstitutional.

So, if Indian judiciary criminalises the marital rape then it will be violation of fundamental rights of a husband and the meaning of marriage which is considered as sacrosanct will be of no use and it will set a bad example on the new generation regarding marriage.

In *Radhu v. State of Madhya Pradesh*,¹⁵ the Supreme Court has cautioned the Lower Courts by stating that “the courts should, at the same time, bear in mind that false charges of rape are not uncommon. There have also been rare instances where a parent has persuaded a gullible or obedient daughter to make a false charge of a rape either to take revenge or extort money or to get rid of financial liability. Whether there was rape or not would depend ultimately on the facts and circumstances of each case”.

In *Narender Kumar v. State (N.C.T. of Delhi)*,¹⁶ the Supreme Court has quoted its earliest decision of *Rajoo & Ors. v. State of Madhya Pradesh*¹⁷ in which the honourable Court has opined that “..... It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication..... there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration”.

4. ‘Rape’ in Indian Penal Code, 1860

Rape is a crime against women which violates her dignity and self – respect and in IPC¹⁸, it is defined and punished under Section 375 and 376 respectively. It is the forcible seizure or the ravishment of a woman without her consent, by force, fraud or fear. It consists of coercive and non-consensual intercourse by a man. In Indian Criminal Laws, there is no concept like ‘marital rape’ being criminalised as such except in the Sixth Provision of the definition provided under Section 375 and Section 376B. While going through the provision, it has been observed that the target offender in the provision is ‘anybody’ and this may not be husband. As there are only two instances when a husband is criminalised for rape, first when his wife is

¹⁵ (2007) 12 SCC 57.

¹⁶ AIR 2012 SC 2281.

¹⁷ AIR 2009 SC 858.

¹⁸ Indian Penal Code, 1860 (Act 45 of 1860).

below sixteen years and, in such case, the presence or absence of consent is immaterial. And second, when he has sexual intercourse with his wife during judicial separation¹⁹. Thus, our Criminal Law penalises a husband for committing the offence of rape, only if –

- a. the wife is below twelve years. of age
- b. the wife is between twelve– fifteen years
- c. the wife is judicially separated

There is no mention of wife above sixteen yrs. in IPC conveying the message that there is no concept of rape of a married woman above sixteen years. They can only be protected from such crimes as ‘cruelty’²⁰ and ‘domestic violence’²¹ only. The reasons behind such provision or no provision is to preserve the sanctity of marriage and prevent breaking of marital relationship. Although IPC has not defined and dealt with the concept of ‘marital rape’, yet it cannot be denial that sexual violence against women and children by strangers as well as known person (including family members) is on rise. However, it is difficult to obtain the data of such crime as it is one of the most under-reported crime due to family loyalty, fear of retribution by the offender, incapability to leave the relationship, safeguarding the lives of the children, *etc.*

5. Issues & Challenges in Criminalizing Marital Rape in India

An attempt to criminalize marital rape may de-stabilize the institution of marriage. It has to be ensured adequately that marital rape doesn’t become a phenomenon which may de-stabilize the institution of marriage apart from being an easy tool for harassing the husband.

The Supreme Court and various High Courts have already opined about the rising misuse of women protection laws like section 498A of IPC.²² And if we talk about criminalizing marital rape, many authors have argued that it is very difficult to prove marital rape as there can be no lasting evidence in case of sexual act between a husband and his wife. If all sexual acts by a husband with his wife qualify a marital rape, then the judgment as to whether it is a marital rape or not will singularly rest with the wife. The question will occur which evidences the courts will rely upon in such circumstances as there can be no lasting evidences in cases of sexual acts between husband and his wife. It becomes a challenge for judiciary to judge which sexual act is rape and which sexual act is not rape.

¹⁹ Indian Penal Code, 1860 (Act 45 of 1860), s. 376B.

²⁰ Cruelty can be a ground of Divorce under personal laws and not criminally punishable.

