

## MARITAL RAPE – AN EASY ESCAPE

- SURYA PRAKASH<sup>1</sup>

### ABSTRACT

Marital Rape should be considered as a serious sexual assault and be criminalized under the Indian Penal Code. Section 375 of The Indian Penal Code makes an exception to the definition of rape saying if committed by the husband does not count to rape unless she is less than 15 years of age. This research talks about how marital rape not only harms the primary benefits of each one of those married women who has been a loss of matrimonial strike yet also isolates them in light of their age and matrimonial status. Criminalization of marital rape is only possible when the society gets over the delusion that rape by the spouse is reasonable and that criminalizing it might disrupt the sanctity of marriage. This article examines the bad ambush which has been executed against the wife and talks about its existence in India which is still practiced burning lives of several women. This article further does a comparative scrutiny between a few countries which have criminalised marital rape and criticizes decriminalisation of marital rape. This article also talks about the current legal status available to women who are innocent victims of such abuse. Lastly, this article ends with the opinion of the author.

**Keywords:** Criminalisation, Comparative, Criticizes, Legal Status, Marital rape, society.

### INTRODUCTION

India, a country which is considered as the ‘motherland’ of its citizens, isn’t it an irony that when it comes to equality, the mothers of our country are not safe.

Defining two terms simultaneously, Marriage is defined as the legal union of a couple as spouses, whereas on the other hand, Rape is defined as a sexual assault usually involving sexual intercourse or other forms of penetration that has taken place against a person’s will- while the

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<sup>1</sup> Student, 2<sup>nd</sup> Year, New law college, Bhartiya Vidyapeeth University

former represents the sanctity of s consensual relationship the latter is a brutal contradiction and in the patriarchal society of India, the concept of marital rape is never a consideration for the society as it is considered to disrupt the sacrosanct of a pious institution like marriage.

While Section 375 of the Indian Penal Code gives a definition of rape under it, the same provides an exception under it stating that rape committed against his own wife, unless she is of 15 years or above, shall not be considered as rape.<sup>2</sup>

### **OVERVIEW OF MARITAL RAPE**

It is considered that a woman by marriage consents prior to sexual relations along with her husband or to refrain from sexual relations outside marriage without the permission of her husband is offensive to liberty and dignity.

Marital rape refers to intercourse by the husband with his wife without her consent, by using threat of force, or physical violence. It is a non-consensual violent act violent by a husband against the wife where she is physically and sexually abused.

The concept of Marital Rape not only does not hold any position as a criminal offence but also is considered as a myth and is beyond the consideration of the Indian society, which has been trying hard to keep intact its traditions and cultures.

It is really unfair to discriminate women just on the basis of their marital status, which is a clear violation of the Fundamental rights incorporated in the Part III of the Indian Constitution.<sup>3</sup>

Fundamental rights are the basic and civil liberties of the people and the Indian penal code and other laws prescribe punishments for the violation of these rights at the discretion of the Court, so here accrues a matter of ambiguity as to the validity of the provisions under the Part III of the Constitution and the remedies available in the Indian Penal Code when the subject of ‘marital rape’ is concerned as it is violation of the Fundamental Rights incorporated under Article 14( Right to Equality), 15(Right against discrimination) and 21( Right to Life).

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<sup>2</sup> Exception 2 of Sec. 375, Indian Penal Code, 1860.

<sup>3</sup> INDIA CONST. art. 14, art.15, art.19, art. 21.

