

“The Slant of Marital Rape in India”

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THE EXORDIUM

Sexual violence is one of the most extreme and effective forms of control in a male dominated society, which simultaneously damages and constraints women’s lives and prompts individual and collective resistance among women thereby maintaining the status-quo of gender inequality, subjugation of women and their control. Sexual violence describes the deliberate use of sex as a weapon to demonstrate power over and to inflict pain and humiliation upon, another human being.⁴ Sexual violence may be defined as any violence, physical or psychological, carried out through sexual means or by targeting sexuality. Sexual violence covers both physical and psychological attacks directed at a person’s sexual characteristics. Sexual violence does not necessarily include direct physical contact between perpetrator and victim, threats, humiliation and intimidation may all be considered as sexually violent. Sexual violence is a complex political phenomenon deep embedded in the socio-cultural milieu. Sexual violence is one of the most extreme and effective forms of control in a male dominated society, which simultaneously damages and constraints women’s lives and prompts individual and collective resistance among women thereby maintaining the status-quo of gender inequality, subjugation of women and their control. Sexual violence is all pervasive and manifests itself in a number of forms, which exist in all institutions of life including the most basic unit of human society i.e., the family. The word “Rape” is derived from the word “*rapio*” which means “*to seize*”. Thus rape literally means a forcible seizure. It signifies in common terminology, “as ravishment of a woman without her consent, by force, by fear, or fraud” or “the carnal knowledge of a woman by force against her will”. In other words rape is a violation with violence of the private person of a woman and outrage by all means, (**Phul Singh v. State of Haryana**)⁵.

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⁴ Peter Gordon and Kate Crehan, Dying of Sadness: Gender, Sexual Violence and the HIV Epidemic. SEPED Conference Paper Series at 2 available at: https://childhub.org/en/system/tdf/library/.../gordon_crehan_gender_sexua.pdf, last visited on Aug. 22, 2017.

⁵ AIR 1980 SC 249

THE CONCEPT OF MARITAL RAPE

Rape must be understood as the gravest kind of sexual violence against women – an extreme manifestation occurring in the continuum of sexual violence which negates the human rights of the women completely. Rape stems from sexist values and beliefs and it is not simply an issue affecting individual woman. It is a social and political issue directly connected to imbalances of power between men and women. Rape is an act of aggression and violence in which the victim is denied her self-determination.

The definition of rape, as recognized by the majority of legal systems, does not go beyond the parameters of a patriarchal value system, reflects old notions of chastity, virginity, marital ties and emphasizes the fear of female sexuality. The legal definition of rape in most countries is limited to non-consensual or forced vaginal penetrations and exempts a particular class of males – husbands, who cannot be charged with the rape of their own wives.

Marital rape can be defined as any unwanted sexual intercourse or penetration (vaginal, anal, or oral) obtained by force, threat of force, or when the wife does not consent. One of the very peculiar implications of the narrow and restricted definition of rape is that it cannot be committed against a particular set of women – a married woman cannot be raped by her own husband. Further, the implication of this loophole is that violent and unwanted sex does not necessarily define rape rather it is illegal sex, i.e., sexual assault by a man, who has no legal rights over the woman.⁶ In other words, in law's eyes, violence in a legal sexual intercourse is permissible, but sexual relations with a woman, who is not one's property is not.

The initial rationale for the marital exemption clause is based on Sir Matthew Hale's statement made in 1678 that "the husband cannot be guilty of rape committed by himself upon his lawful wife, for their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract."⁷

The premise of the statement was based upon the common law notion of marital unity that husband and wife were one and a married man could not be held liable for raping himself. In majority of the countries in the world; husbands enjoy 'criminal law immunity' for raping their wives. Wife rape has existed as long as the institution of marriage.⁸

⁶ Ann Wolbert Burgess and Lynda Lytle Holmstrom, *Rape : Victims of Crisis*, 197 (1974) quoted in Dianne Herman, "The Rape Culture" in *Women – A Feminist Perspective*, ed. by Jo Freeman, 3rd edn., 20 (1984) at 22.

⁷ Sir Mathew Hale quoted in Rosemarie Tong, *Women, Sex and the Law*, 94 (1994).

