

## Concept of Martial Rape and the Need for Change

by

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### ***Abstract***

*Sexual violence against women is always a topic of discussion in India. Where in one place there has always been harass punishment for the offence when committed against a women or child by a stranger or family member other than husband but at the same time the non-consensual and forced sexual intercourse by a husband has been provided protection. The recent judgements of Chhattisgarh HC and Mumbai Session Court which held marital rape not be illegal conduct reaffirms the very notion that rape at the hands of husband is legal.*

*While the country claims to protect the dignity and body of the female the law falls short when protecting the wife from sexual violence at the hands of her husband. The absence of laws and the social stigma associated with speaking against rape in a matrimonial relationship is the reason the cases go unheard or unspoken.*

*This research paper indulges in the legality of martial rape while also discussing the reasoning of why such non-consensual sexual advances towards a married woman are provided protection under the very law that claims to protect the dignity of a woman.*

**Key Words:** Marital Rape, Rape, Consent, Wife

## **Introduction**

The term “rape” is taken from the Latin term, which means “to seize”. Rape is thus described as the forcible seizing or ravishment of a woman without her consent, whether by coercion, fear, or fraud. It entails coerced, non-consensual sexual contact with a woman. Rape is an act of abuse against a woman’s private person, and it is an outrage by every standard. That is the prime invasion of a woman’s self-esteem. The Supreme Court of India characterised it as a “deathless disgrace and the gravest crime against human dignity.”<sup>1</sup> Rape is more than just a sexual assault; it destroys the victim’s entire identity.

In 2020 India was one of 36 countries that have not criminalised the rape of a woman at the hands of her husband<sup>2</sup>. Exception 2 mentioned within the definition of Rape under Section 375 of the Indian Penal Code (IPC) states, “Sexual intercourse by a man with his wife, the wife not being under fifteen years of age, is not rape”. The exception has been rooted in the laws enforced in the British period as in that time period; women didn’t have a separate legal identity from their husband; the husband and wife were treated as one legal entity.

There are 150 countries such as Australia, Canada, Denmark, Norway, the United Kingdom, the United Nations, Italy, Ireland, Taiwan etc. that have criminalised marital rape under their respective criminal laws. The husbands are no longer provided protection when they are having forced non-consensual intercourse with their wives. The law is to apply to husbands as if a woman was raped by any other person<sup>3</sup>.

The question arises why the Indian Parliament is not ready to amend this exception when most of the countries around the world has criminalised rape within a marriage.

Currently, the law doesn’t recognise marital rape as an offence because it considers women as the property of the men and therefore, the act of rape within a marriage is not being recognised as an offence as a man can not be perceived to violate his own property.

The Justice Verma Committee explicitly recommended that the exception of marital rape should be removed from the definition of rape under section 375. It also specified that a marital relationship

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<sup>1</sup> Bodhisattwa Gautam v. Subhra Chakraborty AIR 1996 SC 922.

<sup>2</sup> HHR, “Marital Rape: A Non-criminalized Crime in India”, Harvard Human Rights General available at <https://harvardhrj.com/2019/01/marital-rape-a-non-criminalized-crime-in-india/>

<sup>3</sup> Sylvia Walby. *Stopping rape: Towards a comprehensive policy*. Bristol: Policy Press. ISBN 9781447351566. (2015)

between a husband and wife is not a defence against rape, but such recommendation was not implemented in the new definition of rape which was amended in 2013.

### **Concept of Marital Rape**

Marital rape is referred to the “forced or unwanted sexual intercourse” by a husband with his wife obtained by threat of force, physical violence or when she is unable to give consent. The term unwanted sexual intercourse refers to any kind of penetration (oral, vaginal, or anal) performed against her will or without her explicit consent<sup>4</sup>. Marital rape can be classified into three parts<sup>5</sup>

- Force-only rape: In the present form, the spouse uses only force to coerce his wife into sexual intercourse.
- Battering rape: In the present form, the spouse uses both sexual and physical violence. The assault in the present form may be initiated with physical violence, which later on leads to the sexual assault of the wife.
- Compulsive/ Obsessive rape: The rape involves sadist or obsessive behaviour from the husband. This means the rape includes methods of torture along with the sexual acts and many a time accompanied by physical torture.

Marital rape is especially complicated because the intricate, intimate nature of marital partnerships makes it difficult for the woman to even recognise herself as a victim, let alone report the offending act to police, which is why Marital Rape is one of the most under-reported violent crimes. Also, women who consider themselves victims are unable to contact authorities because they are financially dependent on their husbands, and disclosing the matter could result in financial assistance being withheld, leaving them and their children without food and housing<sup>6</sup>.

