

**“Criminalization of Marital Rape Law in India is still a Taboo”**

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**Abstract**

MARRIAGE The so-called sacred and purest thread that promotes the culture of "ADJUSTMENT" and , "COMMITMENT" among women IN ORDER to "save and respect" honor ,," pride "and" values ". "" of the Indian family that neglects the fact that insists violence, suicides, murders are the price that women pay in return. And one of the most painful things that they are going through since ages is marital rape. Marital rape is the most common and disgusting form of masochism in Indian society. It hides behind the iron curtain of marriage,

There are already a group of men who are pressing hard to highlight the fact that the law against domestic violence has been misused by women and, therefore, must be diluted. Furthermore, it has been spread that women will also promote enactment of the criminal law against marital rape. According to these arguments, a woman, who is not docile, disagrees to perform "sex", are portrayed as an anti-family rebel who breaks the sacred bonds that transform the bedroom into a battlefield. This research paper attempts to reveal the daily possibility and reality of women's lives in light of the violent reaction against their rights and analyzes the debate on the criminalization of marital rape from the point of view of gender. it concludes that this concept must be examined from a broader perspective of violence against women and must be treated accordingly.

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“RAPE IS RAPE”

IT’S NOT A M’C Donalds BURGER WHICH CAN BE CUSTOMIZED AS PER CUSTOMER’S WANT .

Keywords: Marital Rape, India, Law, Violence against Women, Criminal law, Women, Wives, Marriage,

**I. INTRODUCTION**

The word „rape“ is derived from the Latin term rapio, means „to seize“. Rape literally means a forcible seizure. It means the ravishment of women against her will or without her consent or

with her consent obtained by force, fear or fraud or the carnal knowledge of a women by force against her will.<sup>1</sup>

Section 375 of the Indian Penal code defines rape. It means, rape is an unlawful sexual intercourse between a man and a woman without the consent of women or against her will under any of the circumstances enumerated under the section will amount to rape.<sup>2</sup>The committee headed by Justice J S Verma was asked to look into possible amendments to criminal law for ensuring quicker trial of and harsher punishments to, person accused of committing sexual assault of extreme nature on women. The committee was mandated to submit its report within thirty days from the date of Notification. The committee in its Report proposed revision and substitution of sections 375, 376 and 376 A to 376 D if the Indian Penal code for making the law relating to sexual assault on women and girls more effective and deterrent. Most of these recommendations were given legislative effect.<sup>3</sup>Section 375 of the Indian Penal Code, defines „Rape“ and Section 376 provides for punishment for the offence of „Rape“. But, the Act has failed to protect the married women who are subjected to rape by their own husband.

### **Marital Rape—An Exception to Rape**

An intercourse between a man and his wife without the consent of his own wife obtained by force, threat of physical violence and mental torture where the women is unable to give her own consent is said to be considered as a marital rape. Considered as the violence of perversion by her own husband against his wife amounting to physical and sexual abuse. The statistics have clearly mentioned that, in every 6 hours a young married women has been burned or beaten to death and even commits a suicide due to the emotional abuse from her husband. The exception to Section 375 states that non-consensual sexual intercourse by a man with his own wife, if she is over eighteen years, does not amount to rape. It thus keeps outside the ambit of rape a coercive and non-consensual<sup>4</sup>

It is believed that the husband“s immunity for marital rape is premised on the sexual intercourse. Her husband has the right to have sexual intercourse with her, whether she is willing or not, and she is under obligation to surrender or submit to his will and desire. It also aims at the preservation of family institution by ruling out the possibility of false, fabricated and motivated complaints of rape by wife against her husband and the pragmatic procedural difficulties that might arise in such a legal proceeding<sup>5</sup>. However, sexual intercourse with a wife, whose marriage with him is void as he was already married and had a living spouse

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<sup>1</sup> Bhupinder Sharma V. State of Himachal Pradesh AIR 2003 SC 4684, (2003) 8 SCC 551

<sup>2</sup> Aman Kumar V. State of Haryana AIR 2004 SC 1497, (2004) 4 SCC 379

<sup>3</sup> Gazette of India, Extraordinary, Part II, s 3, sub-s (ii), dated 24 December 2012.

<sup>4</sup> <https://medium.com/legis-sententia/marital-rape-in-india-what-stand-does-the-law-take-deb55e8a7048>

<sup>5</sup> <https://www.slideshare.net/cpjChs/women-and-law-1>

and who was aware of the fact of the first marriage amounts to rape. <sup>6</sup>Further non-consensual sexual intercourse in terms of the acts mentioned in Section 375 (a) to (d) under the Indian Penal code, by a person with his own wife who is under a decree of separation or otherwise, is living separately is made an offence under the Indian Penal Code.<sup>7</sup>The punishment provided for non-consensual sexual intercourse by a man with his wife living separately is however compared to that is provided for consensual or non-consensual sexual intercourse with his own wife when she is below the age of fifteen years of age, which by virtue of exception to section 375 amount to rape is very mild. No court is empowered to take cognizance of the offence of sexual intercourse by husband upon his Prima facie satisfaction of the facts which constitutes the offence upon a complaint having been filed or made by the wife against the husband

## **II. TYPES OF MARITAL RAPE**

The following three kinds of marital rape are identified by legal scholars as generally prevalent in the society:

Violation of abuse: in "abuse of abuse", women suffer physical and sexual violence in the relationship and suffer this violence in several ways. Some are abused during sexual violence or rape can follow a physically violent episode in which the husband wants to make amends and forces his wife to have sex against his will. Most marital rape victims fall into this category.

