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# **GROWTH OF LAW IN INDIA – MARITAL RAPE: AN EXAMPLE**

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## **ABSTRACT**

This research paper would be concentrating on:

- The meaning of the term “growth of law” as explained by various jurists, judges and precedents and how it has an impact on the society. It also highlights the need and importance of growth of law as regards laying a foundation for the people.
- The paper also brings to limelight the dubious scheme of whether growth of law is actually applied in today’s practical world or is it a mere textual notion.
- To substantiate the postulations, the relation of growth of law with respect to the most debatable topic of the hour- marital rape and its criminalization has been broached in this research article.

Furthermore, this research paper would be highlighting upon the issues convoluted in not criminalizing marital rape, the taboos involved and the disputable petitions filed. It would also outline the need and importance to do so however; especially if India follows and abides by the saying that the law burgeons with the people and according to the exigencies of the society.

Alongside, the paper also lays down certain recommendations which could help in vindicating all the future concerns which may arise as regards the main topic and how certain small steps, if taken, could aid in achieving a fitter and finer society to live in.

**KEYWORDS:** *Growth of law, marital rape, criminalization, need of the society, taboo, married women, fundamentals, change, interpretation, Section 375, Indian Penal Code, Constitution of India, Article 14, Article 21, expansion, right direction.*

## **INTRODUCTION**

*Meaning of growth of law, impact on society, positive aspects and how far we have come regarding this concept.*

Roscoe Pound once said “The law must be stable but it must not stand still”.<sup>1</sup> Growth of law can also be said to have its foundation on this very intuitive and veracious saying. Decades ago, certain rudimentary norms and principles were formulated in such a manner that man could never have envisaged it to be denominated as “law”. These were mere rules and regulations which were to be heeded and followed by the society under the heads of basic principles and fundamentals as against one another. It was much later that through the struggles, legislative minds, developments and amendments that the law took its actual shape and ultimately formed a nation comprising of its citizens, their rights, duties and obligations.

Many laws that were hatched then are not seen to have the same meaning as regards when they were formulated. The meanings have widened, the laws have been amended and the interpretations have broadened. We can clearly say that as a matter of fact, these changes were brought only for the people and according to the then suitable needs of the community. The society develops and so does the law and this is what would be meant as the “growth” of law along with the growth of the nation.

It is very rightly said that the laws are framed for the society and for the welfare and well-being of mankind however, it must not be an unknown fact that unless and until these statutes and provisions laid down serve the actual purpose of being formulated, they would merely be texts written down on a blank piece of paper. What makes them valuable and identifiable are the people who tend to agree, accept and follow the law. Thus, it is extremely important that law must serve its basic and actual purpose but it cannot be said that while doing so, it can dilute the fact that it could be moulded according to the needs of the society and according to the newly growing generations and mentalities, at any given and suitable time.

If we look at a very well-known example of the “Doctrine of Separation of Powers”, this doctrine was formulated long ago and one of its features included that the three organs of the government

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<sup>1</sup> Roscoe Pound, *West's Encyclopaedia of American Law*, edition 2. (2008). Retrieved June 20, 2021 from <https://legal-dictionary.thefreedictionary.com/Roscoe+Pound>.

that is, the judiciary, the legislature and the executive cannot interfere in the working of the other. However, with the growing times, it was discerned that according to the needs of the society, India is not a country where its people would be comfortable and balanced if the rigid separation was followed. With every passing minute people did realise that there are many fundamental rights which would be violated if India adopted this doctrine in its entirety. Thus, to protect its people and the rights of such people, the law outgrew the textual notions, keeping its purpose stable of acting as a body that people must adhere to but at the same time it also wasn't kept still from time immemorial and grew to cater to the needs of the society.

Hence, it can clearly be seen that growth of law always has a positive impact on the people and the society as a whole if followed and laid down in an appropriate manner because it is only if the law grows that the needs of the people are being heard and they get a better and a more acceptable, flexible yet strong law governing them. Thus, quoting the very renowned Friedrich Karl von Savigny who said that “Law is a matter of unconscious and organic growth and just like language, it varies with people and age”<sup>2</sup> which indeed lays down the reality that law is nothing without it being able to grow in the right direction so that the people following it must be guided to take the right path accordingly.