²¹ The Protection of Women from Domestic Violence Act, 2005 (Act 43 of 2005)

²² “Criminalising Marital Rape may Destabilise institution of marriage, Centre tells HC” *The Hindu* Aug. 29, 2017, available at: <https://www.thehindu.com/news/national/criminalising-marital-rape-will-destabilise-marriage-govt-tells-hc/article19581512.ece> (last visited on April 04, 2019).

Although most of the western countries have criminalized marital rape, it does not mean the India should also follow them blindly. This contention is generally given to point-out that India has its unique problems such as illiteracy, lack of financial empowerment and majority of females, mindset of society, and vast diversity in the culture of the states which implement criminal law, and poverty²³.

In India marriage is considered as a sacramental in nature as given in Hindu Law. Section 375 IPC which define “Rape” as “A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:—

(First) — 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 law fully married.

(Fifthly) — With her consent, when, at the time of 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 consequences of that to which she gives consent.

(Sixthly) — With or without her consent, when she is under sixteen years of age.
Explanation—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

(Exception) —Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape²⁴.

Section 376B deals with sexual intercourse by a man with his wife during separation²⁵.

There are many existing laws which are dealing with the cases of abuse of women like the Protection of Women from Domestic Violence Act, 2005 which defines ‘Domestic Violence’ as an act which occurs when the “respondent” (adult male) “harms or injures or endangers the

²³Priyansh Verma, “It Is About Time That Marital Rape Is Criminalised In India” Youth Ki Awaaz available at: <https://www.youthkiawaaz.com/2018/07/why-marital-rape-should-be-criminalized-in-india> (last visited on May 20, 2019).

²⁴Indian Penal Code, 1860 (Act 45 of 1860)

²⁵*Ibid.*

health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person (woman) or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse.”²⁶ It further adds, “‘Sexual abuse’ includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman.”²⁷ As per DVA, the punishment for domestic violence is – “In addition to other reliefs as may be granted under this Act, the Magistrate may on an application being made by the aggrieved person, pass an order directing the respondent to pay compensation and damages for the injuries, including mental torture and emotional distress, caused by the acts of domestic violence committed by that respondent.”²⁸

The procedure in Domestic violence act is based on civil in nature in respect of the remedy provided. Even if it is proved that a wife was sexually violated by her husband, he will not be imprisoned. However, in case he fails to pay the maintenance (compensation) ordered by the court, he may be jailed for one month as per the Code of Criminal Procedure (Cr.P.C.)²⁹. “If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issued a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month’s allowances remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made and so there is no need to bring a fresh law to deal with these type of cases. Sexual acts within the ambit of marriage are beyond the parameter of rape; it’s not an appropriate word. The sexual abuse in domestic relationship should not be called as rape. It is believed that implied consent was already given at the time of solemnization marriage so there is no need of the consent again and again for having sexual relation, it’s not a contract it is a sacramental.

5.1 ISSUES TO DEAL WITH

- Will it be fair for the court to rely solely on the wife’s testimony?
- Is it fair to call sexual act of marriage as Rape?
- Is it fair to consider husband guilty until unless proved innocent?
- Is it possible to restore the reputation of husband and his source of livelihood if proved innocent?

²⁶The Protection of Women from Domestic Violence Act, 2005 (Act 23 of 2005), s. 3.

²⁷The Protection of Women from Domestic Violence Act, 2005 (Act 23 of 2005), explanation I (ii) of s. 3.

²⁸The Protection of Women from Domestic Violence Act, 2005 (Act 23 of 2005), s.22.

²⁹The Criminal Procedure Code, 1973 (Act 2 of 1974), s. 125(3).

- If marital rape is criminalized without adequate safeguards then it could be misused like the other female protection laws are being used by the dissatisfied wives to harass and torture their Husbands.
- Marriage is the holy institution and application of such laws will wither away its basic fabric as it will lead the investigation to the intricate relationship between the couple.
- It will increase the burden of judiciary which otherwise may serve other more important causes
- This law will more likely to be a passive and potentially infinitesimal law. Since less educated and rural women are not likely to use it and the other strata of women can be said to empowered enough to say no for this kind of acts of their husband.