Rape only by force: in what is called "only by force" rape, husbands use only the amount of force necessary to force their wives; The abuse may not be characteristic of these relationships. Assaults are generally after the woman has refused sexual intercourse.

Obsessive rape: other women experience what has been described as a "sadistic" or "obsessive" rape; These assaults involve torture and / or "perverse" sexual acts and are often physically violent.

## **III. Comparative Study between India and USA**

The United Nation population fund states that more than 2/3rd of the married women in India, who are aged between 15 to 50, have been beaten, raped or forced to provide sex with him. In the year 2005 nearly more than 6500 cases were recorded where women were murdered by their husbands or by their husband's family.

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<sup>6</sup> Bhupinder Singh V. Union Territory of Chandigarh (2008) 8 SCC 631, (2008) Cr LJ 3546 (SC)

<sup>7</sup> Bishnu Dayal V. State of Bihar AIR 1981 SC 39

### **Marital Rape in the United States**

In the year 2006 United Nations Secretary General analysed in-depth study on all forms of violence against women which is the marital rape. It stated that in at least 53 countries rape by husband is not considered to be an offence. In the United States, Marital rape has become much more criminalized. In many countries the marital rape laws are ambiguous and they are not clear that the person can be prosecuted for a marital rape or not. Where in the absence of the law it may be possible to bring prosecution for acts of forced sexual intercourse. In countries where the laws on rape exclude husband where the countries have inherited the Penal Code which states that the sexual intercourse by a man with his own wife is not rape.

### **IV. History of Marital Rape in India**

If we analyze the judicial aspects of India, it is clearly stated that "the sexual relations of a man with his wife, his wife who is not less than 15-18 years old, are not rapes", according to section 375 of the Indian Penal Code. Article 376 of the Criminal Code of India establishes the penalty for violation. According to this section, the rapist must be punished with the imprisonment of any of the descriptions for a period that will not be less than 7 years but which may extend to life or for a period of up to 10 years and may also be fined or both of them. In the case of *Saretha V. T. Venkata Subbaih*<sup>8</sup>, it was considered that the rights and duties of a marriage are like a creation and a dissolution and not the duration of the private contract between two people.

The right to privacy is not lost by the Spousal Association. Therefore, there is no punishment for marital rape and the remedy lies with it. Role of the judiciary in India The need for a new law on sexual aggression was felt. The previous law that prevailed neither defined nor reflected the various types of sexual violence. In *Sakshi v. Union of India*<sup>9</sup>, the Supreme Court had recognized the shortcomings with respect to the law relating to the violation and had suggested that the legislator should cause changes in the law. After approving the bill to amend the criminal law, the 2013 violation was redefined as the most horrific events in which the parliament, through an amendment, sought to expand the scope of the violation and perception by making oral and anal acts equal to rape. The marital rape scenario is on the rise, but the legislator is unaware of criminalizing that crime. Women ignore the real scenario and the laws that prevail in the Indian Penal Code for them.

The judicial decision of the *Empress Queen v. Haree Mythee*<sup>10</sup>, it was claimed that his wife over the age of 15, so the rape law does not apply in that situation. In this case, the husband was punished because his wife was only 11 years old. In the high court of Kerala, *Sree Kumar v.*

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<sup>8</sup> AIR 1983 AP 356

<sup>9</sup> AIR 2004 SC 3566, 2004 (2) ALD Cri 504.

<sup>10</sup> (1890) 18 Cal 49

Perlato Karun<sup>11</sup>, it has been observed that the wife does not live separately with her husband in judicial separation and that she is subject to sexual relations without her will, the act does not equate to a rape.

Therefore, it was said that it was not discovered that her husband was guilty of raping his wife, although he was actually guilty of committing or committing the act. According to the Constitution of India, any approved law must conform to the principles and ideas contained in the Constitution. Any law that has not met the required standards is considered ultra vires and can be revoked or declared unconstitutional. Here, the exemption of Section 375 removes the protection of married women based on their marital status.

Recently, the Supreme Court took another opportunity to inform the Subordinate Court and the Superior Court that, despite the strict provisions on rape, in the past many courts have had a gentler opinion in giving punishments to those guilty of such a heinous crime . . . The court trend, the court pointed out, shows a great insensitivity to the need for proportional punishment for rape perpetrators<sup>12</sup>. This warned them to be cautious, since false accusations of rape, motivated by personal or economic gains, are not uncommon. People accused of this type of sexual violence also need protection against false accusations or engineering of violence accused of bad motives or designs<sup>13</sup>. The false accusations of rape, as a victim of rape, cause great anguish, humiliates and damages the defendants<sup>14</sup>. Rape, being a monstrous burial of a woman's dignity in the dark and a crime by the court and the courts, are obliged to answer the question within the legal parameters. It is a request for justice and the sentence must be in line with the legislative command and discretion conferred on the court<sup>15</sup>.