Women who have been raped by their partners are more likely to be raped multiple times. Husbands sometimes rape their wives while they are sleeping or use intimidation, verbal threats, physical abuse, or weapons to compel their wives to have non-consensual intercourse with them<sup>7</sup>. It is difficult to acquire reliable statistics on rape and violence against women within the home, in part because women

<sup>4</sup> Pradeep Kumar Pandey, Marital rape in India- Needs Legal Recognition, SSRN Electronic Journal (2013) [\(PDF\) Marital Rape in India - Needs Legal Recognition \(researchgate.net\)](#)

<sup>5</sup> Denise Kindschi Gosselin., *Heavy Hands — An Introduction to the Crimes of Domestic Violence.*, Prentice-Hall Inc., New Jersey, ( 1st Edn 2000)

<sup>6</sup> Dr. Gupta Bhavish & Dr. Gupta Meenu, Marital rape- current legal Framework in India and the Need for change, *Galgotias Journal of Legal Studies*, ISSN. 2321-1997, Vol. 1: No 1 (2013)

<sup>7</sup> Ibid

are unable to report cases, since women raped by their spouses may refuse to report due to family allegiance, fear of their abuser's retaliation, unwillingness to flee the relationship, protecting their children's future, or the lack of strict laws against marital rape. In the United States, the best available data on marital rape indicate that one out of every seven or eight married women has been raped or tried to be raped by her husband<sup>8</sup>. According to another study, about 10% to 14% of married women are raped during their marriage<sup>9</sup>. Marital rape can be described as one of the worst kinds of rape as the perpetrator is known to the woman, and she is supposed to trust, love, care and share a home with him.

### **India and Marital Rape**

In India, marital rape is not a legal offence as it is deemed that husband and wife are one individual in the eye of the law; hence a one cannot commit an offence against another. The identity of a wife is combined with the identity of the husband. The *ipso facto* doctrine assumes the wife as the chattel at the mercy of the husband and the immediate family of the male<sup>10</sup>. The above-mentioned assumption is based on the fact that a woman always requires protection from a male for survival, hence women were treated like a minor with no right to hold individual property or making contracts<sup>11</sup>.

Based on all these facts, a woman was never viewed as an individual identity; rather, she belonged to either to the husband or father without any autonomy or agency, and because she was assumed to belong to her husband post marriage, the husband controlled her and thus, he could commit no crime against his property. A husband raping his wife was not viewed as a crime because the crime was committed against the chastity and fidelity of the wife, and as the husband controlled the fidelity, it was seen as making use of his own property.

Any act of sexual assault against any individual violates the dignity, bodily integrity and autonomy, which are the most fundamental aspect of any human life which is violative of the Right to life and personality under Article 21 of the Indian Constitution<sup>12</sup>. In the case, *Maneka Gandhi vs Union of*

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<sup>8</sup> Steven Box, *Power, Crime and Mystification*, London Tavistock Publications, Tavistock Publication, ISBN-10: 0422764108 (1983)

<sup>9</sup> Diana. E. H. Russell, *Rape in Marriage*, Macmillan Pub Co; ( Reprint edition 1983)

<sup>10</sup> Lalenya Weintraub Siegel, 'The Marital Rape Exemption: Evolution to Extinction' 43 *Cleveland State Law Review* 351, 356-57 (1995); Jessica Klarfeld, 'A Striking Disconnect: Marital Rape Law's Failure to Keep up with Domestic Violence Law' 48 *American Criminal Law Review* 1819, 1826 (2011)

<sup>11</sup> Sarah Harless, 'From the Bedroom to the Courtroom: The Impact of Domestic Violence Law on Marital Rape Victims' 35 *Rutgers Law Journal* 305, 311 (2003); Stacy-Ann Elvy, 'A Postcolonial Theory of Spousal Rape: The Caribbean and Beyond' 22 *Michigan Journal of Gender and Law* 89, 105. (2015)

<sup>12</sup> Constitution of India, 1950 Article 21- No person shall be deprived of life or personal liberty except according to the procedure established by law

India<sup>13</sup>, the Supreme Court of India declared that the Right to live with human dignity is a part of the Right to life, and one cannot do away with it. The Supreme Court, in the case of *Suchita Srivtrigh v. Chandigarh Administration of Chandrabhaya*<sup>14</sup>, stated that the Right to make a sexual decision comes within the ambit of the Right to live with dignity under Article 21 of the Indian Constitution.

In the landmark judgement in the case of *Justice Puttswamy (Retd) v. Union of India*<sup>15</sup>, the Supreme Court held Privacy consist of the ability and freedom to make the decision related to one's intimate personal choice with respect to intimacy, especially in regards to procreation, sexuality and intimate relationships.