⁸ Diana E.H. – Russell, *Rape in Marriage*, 2nd edn., 2 (1990).

Section 375 of the Indian Penal Code defines "Rape",

Operative part of the said section is reproduced herein below: 375. *Rape*.—*A man is said to commit "rape" if he—*

- a. Penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
- b. inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
- c. manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any of body of such woman or makes her to do so with him or any other person; or
- d. applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

under the circumstances falling under any of the following seven descriptions:

Firstly,— Against her will.

Secondly, — Without her consent.

Thirdly, — With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly, — With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly, — With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly, — with or without her consent, when she is under eighteen years of age

Seventhly, — When she is unable to communicate consent.

Explanation I—For the purposes of this section, "vagina" shall also include labia majora.

Explanation 2—Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception I—A medical procedure or intervention shall not constitute rape.

Exception 2—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.

The primary aim of the 2013 amendment was to make much needed changes to the definition of rape and to improve women's access to the legal system. The amendments to the Criminal Penal Code and the Evidence Act were aimed at ensuring that women are not re-victimized when they approach the legal system after an act of rape against them. The amendments sought to remove irrelevant medical examinations and unnecessary questions that women were asked during cross-examination, and to facilitate better investigation and trial in rape cases. However, despite the changes in law, the law makers and the governments have taken no step regarding framing of law for Marital Rape.

Even the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), of which India is a signatory, has viewed that this sort of discrimination against women violates the principles of equality of rights and respect for human dignity. Further, the Commission on Human Rights, at its fifty-first session, in its Resolution No. 1995/85 of 8-3-1995 titled "The elimination of violence against women", recommended that marital rape should be criminalized.

That Article 21 of the Indian Constitution, incorporates the right to live with human dignity and is a standout amongst the most fundamental components of the right to life which perceives the independence of a person. The Supreme Court has held in a catena of cases that the offense of rape abuses the right to life and the right to live with human dignity of the victim of the crime of rape

In *Bodhisattwa Gautam v. SubhraChakraborty*²⁸ the court held that rape is a crime against the basic human right and violation of the right to life enshrined in Article 21 of the Constitution and provided certain guidelines for awarding compensation to the rape victim.

In the landmark case of *The Chairman, Railway Board v. Chandrima Das*²⁹, the Hon'ble Court held that rape is not a mere matter of violation of an ordinary right of a person but the

violation of Fundamental Rights which is involved. Rape is a crime not only against the person of a woman, it is a crime against the entire society. It is a crime against basic human rights and is violative of the victims most cherished right, namely, right to life which includes right to live with human dignity contained in Article 21.

That a reading of the aforesaid cases as well various other catena of the judgments and cases, it is ample clear that such an exception as "marital rape: us violative of the basic fundamental concepts on which our entire legal system is bases and such an except damages the entitlement of women to live with dignity and encourages the society to commit crime against the women, which in itself is unacceptable and against the principle and corner stones of the Constitution of India..

That the case of *State of Maharashtra v. Madhkar Narayan*³⁰ the Supreme Court has held that every woman is entitled to her sexual privacy and it is not open to for any and every person to violate her privacy as and whenever he wished.

In the landmark case of *Vishakha v. State of Rajasthan*³¹ the Supreme Court extended this right of privacy in working environments also. Further, along a similar line we can translate that there exists a right of privacy to get into a sexual relationship even inside a marriage.

In *Sree Kumar vs. Pearly Karun*³², the Kerala High Court watched that the offense under Section 376A, IPC won't be pulled in as the spouse is not living independently from her husband under a declaration of partition or under any custom or use, regardless of the possibility that she is liable to sex by her better half without wanting to and without her assent. For this situation, the spouse was subjected to sex without her will by her husband when she went to live with her husband for 2 days as a result of settlement of separation procedures which was going on between the two parties. Subsequently the spouse was held not liable of raping his wife even though he had done so.

The judiciary appears to have totally consigned to the fact that rape inside marriage is impractical or that the disgrace of assault of a lady can be erased by getting her married to the attacker.

In 2005, the Protection of Women from Domestic Violence Act, 2005 was passed which although did not consider marital rape as a crime, did consider it as a form of domestic violence.³³ Under this Act, if a woman has undergone marital rape, she can go to the court and obtain judicial separation from her husband. However, the same doesn't entirely protect the women from the crime has undergone.