6. Constitutional Validity of Section 375 With Reference To Article 14 and Article 21

The Article 14 of the Indian Constitution states that all persons in India are to be treated equally by the law, irrespective of their religion, race, sex or place of birth. Every person in India is guaranteed fundamental rights of equality before the law and equal protection of laws, which does not mean that protection, is only given to women, and what about the man? He is also a victim if allegation is fake then he also needs protection. If we talk about Section 375 of Indian Penal Code, this section only protects a woman against sexual intercourse happening against her will and without her consent. This section makes a classification, by excluding protection to the victims of marital rape. This section provides protection to a statutory rape and not marital rape. This is so as it is often assumed that once a woman is married, she has submit herself to her husband and she is believed to have given a permanent implied consent to sexual relationship with her husband.³⁰

Right to life and personal liberty is enshrined in Article 21 of our constitution. This article impliedly preserves many other rights of the citizens. If the sexual relationship of marriage included in marital rape or in rape category, then it will be violative of a swarm of rights which are included in right to life and personal liberty moreover every citizen has right to live in dignified way what will happen to the dignity to the husband which is lost and derogated due to fake complaint.

³⁰Mayank Shekhar, "Why Penalize Marital Rape"Legal Bites Feb. 1, 2017 available at:<https://www.legalbites.in/penalize-marital-rape/>(last visited on Apr. 30, 2019).

Most of the women are demanding the protection under Article 14 and Article 21 of our constitution. In one of the most leading cases of *Harvinder Kaur v Harmender Singh*³¹, the court commented upon the applicability of the constitutional rights, mainly that of article 14 and Article 21 within a family. It had stated that, Introduction of Constitutional Law in the home is most inappropriate. It is like introducing bull in china shop. It will be a ruthless destroyer of the marriage institution and all that it stands for. In the privacy of home and married life, neither Article 21 nor Article 14 has any place. In a sensitive sphere which is at once most intimate and delicate. The introduction of cold principles of Constitutional Law will have effect on weakening of marriage bond. The Apex Court had also commented upon the matter in the case of *Saroj Rani v Sudarshan Kumar Chadha*³² by saying that “the introduction of equality clause within home will destroy the institution of Marriage.

7. Comparative Study of Marital Rape in the Context of Western World

Marital rape, also known as spousal rape, is a form of sexual violence, the non-consensual sex in which the perpetrator is the victim's spouse. As such, it is a form of partner rape, of domestic violence, and of sexual abuse. Once widely condoned or ignored by law, spousal rape is now repudiated by international conventions and increasingly criminalized. Still, in many countries, spousal rape either remains legal, or is illegal but widely tolerated and accepted as a husband's prerogative.

In 2006, it was estimated that marital rape could be prosecuted in at least 104 countries (in four of these countries, marital rape could be prosecuted only when the spouses were judicially separated),³³ and since 2006, several other countries have outlawed spousal rape. In many countries, it is not clear if marital rape may or may not be prosecuted under ordinary rape laws. Several countries in Eastern Europe and Scandinavia made spousal rape illegal before 1970, but other countries in Western Europe and the English-speaking Western World outlawed it much later, mostly in the 1980s and 1990s. Most developing countries outlawed it in the 1990s and 2000s. India is one of the thirty six countries in the world where connubial rape is legal.³⁴

³¹ AIR 1984 Delhi 66.

³² 1984 AIR 1562.

³³ Available at: <http://www.cities-localgovernments.org/uclg/upload/docs/notaminutemore-endingviolenceagainstwomen.pdf> (last visited on Nov. 21, 2018).

³⁴ Pooja Chaudhari, “Marital Rape Laws will be Misused by Women is Flawed Argument; Here's How the Accused can be Punished” The Logical Indian, Sept. 01, 2017 available at: <https://thelogicalindian.com/awareness/marital-rape-can-be-proven/> (last visited on Nov. 18, 2018).