Exception 2 mentioned in the definition of rape in section 375 is discriminatory as it creates a distinction between the rape of a married and unmarried woman. Article 14 of the Constitution grants the Right of equality and equal protection of law, and the Article states that each person shall be treated in a similar manner in similar condition. Domestic violence is covered under the Protection of Women from Domestic Violence Act, 2005, which protects a wife from sexual, mental, physical, and verbal abuse on the part of the husband. In India, two out of five women are the victim of domestic violence<sup>16</sup>. The only other provision that has a similar characteristic to marital rape is Section 376B of IPC<sup>17</sup>, which punishes the act of non-consensual intercourse between a legally married husband and wife. At the time, there is a decree of judicial separation, punished with imprisonment for a term of 2-7 years<sup>18</sup>. The punishment outlined by both of the provisions are discriminatory in nature, as only on the ground that a woman is married that the penalty for sexually abusing her is less than raping an unmarried woman under Section 375 of the IPC. The non-criminalisation of non-consensual sexual intercourse with a wife cause similar if not more trauma to the wife as she knows and trusts the perpetrator; not only that, but she is to continue to reside in the same household. The non-criminalisation of marital rape is an endorsement of patriarchal assumptions regarding the status of a woman in her family. Such arbitrariness is against the reasonable classification as the marital status of a woman can't be the only ground for denying her protection in the offence of rape. The objective of rape laws is not to protect the

<sup>13</sup> *Maneka Gandhi vs Union of India* AIR 597, 1978 SCR (2) 621 (1978)

<sup>14</sup> *Suchita Srivtrigh v. Chandigarh Administration of Chandrabhaya* Civil Appeal no. 5845 of 2009

<sup>15</sup> *Justice Puttswamy (Retd) v. Union of India* WP (Civil) no. 494 of 2012

<sup>16</sup> Sarthak Makkar, "Marital Rape: A Non-criminalized Crime in India", *Harvard Human Rights Journal* available at <https://harvardhrj.com/2019/01/marital-rape-a-non-criminalized-crime-in-india/>

<sup>17</sup> Indian Penal Code, 1860

<sup>18</sup> Indian Penal Code, 1860 Section 376B- Sexual intercourse by husband upon his wife during separation: Whoever has sexual intercourse with his own wife, who is living separately, whether under a decree of separation or otherwise, without her consent, shall be punished with imprisonment of either description for a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine

secrecy and sanctity of the institute of marriage but to protect the victim and punish the perpetrator. Rape is an offence based on the absence of consent on the part of the victim. It is an undignified act no matter against whom it is committed regardless of the gender, marital status, age or ethnicity of the victim.

Article 15 of the Indian Constitution states that no one shall be discriminated against on the basis of sex. The discrimination in Marital rape is that of stereotyping. The importance of the anti-stereotyping principle is that differential treatment must not exist in the name of culture or tradition. In the case of *Anuj Garg v Hotel Association of India*<sup>19</sup>, the Supreme Court held that prohibiting women from being employed in liquor shops is constitutionally invalid as the discrimination is based on gender stereotypical gender roles under which female employees would ‘provoke sexual assaults’. In the case of *Air India vs Nargesh Meerza*<sup>20</sup>, while declaring the condition of barring marriage for air hostesses during the initial first five years of service was unconstitutional. Chandrachud J stated that “stereotypical understanding that only a woman is burden with family planning and marital bliss is discriminatory”<sup>21</sup>. The Supreme Court held in the case of *Independent Thought V/s. Union of India*<sup>22</sup>, that Exception 2 to the now-amended Section 375 IPC must be read in such a way that for the said exception to be applicable to a husband, the wife must be above the age of 18, and hence the threshold age of 15 years specified by the 2013 amendment was struck down and substituted, however, in this judgment as well, a statement as to marital rape and its criminalisation remained undecided; the Supreme Court clarified that the issue of marital rape was not before it. Thus, the same was not decided by the Court. It is interesting to note that the judgement was formed on the basis that a married minor should be provided the same protection that is provided to a minor under the Protection of Children from Sexual Offences Act, 2012, and the age limit of 15 years is violative of Article 21, Article 14 and Article 15 of the Constitution of India, but at the same time, a distinction is made between a married and unmarried woman in terms of criminalising rape. Hence, there is discrimination in providing similar rights to a woman only on the ground of the marital status of a woman.

Article 19 (1)(a) of the Constitution grants freedom to expression to an individual, and the term expression also includes decisions regarding sexual desire. Hence it gives each individual right to deny any and all sexual desire or encounters. In the *NALSA* judgement, Justice Radhakrishnan held, “that

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<sup>19</sup> *Anuj Garg v Hotel Association of India* 3 SCC 1 (2008).

<sup>20</sup> *Air India vs Nargesh Meerza* (1981) 4 SCC 335.