- **Article 14- Right to Equality<sup>4</sup>** is one of the basic rights which form the core of Fundamental Rights. Right to Equality provides all the citizens equal protection against laws and equality before law, without discriminating any citizen based on caste, class, creed, age, sex, religion or place of birth. Exception under Article 375 of the Indian Penal Code violates Right to Equality as it provides protection to women against sexual assault committed by their husband provided she is of 15 years or less and fails to keep all women on equal footing regarding this provision.
- **Article 15- Right against Discrimination<sup>5</sup>** gives all citizens a right to move to Court<sup>6</sup> if any citizen has been subjected to discrimination based on their class, caste, creed, age, sex, religion or place of birth. This Fundamental Right acts as a shield against discrimination of the citizens and thus strives to remove any subject of inequality and keep harmony amongst the citizens. However, married women above the age of 15 years do not have the right to file a case against sexual assault committed by her husband on her, violating her Right against Discrimination not only on the basis of her sex, but also age and matrimonial status.
- **Article 21- Right to life<sup>7</sup>** is the basic right provided to people irrespective of the nationality. Marital Rape majorly violates right to life of married women above the age of 15 years as it deprives her of her life, personal liberty and her security.

### **PHYSICAL AND PSYCHOLOGICAL IMPACT OF MARITAL RAPE**

In spite of the historical myth that assault by one's spouse is a moderately immaterial occasion causing little injury, look into demonstrates that conjugal assault regularly has extreme and durable ramifications for women. The physical impacts of conjugal assault may incorporate wounds to private organs, cuts, soreness, wounding, torn muscles, weariness and spewing. Women who have been battered and assaulted by their spouses may endure other physical outcomes including broken bones, bruised eyes, ridiculous noses, and blade wounds that happen

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<sup>4</sup> INDIA CONST, art.14.

<sup>5</sup> INDIA CONST, art. 15 cl. 1.

<sup>6</sup> INDIA CONST. art. 32, art.226.

<sup>7</sup> INDIA CONST. art.21.

amid the sexual savagery. Explicit gynaecological outcomes of conjugal assault incorporate unnatural birth cycles, stillbirths, bladder contaminations, barrenness and the potential withdrawal of explicitly transmitted infections including HIV.

Women who are assaulted by their accomplices are probably going to endure serious mental outcomes too. A portion of the transient impacts of conjugal assault incorporate nervousness, stun, extreme dread, sorrow, self-destructive ideation, and post-horrendous pressure. Long haul impacts frequently incorporate scattered eating, rest issues, melancholy, issues in setting up confiding seeing someone, and expanded negative emotions about themselves. Mental impacts are probably going to be enduring. Some conjugal assault survivors report flashbacks, sexual brokenness, and passionate torment for a considerable length of time after the brutality.

### **TYPES OF MARITAL RAPE**

The following three sorts of married rape are identified by legal scholars as generally prevalent within the society:

- **Battering rape:** In “battering rapes”, women experience both physical and sexual viciousness in the relationship and they experience this brutality in different ways. Some are battered amid the sexual savagery, or the assault may pursue a physically brutal scene where the spouse needs to make up and forces his significant other to have intercourse without wanting to. Most of conjugal assault unfortunate casualties fall under this classification.
- **Force-only rape:** In what is called “force only” rape, husbands use only the measure of power important to constrain their spouses; battering may not be normal for these connections. The attacks are commonly after the wife has rejected sex.
- **Obsessive rape:** A few women experience what has been labelled “sadistic” or “obsessive” rape; this involves torture and/or “perverse” sexual acts and is often physically violent from people who derive pleasure from his wife’s pain.