## **NEED AND IMPORTANCE**

*Why growth of law is needed, its importance with respect to the society as a whole and how it helps in strengthening the law and the nation.*

The judiciary plays a critical role in comprehending how the law is to be interpreted in the right manner and how the true essence of it must reach the public out there. This body makes sure that it uses its judicious mind to discern and read in between the lines of any provisions to ensure justice for all. The judiciary thus plays an active role in giving the law to its people.

Over the times, the judiciary has entrenched the fact that what may be prevalent a few years ago may not be able to cope up with the new times, thoughts and environment. It thus is of the opinion that the law needs to be amended and understood in a manner which would be able to cater to the

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<sup>2</sup>*Introduction to Law*. Retrieved June 20, 2021 from <https://www.toppr.com/guides/business-law-cs/introduction-to-law/various-definitions-of-law/>.

needs of the present situations and to the mankind. They hence come out of their shoes to elucidate or adapt to certain alterations which would be instrumental for the people and to maintain law and order in the society.

The need of growth of law can be understood with the help of a very simple example: Section 375 of the Indian Penal Code, 1860 spoke about what the offence of rape is and when this rape is said to have been committed on a person or body. However, after the grisly and horrendous Nirbhaya Case of 2012, there was a need to amend the laws of the Code; something which was framed years ago. This is because the society felt that by helping the law grow in its meaning, widening the interpretations, understanding each clause and adding certain more clauses to make the section firmer and even more unassailable; the provisions were revised and reformed in the year 2013. The judiciary and the law makers saw that the statistics with respect to the offence of rape was shooting high and understood that the criminals have become more prone to commit such a dreadful offence. It was also analysed that in the growing and progressive world, women no longer sit at homes but often travel for their jobs and it would be considered an extreme misfortune and a bummer upon the society who gave a new meaning and beginning to the nation with the help of such steps but still couldn't give the law the strength that is required so that the people wouldn't have any inhibitions and fear in their minds. Thus, the law ought to grow as regards the society and according to the new lifestyle adopted by the people to ensure the purpose of law.

The growth of law hence is one of the most overriding aspects of progress since there would be a certain stillness and regression without such an approach. Time stops for none but the people surely would have if the law did not substantiate, support and mould itself accordingly, for its nation.

With the expansion of law, the people would be able to interpret and analyse the wrong happenings around and could participate in voicing out their opinions against the wrong which would ultimately lead to a decrease in the crime rate. They would follow their duties more wisely, perform their obligations more carefully and also enjoy their rights more freely. All of this would be possible with the people coming up with the times and growing along the way. It would hence strengthen the nation as a whole and make the country a better place to be in.

## **RESEARCH QUESTIONNAIRE AND HYPOTHESIS**

*Many unanswered questions with respect to growth of law, questions that the author had in her mind while writing this research paper and questions that the author would like to address to the general public so that they too give it a thought!*

The concept of growth of law isn't any rocket science but an everyday mechanism which would keep happening while adjudicating upon the matters in the courts or even matters outside the courts. Whatever best suits the society with respect to the rules and regulations and amendments made falls under this theory of growth of law. We surely have come a long way in analysing the postulations and the judiciary has also played an active role many-a-times to expand the law in order to inculcate and protect the rights of every individual.

However, the very first question that would arise in the minds of the mankind is whether this growth of law is actually seen to be applied in every single case that knocks the doors of the judiciary for help? Is it possible for the judiciary to keep amending the laws with respect to the times that keep changing at a rapid rate? Does the country adapt to the notion of "growth of law along with the growth of the nation", in its entirety?

It was also seen that whenever the law grew, it had assisted and guided the people to gain and understand their rights but can it be said that there exists no negative impact on the people because of this idea? Is it so perfect that it can be applied to the everyday life of the man?