The whole legal system relating to rape is in a mess, replete with paradoxes. The major legal lacunae that come in the way of empowering women against marital rape are:

- The judicial interpretation has expanded the scope of Article 21 of the Constitution of India by leaps and bounds and "*right to live with human dignity*" is within the ambit of this article. Marital rape clearly violates the *right to live with dignity* of a woman and to that effect, it is submitted, that the exception provided under Section 375 of the Indian Penal Code, 1860 is violative of Article 21 of the Constitution.
- Article 14 of the Constitution guarantees the *fundamental right* that "*the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India*". Article 14 therefore protects a person from State discrimination. But the exception under Section 375 of the Indian Penal Code, 1860, discriminates with a wife when it comes to protection from rape. Thus, it is submitted, that to this effect, exception provided under Section 375 of the Indian Penal Code, 1860, is not a *reasonable classification*, and thus, violates the protection guaranteed under Article 14 of the Constitution.

MARITAL RAPE AS PROPERTY CRIME-THE MARXIST EXPLANATION

From the times of its rudimentary development as the Marxists explain, the political and legal theory has rested on the assumption of individual's right to own private property. Its second assumption – that men are superior to women and, thus, the legal, social and economic disparities between the two sexes, is justified being very natural – laid down the foundations of a sexist society.⁹ With passage of time, ownership of private property of the man became very crucial. It required control of means and products of reproduction in order to ensure the purity of male lineage and that further required controlled sexual access to a woman by a man, to ensure paternity of their off springs. Since ownership is considered to be best form of control, women were reduced to the private property of sexual nature, owned by distinct male owners. Such notions are prevalent even till date and it is for this reason that husband's absolute ownership of the wife's body and sexuality, remains unchallenged and majority of legal systems do not recognize rape within marriage.

THE LEGISLATIVE DEVELOPMENTS AND THE "AGE OF CONSENT"

For thirty years, after the enactment of IPC' 1860, rape law remained the same. The later change was owing to a number of cases in Bengal in which the child wife died due to consummation of marriage. Out of these, the most notable was **Queen Empress v. Haree Mohan Mythee**¹⁰. This case tells the pathetic story of Phulmonee Dasse, who was eleven years and three months old

⁹ Friedrich Engels, *The Origin of the Family, Private Property and the State* (1972).

¹⁰ ILR 1891 Cal 49

when she died as a result of rape committed on her by her husband. The medical evidence showed that Phulmonee had died of bleeding caused by ruptured vagina. In this case, rape of child wife was severely condemned and it was held that the husband did not have the right to enjoy the person of his wife without regard to the question of safety to her. In 1891, Sir Andrew Scoble introduced the Bill, which culminated into Indian Criminal Law (Amendment) Act' 1891.¹¹ This act raised the age of consent to 12 years both in cases of marital and extra-marital rapes. The object of Act was humanitarian, viz., "to protect female children from immature prostitution and from pre-mature cohabitation". Pre-mature cohabitation resulted in immense suffering and sometimes even death to the girl and generally resulted in injury to her health and that of her progeny.

Beginning of the 20th Century witnessed increased public attention towards the improvement in the physique of the nation and the reduction of causes leading to abnormal mortality of younger generation. In 1922, Rai Bahadur Bakshi Sohan Lal, MLA, moved for leave to introduce a Bill in the Assembly to amend section 375, Indian Penal Code, 1860 (IPC) by raising the age of consent in both marital and extra-marital cases.¹² This attempt to legislation proved futile, but with the passing years, agitation for a modification of law steadily grew owing to a better knowledge of the evil consequences of early marriage and early consummation. In 1924, Hari Singh Gour introduced a Bill to amend section 375, IPC, raising the age to 14 years in both marital and extra-marital cases. The Bill was referred to a Select Committee, which made a material alteration by reducing the age from 14 to 13 years in the case of marital rape.

The amendment in 1925 for the first time introduced a distinction between marital and extra-marital rape cases by providing different age of consent in marital rape cases. The distinction was further emphasized in section 376 by incorporating the words – "unless the woman raped is his own wife and is not under twelve years of age".

