

## MARITAL RAPE – A LICENSE TO RAPE?

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### Abstract:

Marriage is a sacrosanct process in which husband and wife promises to live together with love, care, understanding, trust, mutual respect. It is a meeting of two souls: physically, mentally, and sexually. But here question arises whether this also gives right to husband to do sex without consent of wife or to do it forcefully. When husband do sex without consent of wife or forcefully it refers to word marital rape. It is forcible and non-consensual sexual acts between spouses. The term rape is well defined under section 375 of IPC. But it is covered by its exception (2) being husband, if you have a forcible or non-consensual sexual act with your wife it is not illegal in India. India is still enlisted among 36 countries across the globe who not yet criminalised marital rape.

The government of India itself says that criminalising marital rape, may destabilize institution of marriage and may act as easy tool to harass the husband as section 498(A) of IPC, is usually used on a false pretext to harass the husband and his relatives.

**Keywords:** marriage, non-consensual sex, pornography, husband's chattel, victimization.

### Introduction:

"Marriage is a mosaic you build with your spouse. Millions of tiny moments that create your love story" - Jennifer Smith

Marriage also called matrimony or wedlock. It is a culturally recognised union between two people called spouses. It establishes rights and obligations between them and as well as between them and their near future children and between them and their in law. It is a social institution where the husband and the wife admit to live together. The crux of successful marriage is love, understanding, mutual respect, trust, commitment or togetherness. Marriage is a meeting of two souls; physically, mentally, sexually, who admire to help or understand each other in a difficult situation. Through a marriage a

male and female make a mutual consent to live together throughout the life. It creates a crucial role in transferring the culture and civilization from one generation to another. Marriage generates social capital. Marriage also creates social bonds which is not beneficial for only family out for others as well as including the larger society.

The term 'marital rape' refers to forcible and non-consensual sexual acts between spouses. So far the term 'rape' is concerned it is well defined in Chapter XVI which deals with "Offences affecting Human Body", under section 375 of IPC [<sup>1</sup>] and its crux is – a man commits rape if he has sexual intercourse with a woman (female) against or without consent. And the same is penal offence in India.

The dark part of it is covered by its exception (2), being the husband of the woman if you have a forcible or non-consensual sexual act with your wife, the wife not being under 15 yrs of age, does not amount to rape in India. Or in other words Section 375 of Indian Penal Code explicitly allows a man to rape his adult wife.

Now here the most important question arises that whether marriage gives right to husband to sex forcefully without the consent of wife. After marriage women gets trust that her husband will provide her security, safety and do take care of her, but when she finds that her husband is forcefully cohabiting with her, it really breaks down her believes and her faith.

India is still enlisted in among those 36 countries across globe which have not yet criminalised marital rape. Poland was the first country to criminalise the draconian practice of spousal rape in 1932 and interestingly it has come to mark a century now, yet this practice has not been criminalised in India.

India used to be a British colony till 1947 by all means. Post independence much have gone under change but India is still following the devastating theory which was propounded by Matthew Hale in 18<sup>th</sup> century by Chief Justice of Court of King's Bench, which reads as – "the husband can't be guilty of rape committed by himself upon his lawful wife, for by their matrimonial consent and contract the wife, hath given herself up in this kind unto her husband which she can't retract". Another justification comes

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<sup>1</sup> Rape, by Prof S.N. Mishra

from William Blackstone in 1753 when he defended doctrine of coverture, which says that the legal status of a married woman as her husband's property or chattel. Whereas the truth being, a husband does not actually own his wife's body by virtue of the marriage. Neither the wife divest herself of her rights exclusively to her husband even after the marriage she has right to say 'no' to her husband. While the British itself has criminalised this ill-practice in 1991 but its follower and erstwhile colony India has not.

### **Legislature view on marital rape:**

The Government of India itself says – criminalising marital rape may destabilize institution of marriage and may act as an easy tool to harass the husband, as Section 498(A) of IPC is usually used on a false pretext to harass the husband and the his relatives. [2] The Apex Court replied on the very statement of Union Government in *Independent Thought vs. Union of India*<sup>3</sup> by quoting, “if divorce and judicial separation have not destroyed the institution of marriage, criminalising the marital rape certainly can not either. And as far as case of S.498(A) of IPC on a false pretext is concerned, the court is there to decide the matter whether it is self construed or has actually taken place. If it be the ground to refrain from criminalising the marital rape then the provisions of murder has occasionally been found for making false accusations.