The society surely has come a long way from the times when the first norms were created to now, when the laid down statutes and provisions govern the thinking and the actions of man. If we look at this via an example, we can interpret that the practice of child marriage was seen to be legal and followed in full bloom during the early times however, it was only later that it was ascertained as to how this concept would actually violate the fundamentals and thus there was a need to make a law which would criminalise the same. Although, there are still many small sections of the society which do not, in any manner, see the concept of child marriage to be anything erroneous and indictable and hence tend to practice it too. Thus, the questions which arise in the minds of the general public is that, can growth of law be applied to an extent where all the different sections of the society accept it and get adapted to it? Is it easy to give the new laws and amendments to the society in such a way that they too understand and interpret it in the correct manner? If the growth

of law does not happen uniformly, can it still be seen as the growth of the nation and another most important query which emerges in the minds is that what might be the reasons as to why all sections of the society do not want to accept the growth and follow what they have been following from time immemorial?

These are some of the concerns which come to light whenever a change happens and the questions that tend to form within the minds are how can the conflicting opinions of the general public be neutralized while keeping in mind not to dilute the true essence of law? Can all the opinions and concerns even be addressed by the judiciary who already have a plethora of pending cases ahead or is it that the people have just accepted whatever they have understood the best and what they feel is the right thing to do, in order to live a life that they have created and wanted?

The times are changing vastly, it has been growing and the people have been learning from the past experiences. However, the main doubts that still remain are whether the judiciary and the law makers are able to cope up with these times and make changes in the laws and rules accordingly and if yes, how is it done. On the other hand, another uncertainty that appears is that if at all the judiciary and the law makers are not able to cater to the needs of every section of the society, is there some reason behind this neglect or is it just that the people are not ready for a growth at such a rapid speed? Can the actual concept of “growth” be seen to have diluted amidst the controversies and can the law still be accepted to have been reached its growth?

### **CRITICAL LIMITATIONS: MARITAL RAPE - AN EXAMPLE**

*The concept of marital rape, why is it a matter of concern, the laws being violated, the reasons for it not being criminalised in India, this relation to the theory of growth of law alongside understanding the idea of the law makers.*

In the present world, the society talks about the offence of rape and how the criminals must be put behind bars for their entire lives or even hanged in certain cases. On the other hand, the same society keeps mum when a man rapes a woman just because they have tied the knot of marriage and only for the reasons that the man is now eligible to be called as the “husband” of the woman. Did she consent for the institution of marriage or for the offence of rape? Can it really be said to be an “implied” thing just because the name of marriage is attached? Does the entire sentence of a

“no” not matter after you have been entered into the solemnization of a marriage or is it still seen that the man has some kind of a dominance and say over the women?

According to the National Crime Records Bureau’s (NCRB) ‘Crime in India’ 2019 report, about 70% of women in India are victims of domestic violence.<sup>3</sup> One of such a violence is that of marital rape. Marital rape can be said to be a term used when one spouse forces himself upon the other, without the proper consent of the other, in order to have a sexual intercourse with the spouse. It thus leads to affecting the dignity of the women and ultimately diluting the entire concept of empowerment of women. An analysis of National Family Health Survey (NFHS) 2015-16 data showed that around 99.1 per cent of sexual violence cases are not even reported and that an average Indian woman is 17 times more likely to face sexual violence from her husband than from others.<sup>4</sup> Apart from this, The International Men and Gender Equality survey, 2011 highlights that 1 in every 5 men have forced their wives or partners to have sexual intercourse with them.<sup>5</sup> Also, according to one study by the UN Population Fund, more than two-thirds of married women in India, between the ages of 15 to 49 have been beaten, raped, or forced to provide sex.<sup>6</sup>

The act of marital rape usually is based on the concept of an “implied consent” that when two people get married, the woman automatically gives the husband the consent to have a sexual intercourse with her at any time during the marriage. The laws of the country have also substantiated and have remained silent about this issue. The Indian Penal Code, 1860, under its Section 375 talks about an exception that “Sexual intercourse or sexual acts by a man with his own wife, the wife not being under 15 years of age, is not rape.”<sup>7</sup> This basically means that the statute too has provided a shield to the men in the name of marriage to rape the wife which would ultimately not be considered as a forced sexual intercourse unless the wife’s age is below 15 years. However, the United Nations Declaration on the Elimination of Violence against Women defines violence against women as “any act of gender-based violence that results in, or is likely to result

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<sup>3</sup> Anirudh Pratap Singh, *The impunity of marital rape*, Dec 20, 2020. Retrieved 23 June, 2021 from <https://indianexpress.com/article/opinion/columns/the-impunity-of-marital-rape/>.