Research literature, particularly in the areas of incidence and effects, may extend the use of the term spousal/marital rape to include divorced/legally separated ex-spouses or unmarried cohabiting partners. Current state laws, however, often treat rape by ex-spouses or intimate partners more different than marital rape, and therefore, legally equivalent to stranger rape.

Historically, many cultures have had a concept of spouses' conjugal rights³⁵ to sexual intercourse with each other. This can be seen in Common law, in force in North America and the British Commonwealth, where the very concept of marital rape was treated as impossibility. This was illustrated most vividly by Sir Matthew Hale, in his 1736 legal treatise, *Historia Placitorum Coronæ* or History of the Pleas of the Crown, where he wrote that such a rape could not be recognized since the wife "hath given up herself in this kind unto her husband, which she cannot retract"³⁶.

Hale's statement in History of the Pleas of the Crown was not supported by any judicial authority but was believed to be a logical consequence of the laws of marriage and rape as understood at the time. Marriage gave conjugal rights to a spouse, and marriage could not be revoked except by private Act of Parliament—it therefore seemed to follow that a spouse could not legally revoke consent to sexual intercourse, and if there was consent there was no rape.

In England, earlier as a general rule, a man could not have been held to be guilty as a principal of rape upon his wife, because sexual intercourse is a part of the contract of marriage. However, the marital rape exemption was abolished in its entirety in 1991. The House of Lords held in *R. v. R*³⁷, that the rule that a husband could not be guilty of raping his wife if he forced her to have sexual intercourse against her will was an old concept, which no longer represented the position of a wife in present-day society as it is too much different from that time. The corresponding amendment to the statutory law was made through Section 147 of the Criminal Justice and Public Order Act, 1994. This judgment was also affirmed by the European Court of Human Rights in the decision of *SW v. UK*³⁸.

This might be appropriate for England, but is it appropriate for Indian scenario too to criminalize marital rape? This is big question as earlier in this article we have discussed that

³⁵ G.V. Akshaya & M. Kannappan, "A Study on Marital Rape in the Indian Legal Scenario" 119IJPAM 1090 (2018).

³⁶ Sir Mathew Hale, *The History of Pleas of the Crown*, 628 (London, 1st ed., 1847).

³⁷ (1991) 4 All ER 481.

³⁸ R. Ahmed & N.J. Shaba, "Critical Analysis on Marital Rape and its Legal Consequences: Bangladesh Perspective" 21 JHSS 10 (2016).

in India the matrimonial association is assumed to be sacramental and pious. The main of the marriage is to procreate children and leave behind lineage. In this context sex is one of the chief exponent. Even if we consider present scenario and consider marriage as a contract then also it will be obligation of both the parties to provide maximum possible company to each other and if not possible then there is provision of divorce. So if a wife or even husband is not satisfied by the other spouse by any means then he/she can obtain divorce. The principles of criminal law will diminish the very fabric of institution of marriage. Thus we would say that marital rape should not be criminalized but should be basis of divorce with maintenance and compensation as well for distress and injury caused.

8. Suggestions

8.1 REMEDIES FOR MARITAL SEXUAL VIOLENCE SURVIVOR/ VICTIM IN FAKE CASES

The law against marital rape would be misused by vengeful wives are waiting for an opportunity to send their husband to jail. there are many fake marital rape cases in which court have not just acquittal order but the whole case to be malicious, false, motivated, etc. Any accused of any crime is to be presumed to be innocent until proven guilty, this is the fundamental principle of justice.

There are certain provisions of IPC and if we interpret these provisions then we will find that these provisions protect the husband against the false cases filed by wife:

Section 182. False information, with intent to cause public servant to use his lawful power to the injury of another person³⁹— Whoever gives to any public servant any information which he knows or believes to be false, intending thereby to cause, or knowing it to be likely that he will thereby cause, such public servant—

- (a) to do or omit anything which such public servant ought not to do or omit if the true state of facts respecting which such information is given were known by him, or
- (b) to use the lawful power of such public servant to the injury or annoyance of any person, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

³⁹ The Indian Penal Code, 1860.