<sup>21</sup> *Navej Johar v Union of India* 10 SCC 1 (2018) (n 109) [434]-[437] (Chandrachud J)

<sup>22</sup> *Independent Thought V/s. Union of India* WP (C) No. 382 of 2013

values of privacy, self-identity, autonomy and personal integrity are fundamental rights granted to members of the transgender community under 19(1)(a) of the Constitution of India, and the State is bound to protect and recognise these rights”.<sup>23</sup>

The judgement is important, as it outlines the idea of freedom of expression under the Constitution, which includes aspects of individuality and identity for the purpose of self-determination. In marital sex, the wife has the right to initiate and deny any sexual advances, even from her husband. Denying a woman the right by providing immunity against rape in marriage is violating the very essence of expression and suppressing the individual identity of the wife and is a violation of Article 19(1)(a).

India being a cultural and patriarchal based country, believes that a husband can not rape his wife even when the sexual intercourse is non-consensual<sup>24</sup>. There have been very few attempts to amend the laws by the Parliament, but law commission on multiple instances have recommended the Parliament to amend the definition of rape and remove the exception of marital rape.

The 172<sup>nd</sup> Law Commission Report<sup>25</sup> recommended the Central government to exclude the exception of marital rape from Section 375 of the Indian Penal Code, stating that, “Non-consensual and forced intercourse by a husband with his wife is an offence”. A similar recommendation was presented to the Parliament by the Justice Verma Committee, but the Parliament did not take the recommendation into consideration.

In 2019, a private member bill titled the Women’s Sexual, Reproductive and Menstrual Rights Bill 2018 in Lok Sabha by Dr Shashi Tharoor. The bill proposed criminalising marital rape and giving the women decisional autonomy of termination of pregnancy. He stated that “current Indian laws fail to recognise the decision-making rights related to sexual and reproductive a wife”<sup>26</sup>. The bill was turned down by the Parliament as, according to some Parliamentarians, marriage is a sacred institution with which no interference should be made.

### **Debate against Criminalisation of Marital Rape**

<sup>23</sup> NALSA (n 93) [72] (Radhakrishnan J).

<sup>24</sup> Dr. Gupta Bhavish, Dr. Gupta Meenu, Marital rape- current legal Framework in India and the Need for change, Galgotias Journal of Legal Studies, ISSN. 2321-1997, Vol. 1: No 1 (2013)

<sup>25</sup> 172<sup>nd</sup> report of Law Commission of India on Review of Rape Laws, March 2000, para 3.1.2.1

<sup>26</sup> Rupali Pruthi, Bill to make marital rape a crime introduced in Lok Sabha, Jagran Josh, (Jan 3, 2019)

<https://www.jagranjosh.com/current-affairs/womens-sexual-reproductive-and-menstrual-rights-bill-2018-introduced-in-ls-1546517400-1>



In India, according to the National Family Health Survey, 2018, more than 80% of wives witness their husbands as sexual perpetrators<sup>27</sup>. Marital rape is one of the most under-reported crimes because the law does not support the wife when she is raped by her own husband. In a report published by an NGO, Joint Women Programme, it was reported that one in seven women had been raped by their husband at least once. The presence of marital rape in Indian households can no longer be denied, but the Indian Parliament, again and again, has ignored the prevalence of such crime and criminalising the same. The arguments which are usually made are: -

### **Argument 1 – It is Against Our Culture**

The first argument that one hears is that penalising a husband for having non-consensual intercourse with his own lawfully wedded wife is against our culture. It is argued that such criminalisation will destroy the family structure in villages and rural areas. The former CJI Deepak Mishra of India, in an inaugural session of National Conference on Transformative Constitutionalism in India: Reflections on Shifting Paradigms, stated that marital rape shouldn't be made an offence because it will create absolute anarchy in families, and our country is sustaining itself because of the family platform which upholds family values<sup>28</sup>. During the Rajya Sabha debate on criminalising marital rape, India's Minister of State for Home Affairs, Haribhai Parathibhai Chaudhary, claimed that marriage is a sacred institution. He stated that the idea of marital rape, as it is known worldwide, is inappropriate in the Indian context due to illiteracy, poverty, social conventions and norms, religious views, and the fact that marriage is seen as a sacrament in Indian society<sup>29</sup>.