In which case the punishment was diluted by prescribing a maximum of two years. Thus, the purpose aimed to be achieved by raising the age of consent to 13 years, stood mitigated to a large extent by the diluted punishment provided by amended section 376. The question of age of consent was not considered as finally settled and Hari Singh Gaur again introduced a Bill in 1927 to raise the age to 14 and 16 years in marital and extra-marital cases respectively.

It was followed by the appointment of Age of Consent Committee, which reviewed the prevailing situation and suggested few amendments. The committee was of the opinion that the amended law was ineffective due to the nature of the offence, particularly in case of marriage as consummation necessarily involves privacy. The prevalent view among the awakened sections of

¹¹ Act No. X of 1891, published in Gazette of India, (1891), Pt.V.

¹² Report of the Age of Consent Committee, Calcutta, Government of India, 11 (1928-29).

society was that prohibiting the marriage of a girl under a particular age would be a better measure than to increase the age of consent for sexual intercourse.

The dissenting group among these classes felt that law was partly futile because it afforded no protection to the girls over 13 years, who need it on account of their tender age. The Committee recommended the use of term ‘marital misbehaviour’ instead of rape in marital cases. The offence of marital misbehaviour would be committed by a husband in case of sexual intercourse with his wife below 15 years of age. The Committee recommended the inclusion of offence of marital misbehaviour in Chapter XX of IPC and section 375 and section 376 of the IPC should be confined to rape outside the marital relation. The Committee also recommended maximum punishment of either description for 10 years and fine where the wife was below 12 years of age and imprisonment, which may extend upto one year or fine or both, where wife was between 12-15 years.

THE PRESENT LEGAL POSITION

Under Indian law, exception to section 375, IPC embodies that when the woman is married and not less than fifteen years of age, sexual intercourse by the husband is not rape. Prior to the amendment in IPC in 2013, when the wife was between 12 – 15 years, the drastically reduced quantum of punishment was provided, which may have extended to two years or fine. It amounted to rape only when the wife was below 12 years of age.

The amendment in 2013 has done away with this clause but at the same time has not recognized the concept of marital rape and has chosen to continue with the earlier legal approach. It would be pertinent to point out that ***Justice Verma Committee Report*** has recommended that marital rape exemption in the IPC should be withdrawn. The peculiarity of Indian law is adoption of the principle of primacy and supremacy of husband’s right over that of the wife, even when she is well below the legal age of marriage. The legal corollary of not treating forcible intercourse with a minor wife (between 15 – 18 years) as rape would surely be not to consider such intercourse with an adult wife as marital rape at all.

The only instance, which law covers is that of legally separated couples not living together under section 376-B, IPC and the vast bulk of marital rape remains out the purview of law. The court held in ***Haree Mohan Mythee case***¹³ that husband does not have the absolute right to enjoy the person of his wife without regard to the question of safety of her. As per this decision, the only circumstances where the law recognises the encroachment upon husband’s absolute right to sexual intercourse is when it becomes extremely dangerous to woman due to some physical illness etc. and grave consequences like death may follow.

¹³ (1890) 18 Cal. 49.

Thus, under Indian law, no effort has been made to give even a veneer of protection to the right of a married woman to her physical or sexual autonomy.¹⁴ In the existing scenario, there is hardly any feeble hope of future changes as far as recognition of marital rape of adult women is concerned and even in case of minor wives between 15 – 18 years of age, the offence is treated for less seriously.¹⁵ In 156th Law Commission Report, the Commission expressed its reluctance to raise the age for wife from 15 years to 18 years in the Exception to S-375 IPC,¹⁶ without assigning any reasons in particular. In 172nd Law Commission Report, the Commission found the deletion of the exception to Section 375 IPC, unnecessary as it may amount to excessive interference with the marital relationship. However, the Commission recommended that the age limit for the wife be raised to 16 years from the existing 15 years.

THE RECENT DEBATE BEFORE JUDICIARY

Recently, a PIL¹⁷ before the High Court of Delhi has generated a judicial debate on the constitutionality of exception 2 to section 375, IPC – the marital rape exemption clause. A division bench of acting Chief Justice Gita Mittal and C. Hari Shankar J hearing the PIL against the penal code provision noted that “marital rape is a serious issue, which has notoriously become a part of the culture.”