<sup>4</sup> Anirudh Pratap Singh, *The impunity of marital rape*, Dec 20, 2020. Retrieved 23 June, 2021 from <https://indianexpress.com/article/opinion/columns/the-impunity-of-marital-rape/>.

<sup>5</sup> Marital Rape in India, Dec 22, 2020. Retrieved 23 June, 2021 from <https://www.drishtias.com/daily-updates/daily-news-editorials/marital-rape-in-india>.

<sup>6</sup> Bansari Kamdar, *In India, a Man Can Still Legally Rape His Wife Marital rape, colonial hangover, and patriarchal impunity 73 years later*, August 17, 2020. Retrieved 23 June, 2021 from <https://thediplomat.com/2020/08/in-india-a-man-can-still-legally-rape-his-wife/>.

<sup>7</sup> The Indian Penal Code, 1860, No. 45(India), Section 375-Exception Clause-2 (Amendment, 2013).

in, physical, sexual, or mental harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life”.<sup>8</sup> Although, in 2013, the UN Committee on Elimination of Discrimination against Women (CEDAW) recommended that the Indian government should criminalize marital rape.<sup>9</sup> The JS Verma committee set up in the aftermath of nationwide protests over the December 16, 2012 gang rape case had also recommended the same that by removing this law, women will be safer from abusive spouses, can receive the help needed to recover from marital rape and can save themselves from domestic violence and sexual abuse.<sup>10</sup>

In one part of the society, there are still arguments that support the non-criminalisation of marital rape. The first one speaks about the taboo of the married women itself. Many women from different part of the country find it very absurd to even report a case against their husbands for raping them or forcing them into non-consensual sex. Unfortunately, such women have just accepted this routine silently and do not speak much about it. It is also noticed that these women fear the judgement which would come along from the society as a consequence of voicing their opinions in such a matter and also the fact never remains unchanged that women tend to keep mum because they say they want to save their relationship and do not want it to break in any manner.

When the laws of The Indian Penal Code were drafted in the year of 1860s, and the British era still had an impact upon the nation, it was never identified that the man and the woman are separate from one another i.e., it was never identified that the woman was a “separate legal entity” from the man, in a marriage. Thus, the criminalization of marital rape was a concept that was never thought of. However, with the growth of the nation, it was identified that a married couple includes different people and that the woman is not a cattle in husband’s life. Thus, even in a matrimonial relationship, husband cannot rule over the wife or force her into something that she strongly wishes to oppose. This growth also should’ve been seen in the law along with the nation but it is detected that the laws drafted 73 years ago have still not been changed or touched in this aspect. But we surely do see that the laws of the British however have inculcated these matters and thus accepted

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<sup>8</sup> Anirudh Pratap Singh, *The impunity of marital rape*, Dec 20, 2020. Retrieved 23 June, 2021 from <https://indianexpress.com/article/opinion/columns/the-impunity-of-marital-rape/>.

<sup>9</sup> Anirudh Pratap Singh, *The impunity of marital rape*, Dec 20, 2020. Retrieved 23 June, 2021 from <https://indianexpress.com/article/opinion/columns/the-impunity-of-marital-rape/>.

<sup>10</sup> *Marital Rape in India*, Dec 22, 2020. Retrieved 23 June, 2021 from <https://www.drishtias.com/daily-updates/daily-news-editorials/marital-rape-in-india>.

and amended their laws to criminalise the dreadful acts of marital rape and this was done way back in the year 1991.