Further in the instant case itself much awaited change was pronounced by the Hon'ble Supreme Court which changed the minimum age of 15 yrs to 18 yrs under Exception 2 of S.375 of IPC<sup>4</sup>.

### **Case Study:**

**1<sup>st</sup>:** At 42, Suman, (name changed) a women who lived in Mumbai has spent 24 years of her life dreading the sex assault. She vividly recalls each episode of violence while sitting at a counselling centre in a Mumbai. She tell that she was slapped, beaten with a stick, sexually abused in private and verbally abused in public, being abandoned and later, treated like slave. She says she has cling to her marriage due to roof over her

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<sup>2</sup> <https://www.thehindu.com/news/national/criminalising-marital-rape-will-destabilise-marriage-govt-tells-hc/article19581512.ece/amp/>

<sup>3</sup> *Independent Thought v. Union of India*, (2013) 382 SCC (2017) (India)

<sup>4</sup> *Supra* (3)

head i.e, one room - kitchen flat that is in her husband's name. Having studied up to class- 10, she has taken up odd jobs, but she can't fend for herself with poor earning. She first lodged a domestic violence case against her husband in 2007.

After that nine year later, in August 2015, Suman landed in the emergency room of public hospital with injuries on her private parts that doctors noted as those inflicted in a sexual assault, but later at police station the assault was seen "between a husband and wife " and no cases was registered.

Emergency room and counselling centres for women have been recording what the country is currently debating: the need to criminalise marital rape .

**2<sup>nd</sup>:** 664 cases of women who reported against the domestic violence in 2015 at NGO Sneha's crisis counselling centre in Dharavi and 159 women, who reported against the other issues, marital rape.

**3<sup>rd</sup>:** Again at Sneha's counselling centres at KEM and Sion hospitals, 218 cases of domestic violence in 2015 and 64 women said they had faced marital rape.

**Findings:** When Union Minister Maneka Gandhi said that even if there was a law against marital rape women didn't complain about that. Doctors and counsellors point out that Mrs. Gandhi may not be off the mark but that she missed the complete picture.

The picture got clear when Nayreen Daruwalla, director with Sneha's program on prevention of violence against women and children, said " Women do not report [ marital rape ] directly, but they talk about it indirectly they said that husband not giving money or they talk about other problems ".

Rekha Devar, head of Gynaecology at Maharashtra's largest tertiary care facility, J.J. Hospital, said, " Women never mentioned about sexual assault , either very rarely patient tell us about sexual assault or marital rape or we see injuries and probe them. They also do not aware about that, it is wrong ".

**Data as per National Family Health Survey (NFHS) - 4<sup>5</sup>:**

- Women undergo multiple forms of sexual violence from their spouse such as follows:
  - ❖ Exposure to pornography,
  - ❖ Forcible sex during menstruation,
  - ❖ Forced sex during pregnancy,
  - ❖ Forced oral sex, or
  - ❖ Excessive sexual intimidation.
  
- **83%** of ever married women aged 15 – 49 admit that they have ever been subjected to sexual violence and found their current husband as perpetrator, but most of them didn't share her painful story to others.
  
- In India, **9%** men agree to the fact that a husband has right to force his wife to have sex when they refuse to do so. While the **3.8%** women of highest literate State Kerala face sexual abuse by their husband.
  
- Sexual violence does not come in isolation, it brings physical violence as well, over **35%** of the women aged 15 – 49 have faced physical violence or sexual violence while **5%** of them are subjected to physical violence and sexual violence in one go.
  
- **11%** men agree to the fact that a husband has the right to refuse financial support if she refuses to have sex.
  
- **18%** men agree to the fact that a husband has right to get angry if she refuses to do so.
  
- **15%** of men do not agree to the fact that she is justified in refusing from having sex with her husband when she is tired or not in mood.
  
- Studies have also found that there are some effects a rape victim is likely to live with<sup>6</sup>:
  - ❖ Physical injuries to vaginal and anal areas, lacerations, bruising, et cetera.
  - ❖ Anxiety, shock, depression and suicidal thoughts.

<sup>5</sup> [https://www.google.com/url?sa=t&source=web&rct=j&url=http://rchiips.org/nfhs/NFHS-4Reports/India.pdf&ved=2ahUKEwjZ3aW-zsrrAhUFdCsKHdwwD\\_sQFjABegQIARAB&usg=AOvVaw1cPRD4bOXkxIPk3GeWk9cB](https://www.google.com/url?sa=t&source=web&rct=j&url=http://rchiips.org/nfhs/NFHS-4Reports/India.pdf&ved=2ahUKEwjZ3aW-zsrrAhUFdCsKHdwwD_sQFjABegQIARAB&usg=AOvVaw1cPRD4bOXkxIPk3GeWk9cB)

<sup>6</sup> [https://www.indialawjournal.org/archives/volume2/issue\\_2/article\\_by\\_priyanka](https://www.indialawjournal.org/archives/volume2/issue_2/article_by_priyanka).