Section 195⁴⁰. Giving or fabricating false evidence with intent to procure conviction of offence punishable with imprisonment for life or imprisonment: Whoever gives or fabricates false evidence intending thereby to cause, or knowing it to be likely that he will thereby cause, any person to be convicted of an offence which by the law for the time being in force in India is not capital, but punishable with imprisonment for life, or imprisonment for a term of seven years or upwards, shall be punished as a person convicted of that offence would be liable to be punished.

Section 193⁴¹. Punishment for false evidence: Whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine, and whoever intentionally gives or fabricates false evidence in any other case, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Section 211⁴². False charge of offence made with intent to injure: Whoever, with intent to cause injury to any person, institutes or causes to be instituted any criminal proceeding against that person, or falsely charges any person with having committed an offence, knowing that there is no just or lawful ground for such proceeding or charge against that person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both; and if such criminal proceeding be instituted on a false charge of an offence punishable with death [imprisonment for life], or imprisonment for seven years or upwards, shall be punishable with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

9. Conclusion

It has been concluded that Indian laws have failed to provide a proper protection to husband. Husband is also victimized by the false allegation. They have been exploited without accurate remedies. If we talked about the consent, the implied consent has been given by the wife at the time of marriage. There is no need to ask again and again for establishing a sexual relation with wife at least the pious marriage wedlock should be kept out the ambit of the offence rape. Because theory of Hinduism said said kama is also the dharma of partners .

⁴⁰ The Indian Penal Code, 1860.

⁴¹ Ibid.

⁴² Ibid.

In order to protect the husband from the false allegation of rape the judiciary should take appropriate steps to save husband at the initial of allegation and also at the end when husband proved innocent and the wife should be punished. This will set an example to many ladies who are using these offences as weapon. Then only fundamental rights under Article 14 and 21 of Constitution will be protected. Criminalization of marital rape is the major concern in the legal system and also in society. It is observed from the above study that it is difficult to criminalise marital rape due to the social and cultural trends. Moreover, such crimes will be difficult to prove as there remains no evidence of such offence.

In spite of this difficulty, the legislature cannot turn a blind eye to the ever-increasing crime of the society. But to save the social, cultural and emotional trends, the term of such crime must be restructured just like 'incest' to denote sexual violence of child by family members. Once, it is done, every effort has to be made to safeguard innocent people against fake cases. The enforcement and investigative mechanism have to work out such means so that laws which are designed and framed for safety of people, does not turn out to be hopeless for some. Appropriate steps should be taken by the Government of India to include the term "Marital rape" in different category, otherwise it would fail to give the equality test and right of life in article 14 and 21. It should not generalise the statutory definition of 'rape' given in Section 375 IPC, as DV Act and various other laws already recognises sexual violence or spousal violence against wife. Thus, there seems no use to criminalise the "marital Rape" in IPC because it would destroy a couple's private and social life and all chance of reconciliation, leading to miscarriage of justice.

The government and society should realise before backing the demand for criminalisation of marital rape, that not only the wife but also the husband can be victim of these fake cases. Thus, the authors have tried to study the issues and challenges and other effective alternatives given in criminal law related to criminalisation of the marital rape and fake cases through this paper. Our purpose is not to make the husband and wife an enemy but they are partners so that there remains no need to criminalise and introduce the term "marital Rape" in the sacred relation of marriage rather we should focus on reconciliation of their relation we should not forget why the family courts were established in 2009.

Further, we should not forget the purpose of section 9 of HMA 1955 which talks about restitution of conjugal rights. Thus, in light of above, we propose not to use marriage sexual relation in 'rape' category while remembering the fact that marriage in India is of sacramental

in nature and appreciating the fact that marriage creates the relation of man and women as a husband and wife and not as an accused and complainant.