The RTI Foundation has filed the PIL in 2015 and other individuals and institutions¹⁸ have also approached the High Court of Delhi challenging the exemption under section 375 as well as section 376B IPC on the ground that it excludes marital rape as a criminal offence. It has been argued in the PIL that the exemption is unconstitutional and violates the right of married women under articles 14, 15, 19 and 21 of the Constitution. One of the petitioners has challenged the provisions of Cr PC, which are to be read with section 376 IPC on the ground that differential

¹⁴ Another peculiarity of Indian law is the provision for decree of restitution of conjugal right’s embodied in s. 9, Hindu Marriage Act, 1955. In T. Sareethav. Venkata Subbiah (AIR 1983 AP 356), the Andhra Pradesh High Court declared it unconstitutional and violative of the fundamental right of personal liberty and privacy. But the Apex Court upheld the validity of s. 9, Hindu Marriage Act, 1955 in Saroj Rani v. Sudarshan Kumar (AIR 1984 SC 1562) and totally ignored the effect such a decree can have on an Indian woman, who under the threat of judicial and social pressure and financial dependence may well be forced to go back to the matrimonial house and because of her vulnerable position in it, be forced to have sex and live a life of misery in an atmosphere she obviously abhors.

¹⁵ Law Commission of India – 156th Report on The Indian Penal Code, Ministry of Law and Justice, Government of India, 161 (August, 1997). The NCW had recommended that the age limit in the Exception to S-375, IPC be raised from 15 years to 18 years.

¹⁶ Law Commission of India – 172nd Report on Review of Rape Laws, Ministry of Law and Justice, Government of India, (2000), para 3.1.2.1.

¹⁷ The PIL has been filed by NGO RTI Foundation challenging that IPC’s s. 375 saying that it does not consider forcible sexual intercourse by a man with his wife, as rape.

¹⁸ The High Court of Delhi is hearing a clutch of petitions filed by All India Democratic Women’s Association, RTI Foundation and some other individuals who want deletion of exception 2 to s.375, IPC.

procedure as well as differential punishment is prescribed, which is arbitrary and unconstitutional.¹⁹

Incidentally, the hearing of the case stands intervened by another NGO called Men's Welfare Trust that claims that laws have already given a special status to a married woman, wherein she is liable to get maintenance, alimony, right to residence from her husband by way of various provisions.

In the light of this, men become vulnerable to victimization at the hands of women, who file false cases of sexual harassment, 498-A IPC and domestic violence etc. Men's Welfare Trust pointed out that around 62,000 married men commit suicide every year, which is more than double the suicides by women, with domestic including marital issues being the single largest reason.²⁰

The Government of India has filed an affidavit before the High Court of Delhi²¹ and maintained that "it has to be ensured adequately that marital rape does not become an easy tool for harassing the husbands. The affidavit further maintains that criminalizing rape could destabilize marriages and make men vulnerable to harassment by their wives."

It is a matter of fact that there is very scanty data available on domestic violence including marital rape because of conservative and patriarchal norms. There are several countries, including Nepal, US, UK and South Africa, where marital rape has been criminalized, but in India, the response of Central Government, on this issue, has been extremely misogynist and obnoxious. The Central Government has also expressed its wish to implead "State Governments" as there may be a cultural variation on the issue of marital rape.²²

It is very disappointed to note the comments of the government, which are obnoxiously anti women at the onset. The government has assumed that 'all sexual' acts by husbands would be labelled as rapes and all wives are potential liars, who would like falsely implicate their husbands. The government's notion that the stability of marriage is ensured by preventing women from filing complaints about rape reveals the true mind set of patriarchs in a conservative society.

INDEPENDENT THOUGHT v. UNION OF INDIA

In a writ petition filed in public interest by a society – Independent Thought, the Supreme Court has considered the scope and viability of exception 2 to section 375 IPC. The issue before the

¹⁹ Delhi High Court to Hear Pleas Against Criminalizing Marital rape", Times of India, Aug. 29, 2017.

²⁰ "Delhi High Court to Hear NGO's Plea Opposing Marital Rape", Indian Express 28, 2017

²¹ "Men May Suffer if Marital Rape Becomes Crime, Indian Government Says", Reuters Aug. 30, 2017.