We can also see that the concept of marital rape clearly violates the very fundamental right enshrined under Article 14 and Article 21 of the Indian Constitution<sup>11</sup> wherein we can see that there are two different sects of women created. One who cannot be raped by men and one who can be forced into it just because of the label of “marriage.” This obviously leads to a violation of right to life of one section of the women. The theory of marital rape also dilutes the entire purpose and aim of Section 375 of the Indian Penal Code.<sup>12</sup> It aims at protecting the women from being raped or sexually assaulted however, by not criminalising the marital rape, it again comes back to the point wherein the women are not safe and this safety of them is being affected right at their households. Moreover, the women who have been raped silently under the roofs of their houses find it even more difficult to escape because of the ties of marriage.

Thus, we can clearly see that the status of marital rape is such that it really does need a full stop instantly. The nation has surely grown and become more open about voicing their opinions and concerns regarding the matters of rape especially after the terrifying Nirbhaya Case of 2012. The laws under the IPC have also amended as regards this but what we fail to understand is that why has the growth taken place only in one respect whereas the other section of the women still tend to suffer the same horror. It is high time that the lawmakers understood that just because the women are married, it does not give the man any license of permit to force them against their will. An unmarried woman being raped by a stranger or a married women being forced by her own husband still come to ground point that the bodies of women are being used in a forceful and inadmissible manner. The growth cannot take place only for a particular section of the society especially if the entire nation tends to face the same fear. The country fails to understand as to why the governments have not taken an action yet to criminalise and eradicate this issue specially after the statistics of the crime is shooting up and becoming a matter of great concern.

Hence, we can clearly see that the concept of growth of law has not fully been applied to Indian contexts specially in practical senses. Growth of the nation surely did happen however; a certain part of the section still remains regressive due to the fact that laws have not expanded and grown

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<sup>11</sup>The Constitution of India as per 2020, Article 14 and Article 21.

<sup>12</sup>The Indian Penal Code, 1860, No. 45 (India), Section 375.

with respect to their interpretations. Section 375 of the IPC was already drafted in a beautiful manner after the 2012 Rape Case and thus there is not a requirement of any new law to come up by just the analyzations and interpretations to grow within the same law, giving the married women the same status and right to the newly framed law. When we speak about the growth, it would mean taking all the different parts of the society into consideration and if this aspect of it is not recognised by the lawmakers, then it ultimately dilutes the entire purpose of any law being formed and moving along with general public. It still has a negative impact on people and hence the growth is being stopped; making the law “stand still” for many victims of the society.

### **CASE STUDIES AND EXAMPLES**

*This section of the research paper talks about certain cases and stories with respect to marital rape, tries to understand the ideas of the lawmakers and the judiciary and thus analyses the judicious mind to the aspect growth of law.*

The first case that the paper would want to bring to limelight is that of *State of Karnataka v. Krishnappa*.<sup>13</sup> It was held by the Supreme Court that any form of non-consensual intercourse would ultimately lead to be violence in the form of sexual as well as a physical violence upon the woman and leads to an intrusion of the sanctity of women enshrined under Article 21 of the Indian Constitution. This very evidently states that any form of forceful conduct would lead to violence and dilute the fundamentals of Right to Life<sup>14</sup> given under the Constitution.

The next case is of *Suchita Srivastava v. Chandigarh Administration*.<sup>15</sup> The Supreme Court held that the right of a women to make decisions regarding the sexual acts with respect to her body, privacy and dignity falls under Article 21 of the Indian Constitution. In this judgement too, we can discern that the right to sexual intercourse of women is protected and is to be decided by them; irrespective of their marital decision and hence falls under being violative of Article 21 if not adhered to.

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<sup>13</sup> State of Karnataka v. Krishnappa, (2000) 4 S.C.C. 75 (India).

<sup>14</sup>The Constitution of India, Article 21.

<sup>15</sup> Suchita Srivastava v. Chandigarh Administration, (2009) 9 S.C.C. 1 (India).

Talking about the judgement given in the case of *Nimeshbhai Bharatbhai Desai vs State of Gujarat*; The High Court gave a judgment that the exemption to marital rape “stems from a long outdated notion of marriage which regarded wives as no more than the property of their husbands,” adding that “it has long been time to jettison the notion of ‘implied consent’ in marriage. The law must uphold the bodily autonomy of all women, irrespective of their marital status.”<sup>16</sup>

Apart from these, there was also a PIL filed by an NGO with respect to exception enshrined under S.375 of IPC and the classification of women thus done. However, the SC just widened the age limit from 15 to 18 years.