It is interesting to note that in the case of *Independent thought Vs. Union of India* (2017)<sup>30</sup>, the Supreme Court clarified that marriage is personal and the institution of marriage can't be ruined by anything other than the criminalisation of marriage itself; if divorce and judicial separation have not destroyed the institution of marriage, then neither can criminalisation of Marital Rape. A very similar observation was made in *Nimesh Bhai Bharatbhai Desai vs the State of Gujarat*<sup>31</sup> while outlining the

<sup>27</sup> Anubhav Pandey, Why we need a law protecting women's sexual reproductive and menstrual rights, ipleaders. (Jan 29, 2019) <https://blog.ipleaders.in/womens-sexual-reproductive-and-menstrual-rights-bill-2018/>

<sup>28</sup> TNN, "Marital rape needn't be an offence: Ex-Chief Justice of India Deepak Mishra", The times of India, (Apr 9, 2019) <https://timesofindia.indiatimes.com/city/bengaluru/no-need-to-make-marital-rape-an-offence-ex-cji-dipak-misra/articleshow/68785604.cms>

<sup>29</sup> Pallavi Prasad, "Why It's Still Legal For Indian Men to Rape Their Wives", The Swaddle (Jan 20, 2020) <https://theswaddle.com/marital-rape-india-decriminalized-crime/>, Ministry of Home Affairs Women Subjected to Marital Rape, Government of India, Press Information Bureau dated April 29, (2015) <http://pib.nic.in/newsite/PrintRelease.aspx?relid=119938>

<sup>30</sup> *Independent thought Vs. Union of India* WP (C) No. 382 OF 2013

<sup>31</sup> *Nimesh Bhai Bharatbhai Desai vs the State of Gujarat* R/CRIMINAL MISC.APPLICATION NO. 26957 of 2017



legislation pertaining to sexual offences; it was discovered that men should be informed that marriage is not a licence to violently rape their wives. Marriage does not give a husband possession of his wife's body, and she does not become an object of possession in any way. She does not lose her human Right to exclusive autonomy over her own body by marrying, and she is therefore well within her rights to legitimately grant or withhold her permission to marital coitus at any time. Marital rape exists in India, and it is a heinous crime that has entirely eroded faith and confidence in the institution of marriage. A great number of women have borne the brunt of the practice's decriminalisation and live in constant terror for their lives as a result. The Gujarat High Court ruled that the accused should be prosecuted for violating his wife's modesty and that an inquiry into this matter should be launched.

### **Argument 2- Once Married, Consent Is Implied**

The distinction made between the rape of an unmarried and married woman is based on the doctrine of implied consent and the doctrine of the converter<sup>32</sup>. The doctrine of implied consent is based on the assumption that a woman, while entering into the contract of marriage, consents for sexual intercourse and the consent can not be withdrawn after they enter into the marriage<sup>33</sup>. Sir Matthew Hale, Chief Justice of England in 17<sup>th</sup> Century, stated, “ the husband cannot be held guilty for raping his lawful wife, because, by mutual consent and contract, the wife has given herself up to her husband in this manner, which she cannot withdraw”<sup>34</sup>.

The doctrine of coverture is based on the idea that when a man and woman marry, their identities fuse, and they become ipso facto one person in the eyes of the law. Once married, the identity of the wife is submerged with the husband's identity, and they are to be assumed as a single identity. The doctrine views the wife as the property of dominant male members of the family<sup>35</sup>.

Many still believe that at the time of marriage, women give consent to involve in sexual intercourse and that consent is implied throughout the marriage<sup>36</sup>. A husband can't be held liable for raping his wife as she is deemed his property, and while having non-consensual intercourse with her, it is seen as him making use of his property.

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<sup>32</sup> Rebecca Ryan, 'The Sex Right: A Legal History of the Marital Rape Exemption', Law & Social Inquiry (1995)

<sup>33</sup> Sir Matthew Hale, History of the Pleas of the Crown, London Professional Books, (1972)

<sup>34</sup> Ibid

<sup>35</sup> Lalenya Weintraub Siegel, 'The Marital Rape Exemption: Evolution to Extinction' Cleveland State Law Review 351, 356-57 (1995); Jessica Klarfeld, 'A Striking Disconnect: Marital Rape Law's Failure to Keep up with Domestic Violence Law' American Criminal Law Review, (2011)

<sup>36</sup> Sir Matthew Hale, The History of The Pleas of The Crown (1st ed, E and R Nutt and R Gosling 1736) 629. 'The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract' cited in Catharine MacKinnon, 'Rape Redefined' (2016) 10 Harvard Law and Policy Review 431, 444.

In the case of *Nimeshbhai Bharatbhai Desai vs State Of Gujarat (2018)*,<sup>37</sup> the Gujarat HC held that it has long been beyond time to abandon the concept of “implied consent” in marriage. The legislation shall protect all women’s sexual integrity, regardless of marital status. Another Delhi High Court decision in a PIL claimed that marriage does not imply that the wife is always ready, willing, and consenting [to sex]. The husband would have to demonstrate that she was a willing participant.”<sup>38</sup>

### **Argument 3- Women Will Misuse Marital Rape Laws**

One of the arguments laid against the criminalisation of marital rape is that women will misuse the laws by filing false cases against their husbands. On the one hand, the argument for not criminalising marital rape is that the majority of the Indian married population is illiterate, poor and follows religious values, but on the other hand, it is argued by the government that the woman is so smart and intelligent that she will seek revenge on the husband by implementing false case.