- ❖ Gynecological effects including miscarriage, stillbirths, bladder infections, STDs and even infertility.
- ❖ Long drawn symptoms like insomnia, eating disorders, sexual dysfunctions and negative self image.

### **International Perspective:**

The laws regarding marital rape and harassment over the planet have usually less legal protection to women, whereas rape has the strongest legal protection round the world. United Nations have found that in 36 countries rape perpetrators are exempted from prosecution once they are married. Whereas Western Asia was the weakest region of the world for legal protection regarding this issue, due partially to the very fact that they need no laws against marital rape. In different countries the laws against marital rape and violations are different, this is often a robust and worrying issue which the citizens are facing their lifestyle.

In several countries the punishment for marital rape is different even some countries like France, rape including marital rape, is punishable by 15 years to captivity counting on the circumstances, yet sexual aggression excluding rape only leads to up to five years imprisonment and a €75,000 fine. In US, each state has the likelihood to possess its own particular law regarding sexual abuse. In Texas the felon can confront to twenty years in jail and a \$10,000 fine.

On the opposite hand some countries like Belgium, Luxembourg and therefore the Netherlands treat rape as a problem of morality instead of violence and permit the perpetrator to flee any punishment by admitting their guilt and reaching a settlement with the victim.

In China, India and Indonesia, rape is legal if both parties are married and therefore the rapist also can escape prosecution if they marry their victims. It's similar in Russia, Greece, Serbia and Thailand, but as long as both parties were already in a relationship.

In Nepal, the sexual violence committed during the interior armed conflict was never adequately addressed. Even in today's society, perpetrators are still not being appropriately punished, and victims are discriminated against. The State urgently needs to

reform its laws. Doing so is the only way to achieve the inclusion and equal rights that are enshrined in the 2015 constitution. In May 2019, the UN Human Rights Committee (HRC) called on Nepal to bring its laws regarding rape and other sorts of sexual violence in line with international standards. Furthermore, the state should improve victims' access to justice. Over 13,000 people lost their lives in the internal conflict, and around 1,000 disappeared. Both parties to the conflict, the government troops and the Maoist rebels, raped and abused women and girls.

Nepal should heed the advice of UN Secretary-General António Guterres on how to deal with sexual violence in conflict. In March 2019, he called on the UN Security Council to grant victims temporary legal protection and full compensation, including medical and psychosocial care, social assistance and appropriate reparations.

#### **International Data (as per UN Women)<sup>7</sup>:**

- More than 35% of women across the globe have experienced either physical or sexual violence. Whereas it is 83% in India, an extremely devastating figure.
- In the countries of Middle – East and North Africa, where the children see his father treating his mother brutally in the house, were more likely to report perpetrating their better half during their adulthood.
- In 2017, it was reported globally that more than 87,000 women were killed by their intimate partners. And out of this figure around 30,000 were killed by their current intimate partners.

#### **Violation of Article 14 of Indian Constitution:**

Article 14 ensures that “the State shall not deny to any person equality before the law and equal protection of the laws within the territory of India”. [<sup>8</sup>]

Exception 2 of S.375 of IPC violates the right to equality enshrined under Article 14 of Indian Constitution as it discriminates the married women by denying equal protection from rape and sexual assault. The exception makes it possible the easy victimization of

<sup>7</sup> *Facts and figures: Ending violence against women*, UN WOMEN, <https://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures>

<sup>8</sup> Constitution of India, by O.P. Rai

married women for no reason other than their marital status while protecting unmarried women from those same acts.

Exception 2 defeats the very purpose of Sec. 375 of IPC, i.e. to protect women and punish those who are indulged in such an inhumane and heinous activity of rape. Meanwhile exempting husband from it makes it contradictory to achieve the very purpose, as the consequences of rape is same whether the victim is married or unmarried.

When it comes to the Indian perspective victim herself tries to conceal the happenings as she finds it much difficult to escape from such abusive, brutal and suffocating environment because they are legally and financially tied to their husband.

And here Exception 2 triggers as well as provides safeguard/shield to husband to have forcible and non-consensual sexual intercourse with his wife, as they know very well that their deeds will not amount to rape.