**RIGHT TO SAY NO: INTERNATIONAL LAW**

The key and explicit major rights disregarded by the wrongdoing of spousal rape are recognized in the accompanying segments. Marital rape abuses jus cogens standards, for example, the denial against torment, just as key human rights, for example, the privilege to life, freedom, and security of individual, break even with insurance under the law, and non discrimination. It further abuses rights basic to the self-rule and prosperity of an individual, for example, the privilege to wellbeing and to equity inside the family. Besides, marital rape encroaches on the heap different rights that have been perceived by territorial human rights instruments, local laws, and transitional and local courts. These incorporate the rights to sexual self-assurance, human poise, accommodating treatment, security, effective judicial recourse, safety, physical and mental integrity, and integrity of the person, sexual and reproductive choice, and health. The U.N. has consistently declared that violence against women impairs or nullifies women's human rights and their exercise of "fundamental freedoms" whether this violence occurs in public or in private life. The CEDAW Committee has specifically identified these rights as being impaired or entirely nullified by gender violence. These rights are protected in the core human rights treaties that have been rectified by most countries. The core international treaties protecting human rights include the ICCPR, ICESCR, the Convention against Torture (or "Torture Convention"), and the CEDAW. Human rights treaties impose obligations on the state to regulate the actions of private actors. As with all other specific human rights violations, marital rape is not explicitly mentioned in the instruments. As shown in the earlier section, treaty bodies like the CEDAW Committee have interpreted these rights to include the prohibition of marital rape. By ratifying these conventions, states accept the jurisdiction of the treaty bodies to monitor state compliance and to provide the substantive content for the rights and the nature of obligations through general comments and recommendations. The analysis turns next to the specific and most fundamental human rights which are breached by marital rape.

**LEGAL POSITION IN OTHER COUNTRIES**

- **In United States:**

Researchers studied that 10 %– 14% married women experience rape in marriage. When researchers examined the prevalence of different types of rape, they found that marital rape

accounts for approximately 25th of all rapes.<sup>8</sup> In fact, it was not until the 1970's that the society began to acknowledge that rape in marriage may even occur.

Till recently, the general rule was that a husband could not be convicted of the offence of raping his wife as he is entitled to possess sexual intercourse with his wife, which is implied beneath the contract of marriage<sup>9</sup>.

In 1993, matrimonial rape became against the law in all fifty States, under at least one section of the sexual offence codes.<sup>10</sup> However, it's remarkable that only a minority of the States have abolished the marital rape exemption in its entirety, and that it remains in some proportion or other in all the rest. In most American States, necessities requirements still apply<sup>11</sup>.

In seventeen States and therefore the District of Columbia, there are no exemptions from rape prosecution granted to husbands. However, in cardinal States, there are still some exemptions given to husbands from rape prosecution. When his wife is most vulnerable (e.g. she is mentally or physically impaired, unconscious, asleep etc.) and is legally unable to consent, a husband is exempt from prosecution in more of these 33 States. The existence of some spousal exemptions in the majority of States indicates that rape in marriage is still treated as a lesser crime than different sorts of rape. Importantly, the existence of any spousal exemption indicates an acceptance of the archaic understanding that wives are the property of their husbands and the marriage contract is entitlement to sex.

- **In England:**

Earlier as a general rule, a man could not have been held to be guilty as a principal of rape upon his mate, for the wife is in general unable to retract the consent to sexual activity, which is a part of the contract of marriage. However, the matrimonial rape exemption was abolished entirely in 1991. The House of Lords held in *R. v. R*<sup>12</sup>. That the rule that a husband could not be guilty of raping his married woman if he forced her to possess gender against her will was an anachronism and offensive common-law fiction, which no longer described the position of a spouse in present-day society, and that it should not be applied. Corresponding modification to the

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<sup>8</sup> National Violence against Women Survey, NCJ 172837, Washington, DC, US Department of Justice.

<sup>9</sup> 65 Am Jur 2d, Rape, § 527.

<sup>10</sup> National Clearinghouse on Marital and Date Rape, 1996.

<sup>11</sup> Schulhofer, S.J, *Unwanted Sex : The Culture of Intimidation and the Failure of Law* (Harvard University Press, Cambridge, 1998), at 30.

<sup>12</sup> *R v. R* [1991] UKHL 12.

statutory law was made through Section 147 of the Criminal Justice and Public Order Act, 1994.<sup>13</sup> This judgment was also thoroughbred by the European Court of Human Rights within the decision of *Southwest v. UK*.

- **In New Zealand:**

Marital rape exemption was abolished in 1985 once in the Section 128 to the Crimes Act, 1961<sup>14</sup> was enacted.