The issue, more often known as Innocent Husband/Vindictive Wife, has been a constant debate on both ordinary criminal statutes in India. The laws impose strict liability on the husband and family to prove that the wife was not subjected to any mental or physical agony. Even though there very little to no proof of misuse of these laws, the conversions regularly surface when the debate is on the topic of domestic violence or marital rape<sup>39</sup>.

In the case of *RIT Vs. Union of India (2015)*<sup>40</sup> the Union government submitted an affidavit to the High Court of Delhi stating, “A rule criminalising marital rape will become an “easy tool to bully husbands,” arguing absurdly that “if all sexual acts between a husband and his wife qualify to be marital rape, so the decision whether it is marital rape or not would solely remain with the wife.” The Union government argued that the decision of marital rape should not be based solely on the testimony of the woman<sup>41</sup>, which contradicts recognised rape adjudication norms.

### **Debate in Favor of Criminalization of Marital Rape**

In a study, it was reported that one in three men in India has admitted to having forced and non-consensual intercourse with their wives<sup>42</sup>, in another report, the UN Population Fund reported that more

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<sup>37</sup> *Nimeshbhai Bharatbhai Desai vs State Of Gujarat R/Special Criminal Application No.7083 of 2017*

<sup>38</sup> Urvija Baneji, Delhi HC on Marital Rape: “A Rape Is a Rape.”, The Swaddle (Jul 18, 2018) <https://theswaddle.com/delhi-high-court-on-marital-rape-a-rape-is-a-rape/>

<sup>39</sup> Saptrishi Mandal, The Impossibility of Marital Rape’ Australian Feminist Studies, 29:81, 255-272 (2014)

<sup>40</sup> *RIT Vs. Union of India W.P (C) No. 284/2015*

<sup>41</sup> *RIT Foundation v Union of India*, Written Submission on behalf Respondent (Union of India) (WP (C) No284/2015 (2015) [3] (Delhi High Court).

<sup>42</sup> Bansari Kamdar, “In India, a Man Can Still Legally Rape His Wife”, The Diplomat (Aug 17, 2020)

than two-thirds of married women in India, between the age gaps of 15 to 49, have been beaten, raped, or forced to provide sex to their husbands, yet the government is reluctant to criminalise such sexual assault. The UNDP chief commented that India should criminalise marital rape to protect women from forced sexual intercourse with their husbands.<sup>43</sup>

In India, cruelty is a ground for demanding divorce<sup>44</sup> by the Hindu Marriage Act<sup>45</sup> and other personal laws, but interestingly sexual violence and torture against a wife is not treated as a crime, under the Protection of Women from Domestic Violence Act, 2005 a woman is only awarded a protection order and not a criminal remedy against her husband. According to the legislators seeking divorce is a more comfortable choice than penalising the husband for sexually abusing the wife; in doing so, the government recognises the patriarchal assertion of a male or the female bodily autonomy. Claiming that the women of the country are poor, illiterate and burdened by the religious beliefs and social customs, to which an inherently contradictory statement is issued stating that the women in India are abusing and misusing the dowry and domestic violence law to exact revenge and hares their husbands. Both the statements are used in order to deny women protection from sexual abuse with marriage, where one assumes that the women of India are illiterate and trapped in the orthodox social and religious beliefs to understand the sexual violence within a marriage, while the second assumes that a woman is smart to understand the technicalities and complexity of the said laws to take revenge on her family members.

The Indian Constitution provides equal rights and liberties to all its citizens, regardless of sex, caste, colour etc., but when the institution of marriage is in question, the law and government rarely interfere in it. The legal vernacular is riddled with ancient and draconian terms such as ‘restitution of conjugal rights, which legalises rape inside marriage. According to this notion, the Court has the authority to require a spouse to submit to the conjugal act. This provision is interpreted as the consent of the parties in a marriage. Further, when the rights of women are challenged in India, the courts take a contradictory attitude and frequently issue complicated judgements on the rights of spouses within a marriage. For example, in the case of *Harvinder Kaur v Harmender Singh*<sup>46</sup> While remarking on the

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<https://thediplomat.com/2020/08/in-india-a-man-can-still-legally-rape-his-wife/>

<sup>43</sup> Suhasini Haider, “Criminalise marital rape: UNDP chief” The Hindu (Sept 16, 2016)