Since no rational nexus can be deciphered between the classification created by the exception and the underlying objective of the act, it does not satisfy the test of reasonableness and thus violates Article 14 of the Indian Constitution.

#### **Violation of Article 21 of Indian Constitution:**

Article 21 of states “no person shall be denied of his life and personal liberty except according to the procedure established by law”<sup>9</sup>. In various cases Hon'ble Supreme Court has extended the ambit of Article 21 and included the right to health, privacy, education, dignity, safe living conditions and safe environment.

In most recent case *Justice K.S. Puttuswamy (Retd.) Vs. Union of India*<sup>10</sup>, the Apex Court recognised the “Right to Privacy” as a fundamental right of all citizens and held that it includes “decisional privacy reflected by an ability to make intimate decisions primarily consisting of one’s sexual or procreative nature and decisions in respect of intimate relations”.

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<sup>9</sup> Supra - (7)

<sup>10</sup> Justice K.S. Puttuswamy (Retd.) v. Union of India, (2017) AIR 2017 SC 4161 (India)



In *State of Karnataka Vs. Krishnappa*<sup>11</sup>, Hon'ble Supreme Court held that sexual violence apart from being an inhumane act is an unlawful intrusion of the "right to privacy" and sanctity of a female.

In *Suchita Srivastava Vs. Chandigarh Administration*<sup>12</sup>, the Supreme Court had a holding that equated the right to make choices related to sexual activity with right to personal liberty, privacy, dignity & bodily integrity under Article 21.

In *Govinda Vs. State of Madhya Pradesh*<sup>13</sup>, the Supreme Court had propounded the "right to abstain" from sexual activity and further stated that forcing for sexual cohabitation is a violation of the said fundamental right.

All the above mentioned rulings do not specify the status of women instead it is irrespective of marital status of women. Every woman has fundamental rights and remains with her till the time she breathes. So marrying his husband does not mean that she has divested all her rights to that of his husband. Though she is married, she possesses those rights and may refrain from having sex even with her husband. A 'no' always means no whether she is married or unmarried and it is justified as it is her fundamental right.

#### **Patriarchal approach of Legislature:**

Since no laws explicitly prohibits men from raping his legally wedded wife except the following conditions :-

1. Sexual intercourse or sexual acts by a man with his own wife, the wife being under 15 yrs of age.
2. Sexual intercourse by the husband upon his wife during a period of separation.

The first one punishes as the victim falls under the category of children so not criminalising such a dreadful practice would result in increased number of such cases and it not acceptable by the society at large whereas second one punishes with utmost mild effect which provides an imprisonment for a period of minimum 2 yrs and which may

<sup>11</sup> The State of Karnataka v. Krishnappa, (2000) 4 SCC 75 (India)

<sup>12</sup> Suchita Srivastava v. Chandigarh Administration, (2008) 14 SCR 989 (India)

<sup>13</sup> Govind vs State Of Madhya Pradesh & Anr, 1975 AIR 1378

extend upto 7 yrs while the general punishment provided for rape puts the perpetrator behind the bar for atleast 10 yrs.

*Delhi High Court* while dismissing the PIL to criminalise marital rape filed by Anuja Kapur said that the drafting of the law is the function of the legislature rather than the courts<sup>14</sup>.

### Conclusion:

Advancing well into the timeline, marital rape is not a crime in India. Despite several amendments, law commission, new legislations and most importantly even after recommendation of **J.S. VERMA COMMITTEE**<sup>15</sup>, which was constituted after Delhi Nirbhaya Gang Rape in 2012, to make the rape laws more stringent and to reduce the complexity of trial procedure.

The absence of provisions of law to criminalize marital rape reflects the states inability to recognise the right of a wife who is a women and most importantly a human.

Considering the astonishing and alarming data as well as violative constitutional perspective it is the high time for judiciary to strike down the exception to of Section 375 of IPC and to declare it as unconstitutional.

After all, rape is a rape, irrespective of who the perpetrator is and the age of the survivor.

<sup>14</sup> <https://www.google.com/amp/s/www.shethepeople.tv/news/advocate-files-plea-marital-rape/amp/>

<sup>15</sup> J.S. Verma Committee Report

<https://www.google.com/url?sa=t&source=web&rct=j&url=https://www.prindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committe%20report.pdf&ved=2ahUKEwjW7cb328rrAhULOSsKHXIZCgAQFjAAegQIDBAC&usg=AOvVaw2I6Zp2KAe0nVK1-hcgTa5i>

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