Sub-section (4) now provides that a person can be convicted of sexual violence in respect of sexual connection with another person notwithstanding that they are married at the time the sexual connection occurred. Further, the very fact that the parties are married or have been in an exceedingly continuing relationship will not warrant a reduction in sentence. There is now, therefore, no distinction in principle to be drawn between sexual violation in marriage and outdoors of marriage.

- **In Mexico:**

The country's Congress ratified a bill that makes domestic violence punishable by law. If convicted, married rapists could be confined for 16 years. In Democratic Socialist Republic of Sri Lanka, recent amendments to the penal code recognize matrimonial rape but only with respect to judicially separated partners, and there exists great reluctance to pass judgment on rape in the context of partners WHO are actually inhabitancy. However, some countries have begun to legislate against married rape, refusing to accept the marital relationship as a cover for violence in the home. For example, the Government of Cyprus, in its contribution to the Special report, reports that it's Law on the Prevention of Violence in the Family and Protection of Victims<sup>15</sup>, passed in the month of June in the year 1993, clarifies that "rape is rape despite whether it is committed among or outside marriage".

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<sup>13</sup> The Criminal Justice and Public Order Act 1994, sec.147.

<sup>14</sup> The Criminal Justice and Public Order Act, 1994, sec. 147 cl. 4.

<sup>15</sup> Law on the Prevention of Violence in the Family and Protection of Victims, June 1993.

**CURRENT STATUS IN INDIA**

In Republic of India marital rape exists de facto but not de jure. While in other countries either the law-makers has criminalized marital rape or the judiciary has played important role in recognizing it as is offence, in India however, the judiciary seems to be operating at cross-purposes. In *Bodhisattwa Gautam v. Subhra Chakraborty*<sup>16</sup> the Supreme Court held that “rape is a crime against basic human rights and a violation of the victim's” most cherished of basic human rights, namely, the right to life enshrined in Article twenty one of the Constitution. Yet it negates this very pronouncement by not recognizing marital rape.<sup>14</sup> Though there has been some advances in Indian legislation in relation to domestic violence, this has mainly been confined to physical rather than sexual abuse. Women World Health Organization experience and need to challenge sexual violence from their husbands are currently denied State protection as the Indian law in Section 375 of the Indian penal code, 1860 has a general matrimonial rape exemption. The foundation of this exemption can be traced back to statements made by Sir Matthew Hale, C.J, in 17th century European country.

**Hale** wrote:

*“The husband cannot be guilty of a rape committed by himself upon his lawful better half, for by their mutual married consent and contract, the wife hath given herself in kind unto the husband, which she cannot retract.”*<sup>17</sup>

This gave rise to the notion that a married woman does not have the right to refuse sex with her husband. This allows husbands rights of sexual access over their wives in direct resistance of the principles of human rights and provides husbands with a “licence to rape” their wives.

Only two groups of married women are covered by the rape legislation — those being under 15 years<sup>18</sup> of age and those who area unit separated from their husbands. While the rape of a woman below 12 years of age could be penalised with rigorous imprisonment for tenure of 10 years or more, the rape of a girl below 15 years of age carries a lesser sentence if the raper is married to the victim. Some progress towards criminalizing domestic violence against the better half

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<sup>16</sup> *Bodhisattwa Gautam v. Subhra Chakraborty* (1996), 1 SCC (490).

<sup>17</sup> 1 Hale, *History of the Pleas of the Crown* 629 (1778).