<https://www.thehindu.com/news/national/Criminalise-marital-rape-UNDP-chief/article14154754.ece>

<sup>44</sup> Shashi Bala v Rajiv Arora FAO No. 185/2001 Delhi High Court, Judgment delivered on 21.3.12

<sup>45</sup> The Hindu Marriage Act 1955 Section 13 (1)

<sup>46</sup> *Harvinder Kaur v Harmender Singh* AIR 1984 Delhi 66

application of the Right to equality and Right to life inside a family, the Court stated that “introduction of constitutional law in the home is most incorrect”, it’s like unleashing a bull in a China shop. It will be a brutal destroyer of marriage and everything it stands for. Articles 21 and 14 have no place in the privacy of the home or married life. The adoption of harsh principles of Constitutional Law would have an effect on diminishing the marriage relation in a sensitive domain that is both intimate and delicate.” Analyzation of such judgements reveals that wives are treated as lesser citizens by the Indian laws<sup>47</sup>. The cause for this prejudice is the judiciary’s patriarchal perspective to defining the framework of rights and obligations within a family.

This argument is used in cultures where marriage is seen as a contract to emphasise that the act of the wife yielding herself in marriage to the husband is an exchange done freely for the purpose of maintenance and general well-being to be assured by the husband. Such a concept is fundamentally contrary to the modern concept of marriage as a union of equals since it is based directly on patriarchal conceptions of male supremacy and his unique role as provider and protector. Furthermore, the social contract’s objective is to defend oneself from third parties, not from the “determinate superior.” When the superior accepts the position of the oppressed, there is no escape.

Secondly, the implied consent approach fosters the idea of sex as key, of sexual interactions as the primary component in marital life and all other elements as secondary. As a result, the discussion has been reshaped to focus solely on sexual autonomy rather than autonomy in general.

Thirdly, the argument is based on the selective application of permission. It purports to establish consent by using marriage as an indicator: the woman is considered to have offered unconditional assent to sexual intercourse with her husband by virtue of her marriage. However, such a classification presents two significant concerns. On the one hand, it creates an artificial boundary between married and unmarried sexual encounters, thereby relegating or even condemning extramarital sex. As a result, sex before marriage is forbidden, and sex after marriage with someone other than one’s wife is forbidden. While forced sex outside of marriage is clearly defined as rape, consensual intercourse with another woman outside of marriage (adultery) is no longer a criminal offence<sup>48</sup>. Under these circumstances, the protection afforded to coerced sex within marriage becomes absurd. However, on

<sup>47</sup> State v Aftab Alam, Special Fast Track Court, Dwarka Court SC No. 131/13 Unique Case ID No. 02405R0075252013  
Date of Pronouncement 05.06.2014

<sup>48</sup> Joseph Shine v Union of India [2019] 3 SCC 39

the other hand, if consent is used to waive bodily autonomy inside marriage, it should apply equally to all circumstances in which bodily autonomy is violated, including violence<sup>49</sup>. If consent is used to waive solely sexual autonomy while preserving all other parts of physical autonomy, the sexual component of marriage is elevated above everything else, which, as previously noted, is incongruous with the current concept of marriage as an equal partnership.

To differentiate it from the present Western concept, the Indian notion of marriage as a divinely appointed union is invoked, and support is gained from the fact that daily domestic life in India is still controlled by the religious norms of each culture<sup>50</sup>. The fact that marriage in India is considered as a marriage of two families rather than only between the partners contributes to this perception. Many people in India, including lawmakers, believe that the family is the key arbiter in domestic issues. Their problem appears to be that the intervention of criminal law within the family framework would imperil this informal alternative and significantly diminish the probability of peaceful resolution of such disagreements<sup>51</sup>. The assumption that the family is the natural or ideal forum for domestic conflicts deprives victims of the opportunity to seek legal redress that is otherwise available to all citizens. While it is debatable whether promoting the integrity of the family unit is a State prerogative, broader problems remain. Proponents of the family privacy argument argue that they do not want the state to intervene in what is essentially a private dispute between a husband and wife while also requesting that the state actively promote a specific preferred informal institution to arbitrate disputes involving human rights violations. Neither of these is legitimate grounds for leaving victims remediless.