In another case of *The Chairman, Railway Board v. Chandrima Das*<sup>17</sup>, the SC very categorically enforces that the offence of rape is “not merely just an offence under the IPC but as against the entire nation.” If this is the case, then why is it seen that the women of a particular part of the society have been left out and in fact adhering to the judgement given; it would mean that they are not a part of the nation to whom the offence doesn’t extend as a crime if happened to one’s own body?

In all the above-mentioned case studies, it can clearly be seen that the judiciary has given many judgements as regards the offence of rape in India and in order to support the women of the country however, have seen to be silent when it comes to women labelled with the term of marriage. The growth thus ultimately takes a back step if the courts have aided only a certain section of the society. The intention of the lawmakers surely is to protect the women however, the interpretation of the law is still not expanded to include all sorts of women who face the horrific crime of rape. Thus, identifying India as a country which grows along with its law would stand as a falsely understood notion in many practical aspects of the mankind.

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<sup>16</sup> Nimeshbhai Bharatbhai Desai vs State of Gujarat, (2018) S.C.C. OnLine Guj 732.

<sup>17</sup> The Chairman, Railway Board v. Chandrima Das, (28.01.2000).

## **CONCLUSION**

*Summing up the entire research paper and the topic; scope in future.*

Growth of law in the society plays a vital role and impacts the people of nation in every sector of their lives. Coming from the old times to the new ones, the growth of nation with respect to mentalities of the people have changed but also a negative aspect to this is that the crimes have aggregated and increased and thus the need for stringent laws and expansion of interpretations is also seen to have paramount importance. Although the laws have been growing in some aspects; the other facet of it remains untouched.

Since growth is such an indispensable factor which tends to leave footprints on each and every individual; the direction and target of growth must also be on similar lines. Thus, the research paper brought into limelight the status of marital rape in the country of India and how its non-criminalisation has led to a pause in the growth of the nation. Rape laws surely have been enhanced and expanded although, the benefit is provided to only a certain section of the society whereas the other still face similar trauma. It is very rightly said that “the victim of rape lives with the rapist all her life” and thus the need to outgrow the law and extend it to inculcate the fundamentals is the need of the hour. Regressive approach is not what the nation must target especially if the people of the society have come this far in their developments.

Thus, we can conclude the paper by outlining that growth of law has not been fully successful in achieving its aims and goals. There are still many sides of the story that needs to be read and understood. Coming this far into developments would surely be greatly applaudable however; the future of the nation must not pause as regards the growth of an individual, the growth of the nation as a whole and most importantly, the growth of the laws of the country.

## **RECOMMENDATIONS**

*Idea of the writer; any changes to be made and how a better approach to the topic of the research paper would lead to a better society to live in.*

The author of this research paper feels that the growth of our nation has seen a magnificent change towards many positive outlooks and the lawmakers are to be acclaimed for their success. However,

in certain areas we can surely say that these lawmakers need to put an extra effort to justify the laws and to make these laws available to every section of the society.

With respect to the example of marital rape, the author feels that where the fundamentals of the individual are at stake; changes are to be made in order to ensure their grant to each one. Married or unmarried, if the victim goes through the same trauma and horrors in both situations due to the offence of rape, both are to be granted equal rights and protection under the law. When the mentality of the rapists grew to such an extent that they had the ill intentions to perform terribly atrocious and hideous crimes, the law stood with the victim after enhancing itself to suit and cater to the needs of the victim and also to remind the offenders that law is the supreme thus, no person would be left unpunished for committing such crimes. In the same manner, it is time yet again for the law to grow itself because the mentality of the criminals has reached levels where it needs to be stopped and at the same time, the situation of the unfortunate victim surely needs the helping hand of a new form of law to reassure them that they would be protected and never left alone amidst the chaos.

Last, but not the least, growth and change both go hand in hand because these two are inevitable and bound to happen. However, it is the duty of the lawmakers and the nation too to ensure that the growth happens in the right direction and at the right time which would ultimately move along with the people to secure the principles of justice as well as make the country a better place to live in.