²² 5Jibby J. Kattakayam, "What the Union Government's Submissions on Marital Rape in the Delhi High Court Reveal" at <http://blogs.timesofindia.indiatimes.com>

court was to consider the recognition of marital rape when the husband has sexual intercourse with the wife when she happens to be between 15-18 years of age. This is a landmark decision of Supreme Court whereby the court has held:²³

“Exception 2 to s-375 of the Indian Penal Code answers this in negative, but in our opinion sexual intercourse with a a girl below 18 years of age is rape regardless of whether she is married or not. The exception carved out in the IPC creates an unnecessary and artificial distinction between a married girl child and an unmarried girl child and has no rational nexus with any unclear objective sought to be achieved. The artificial distinction is arbitrary and discriminatory and definitely not in the best interest of the girl child.”

The court further held that the artificial distinction is contrary to the philosophy and ethos of articles 15(3) and 21 of the Constitution as well as the International conventions. It certainly violates the bodily integrity of the girl child and her reproductive choices.

The petitioner society pointed out that any person who has sexual intercourse with a girl child below 18 years will be liable for statutory rape even if it is with the consent of the minor girl and the situation is very absurd when the offender happens to be her husband because in such case the marital exemption applies and the husband goes scott free and escapes the punishment completely. It is because of her marriage, the right of such girl child to her bodily integrity and to decline sexual intercourse with her husband is snatched away. Just because of her marriage she does not become mentally or physically fit for such decisions.

The Independent thought judgment is indeed a vivid illustration of judicial activism and craftsmanship to give a socially viable interpretation to a provision incorporating a dead concept in the legislation. But at the same time, it is a little disappointing to note that how the Supreme Court on more occasions than one, has very categorically stated that they would not like to make a comment on marital rape generally where the age of the wife is 18 or more than 18 years.

CONCLUSION

Marital rape is one of the worst types of sexual violence occurring at the level of family. Due to the nature of the activity and the associated issues of privacy of relationships, internalization of patriarchal subjugation and most of the times, because of their economic dependency, the women victims don't come forward with their sufferings.

The patriarchal mind set has led the law to close its eyes to the plightful misery of the abused wives and the law does not even recognize marital rape as an offence leave aside providing any penalties in such cases. Marital rape occurs in all types of marriages irrespective of age, social class, race or ethnicity. A very meagre and scanty research data is available on the issue and lack

²³ Madan B. Lokur, J in 2017 SCC Online SC 1222 [Writ petition (C) no.382 of 2013] at 2.

of data poses a major hindrance in the direction of making due efforts by the government and the legislature to provide effective legal forum to address the traumatized victim's concerns.

The acceptance of any spousal exemption from rape indicates an acceptance of the archaic understanding that wives are the sexual property of their husbands and the marriage contract is an entitlement to coerced sex. Moreover, by confining the offence to women, who are not married to the perpetrator, rape laws become discriminatory and deny equal protection to a class of persons – married women, on account of their status.

It has been concluded that Indian laws have failed to provide a proper protection to women as earlier. As the women are still treated as the property of husband and he has all the rights to exploit her and no remedies have been provided. Though a husband's violent and non consensual act of intercourse may entitle a wife to bring action for criminal assault, the incorporation of the principle of liability for marital rape in our penal laws is not present. This prima facie violates Article 14 and 21 of the Indian Constitution. Non-criminalization of marital rape is the major concern in the Indian legal system. In order to protect the women, the Judiciary should take initiatives to safeguard them. Married women should be taken proper care and they should not be subjected to sexual assault or violence. Hence this section has a very narrow view in dealing with sexual assault and as such till now there is no legal provision which protects the married women.

The Supreme Court has recognized rape of a minor wife in very loud terms and has delivered a landmark judgment suggesting the legislative formula to make child marriages void ab initio. But the major wives have not been able to win the judicial sympathy so as to get marital rape recognized by the apex judiciary. The narrow and restrictive definition of rape, which allows for the marital exemption make the definition of rape, a hollow statement, which provides escape-route for many perpetrators of sexual violence and the quest for justice remains unquenched.

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