The Supreme Court has recognised marriage as an alliance between two autonomous equals and that marriage does not turn women into property whose sexuality may be controlled by their husbands<sup>52</sup>. In reality, despite the fact that the ruling was made in the context of the unconstitutionality of marital rape immunity for females aged 15 to 18, the Court agreed that rape inside a marriage is not a conceptual impossibility. Marriage was also seen to be ‘personal’ rather than ‘institutional.’ Even if the institution

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<sup>49</sup> Hasday, Reva Siegel, ‘The Rule of Love: Wife Beating as Prerogative and Privacy’ Yale Law Journal 2117, 2148-49 (1996)

<sup>50</sup> Saptrishi Mandal, The Impossibility of Marital Rape’ Australian Feminist Studies, 29:81, 255-272 (2014)

<sup>51</sup> Aarefa Johari, ‘As Government Refuses to Criminalise Marital Rape, Laws on Such Assaults Remain a Muddle’ The Scroll (Apr 30, 2015) <https://scroll.in/article/724239/as-government-refuses-to-criminalise-marital-rape-laws-on-such-assaults-remain-a-muddle>. While discussing the Criminal Law (Amendment) Bill 2012, Lok Sabha member Sumitra Mahajan made the following statement: ‘People these days get divorced over insignificant issues. Marital rape shouldn’t be made into a criminal offence... Things like these should be sorted out within the family or by counselling. There is no need for a law’.

<sup>52</sup> Independent Thought v Union of India (2017) 10 SCC 800 [73]

of marriage is somewhat regulated by legislation, its sanctity ultimately rests on the partners' level of devotion and determination to maintain the married connection. Even if religious sanctity is called into question, it cannot be safeguarded at the expense of fundamental rights and principles like equality, dignity, liberty, and autonomy. It has also been argued that the purported goal of preserving the sanctity of marriage was actively promoting patriarchal stereotypes by promoting the notion that women had no sexual freedom or agency inside the married relationship.

Section 497 of the Indian Penal Code, which criminalises adulterous connections with one's wife, was declared to be illegal State intrusion for the purpose of maintaining the purity and stability of marriage by the Supreme Court in *Joseph Shine v Union of India*<sup>53</sup>.

The other, more general concern is that removing the exception may lead to its abuse, resulting in a flood of bogus claims against husbands. This dilemma, known colloquially as the Vindictive Wife/Innocent Husband conundrum, has dominated discussions in India over domestic violence law as well as a general criminal statute. Despite the fact that there is little to no scientific evidence to show widespread abuse of such clauses, they frequently come up in discussions about domestic violence and marital cruelty. Misuse of legal measures for women's protection is typically done at the request of attorneys rather than their clients and may be linked to the difficulty in obtaining formal separation or divorce<sup>54</sup>. The discussion about marital rape has frequently been sidestepped by referring to alternative remedies available under Indian law, such as domestic violence statutes, that can be employed in its place. The availability of alternative criminal remedies against the husband and his family relations in offences and other areas of law is an admission that cruelty in marriage is a part of our social reality. Recognizing cruelty but denying a specific kind of remedy is illogical and hypocritical.

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<sup>53</sup> *Joseph Shine v Union of India* [2019] 3 SCC 39

<sup>54</sup> Rehan Abeyratne and Dipika Jain, 'Domestic Violence Legislation in India: The Pitfalls of a Human Rights Approach to Gender Equality' *American University Journal of Gender Social Policy and Law* 333, (2012)

### **Way Forward**

The continued exclusion of marital rape from criminal law upholds the husband's claim of the woman as his exclusive property. Views about women's sexuality, and therefore ideas about non-marital and marital rape in Indian society, stem from concepts of gender, shame, and family honor, rather than women's rights and individual liberty.

Exception 2 under Section 375 of IPC is discriminatory in nature and against Article 14 of the Constitution of India. This provision is biased on the basis if a woman is married or not. The exception is also against Article 21 of the Constitution of India. Through many judgements, the Supreme Court has extended the meaning of Article 21 and included the rights to health, privacy, dignity, safe living conditions, and safe environment and continuous internet, among others. In the landmark judgement of *Justice K.S.Puttaswamy(Retd) vs Union Of India(2018)*<sup>55</sup> was held by the Supreme Court "decisional privacy is represented by the Right to make intimate decisions specifically concerning one's sexual or procreative behaviour, as well as decisions concerning intimate relations..."<sup>56</sup> A breach of Constitutional rights is compulsory sexual intercourse and cohabitation. Since the judgement doesn't discriminate on the basis of a married or unmarried woman, there is no direct judgement which states that a woman upon marriage forfeits their Fundamental Right of privacy upon marriage. All women have the Right to not consent against forced sexual intercourse and the Right to say no.

India is progressing toward favorable legal reform for women in general, but more steps are required to achieve both legal and social reform, which would end in criminalizing marital rape and altering the underlying cultural beliefs about women in marriage.

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<sup>55</sup> *Justice K.S.Puttaswamy(Retd) vs Union Of India* WP (C) No. 494 OF 2012

<sup>56</sup> Pallivi Prasad, "Why It's Still Legal for Indian Men to Rape their Wives", The Swaddle (Jan 20, 2020) <https://theswaddle.com/marital-rape-india-decriminalized-crime/>