<sup>18</sup> Exception 2 Sec. 375, Indian Penal Code, 1860.xc

happened in 1983 when Section 376A was additional in the Indian penal code, 1860<sup>19</sup>, which criminalized the rape of a judicially separated wife. It was an amendment based on the recommendations of the Joint Committee on the Indian legal code (Amendment) Bill, 1972 and the Law Commission of India. The Committee rejected the contention that marriage may be a licence to rape. Thus, a husband will now be indicted and imprisoned up to 2 years, if firstly, there is a sexual intercourse with his wife, secondly, without her consent and thirdly, she lives separately from him, whether under decree or custom or any usage.<sup>20</sup> However, this is only a piecemeal legislation and far additional must be done by Parliament as regards the difficulty of marital status rape. When the Law Commission in its forty second<sup>21</sup> Report advocated the inclusion of sexual activity by a person along with his minor partner as associate degree offence it absolutely was seen as a ray of hope. The Joint Committee that reviewed the proposal pink-slipped the advice. The Committee argued that a husband couldn't be found guilty of raping his partner no matter be her age. When a person marries a woman, sex is also a part of the package.

Many women's organizations and therefore the National Commission for girls are difficult the deletion of the exception clause in Section 375 of the Indian legal code that states that “sexual intercourse by a person along with his own partner, the wife not being under fifteen years of age, is not rape”. However, the Task Force on women and set up by the woman and child Department of the government of India took the view that there should be wider debate on this issue. The mandate of the Task Force was to review all existing legislation and schemes bearing on ladies. Of the four recommendations created by the Task Force vis-à-vis rape below the Indian legal code, the most significant pertains to the definition of rape. It took the position that the definition of rape has to be compelled to be broadened to incorporate all styles of statutory offence. As per the advice, the Law Commission's proposed definition of “sexual assault” could be adopted in place of the existing definition of rape in Section 375 IPC<sup>22</sup> as “it is wide, comprehensive and acceptable”. However, like the Law Commission, the Task Force also stopped short of recommending the inclusion of marital rape in the new definition.

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<sup>19</sup> Sec. 376, Indian Penal Code, 1860.

<sup>20</sup> Sec. 376B, Indian Penal Code, 1860.

<sup>21</sup> Law Commission of India, 42<sup>nd</sup> Report.

<sup>22</sup> Sec. 375, Indian Penal Code, 1860.

As of now, the law in Asian country is all inadequate in providing supporting mechanisms for girls to exercise bodily

### **REFORMS TO BE MADE**

In view of the above discussion, the following are suggested:

— Marital rape should be perceived by Parliament as an offense under the Indian Penal Code.

— Marital rape shall be kept on the same footing as rape under Section 376 of the Indian Penal Code.

— The subject shall be treated as crucial as other offences and shall not be considered lightly.

— The protests of the spouse like that of shouting or yelling or opposing mightily shall not be considered as a barrier to the charge.

— The spouse should have a choice of getting a declaration of separation if the charge of marital rape is demonstrated against her better half. Despite the fact that an instance of marital rape may fall under "cold-bloodedness" or "rape" as a ground of separation, it is fitting to have the legitimate position elucidated.

— Demand for separation might be a possibility for the spouse, yet on the off chance that the wife does not have any desire to fall back on separation and needs to precede with the marriage then the marriage ought to be permitted to proceed.

— Corresponding changes in the wedding laws ought to be made.

### **CONCLUSION**

It is surrendered that changing the law on sexual offenses is a considerable and touchy undertaking, and all the more in this way, in a nation like India, where there is a contemporaneous nearness of a fluctuated and separated arrangement of individual and religious laws that may collide with the new alterations in the statutory criminal law. Further, however, there is requirement for generous changes in the law on sexual offenses, for example, making them impartial and wiping out the imbalances, a radical updating of the structure of sexual offenses isn't prudent.

The prompt need is criminalization of marital rape under the Indian Penal Code. In any case, simple presentation of a direct as an offense isn't sufficient. Something more is required to be improved the situation sharpening the legal executive and the police. There is additionally a need to teach the majority about this wrongdoing, as the genuine goal of condemning marital rape must be accomplished if the general public recognizes and difficulties the predominant fantasy that rape by one's mate is immaterial.