## **V. Position of marital rape law in india**

In India, marital rape exists in fact but not in law. While in other countries the legislator has criminalized marital rape or the judiciary has played an active role in recognizing it as a crime, in India, however, the judiciary seems to operate with cross purposes. In *Bodhisattwa Gautam v. Subhra Chakraborty*<sup>16</sup>, the Supreme Court stated that "rape is a crime against fundamental human rights and a violation of the victim's most precious fundamental rights", ie the right to life enshrined in Article 21 of the Constitution. However, he denies this claim by not recognizing marital rape<sup>17</sup> Although there has been some progress in Indian legislation in relation to domestic violence, this has been limited mainly to physical abuse and not sexual abuse. Women living and

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<sup>11</sup> 1999 (2) ALT Cri 77, II (1999) DMC 174

<sup>12</sup> *Shimbhu v. State of Haryana* AIR 2014 SC 739, (2014) Cr LJ 308 SC

<sup>13</sup> *Radha v. State of Madhya Pradesh* (2007) 12 SCC 57, 2007 Cr LJ 4704 SC

<sup>14</sup> *Narendra Kumar V. State (NCT of Delhi)* AIR 2012 SC 2281, (2012) 7 SCC 171, (2012) Cr LJ 2033 SC

<sup>15</sup> *Shyam Narain V. State NCT of Delhi* AIR 2013 SC 2209, (2013) Cr LJ 3009, (2013) 7 SCC 77.

<sup>16</sup> (1996) 1 SCC 490

<sup>17</sup> Tandon, N. & Oberoi, N., *Marital Rape — A Question of Redefinition*, Lawyer's Collective, March 2000, p. 24

wishing to challenge the sexual violence of their husbands are currently denied state protection, since the Indian law in Section 375 of the Indian Penal Code of 1860 has a general exemption from marital rape. The basis of this exemption goes back to the statements of Sir Matthew Hale, C.J., in seventeenth-century England. Hale wrote:

"The husband cannot be guilty of a violation committed by himself against his legitimate wife, since with his mutual consent and marriage contract, the wife has given herself in kind to her husband, who cannot withdraw"<sup>18</sup>.

This established the idea that once married, a woman has no right to refuse sex with her husband. This allows husbands sexual access rights to their wives in direct violation of human rights principles and gives husbands a "license to violate" their wives.

Only two groups of married women are covered by the rape legislation: those under the age of 15-18<sup>19</sup> and those separated from their husbands<sup>20</sup>. While the rape of a girl under the age of 12 can be punished with strict imprisonment for a period of 10 years or more, the rape of a girl under the age of 15 entails a lesser penalty if the rapist is married to the victim. Some progress towards the criminalization of domestic violence against his wife took place in 1983 when Section 376-A was added to the Criminal Code of India in 1860, which criminalized the violation of a judicially separated wife. It was an amendment based on the recommendations of the Joint Committee on the draft law of the Penal Code of India (amendment), 1972 and of the Legal Commission of India<sup>21</sup>. The Committee rejected the claim that marriage is a rape license. Therefore, a husband can now be accused and imprisoned for up to 2 years, if first there is a sexual relationship with his wife, secondly, without his consent and thirdly, she lives separately from him, already or by decree or habit or any use. However, this is just a fragmented legislation and Parliament needs to do much more regarding the issue of marital rape. When the Legal Committee in its 42nd Report supported the inclusion of a man's sexual relations with his minor wife as a crime, it was seen as a ray of hope<sup>22</sup>. The joint committee that reviewed the proposal rejected the recommendation. The Committee claimed that a husband could not be convicted of raping his wife regardless of his age. When a man marries a woman, sex is also part of the package.

Many women's organizations and the National Women's Commission have called for the elimination of the exception clause in section 375 of the Penal Code of India which states that "a man's sexual relations with his wife, his wife is not less than fifteen years old, it's not rape ". However, the working group on women and children created by the department of women and

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<sup>18</sup> 1 Hale, *History of the Pleas of the Crown* 629 (1778).

<sup>19</sup> . Exception to Section 375 of the Indian Penal Code, 1860.

<sup>20</sup> Section 376-A of the Indian Penal Code, 1860.

<sup>21</sup> Law Commission of India, 42nd Report, 1977, *Indian Penal Code*, para 16.115, p. 277.

<sup>22</sup> . Ibid

children of the Indian government considered that there was a broader debate on this issue. The task force's mandate was to review all existing laws and schemes relating to women. Of the four recommendations made by the Task Force regarding the violation under the Penal Code of India, the most important refers to the definition of violation. He took the position that the definition of rape should be extended to include all forms of sexual abuse. According to the recommendation, the definition proposed by the Legal Commission of "sexual violence" could be adopted instead of the current definition of rape in section 375 IPC as "it is broad, global and acceptable". However, like the Legal Commission, the Task Force also stopped recommending the inclusion of marital rape in the new definition. As of now, the law in India is totally inadequate to provide support mechanisms for women to exercise bodily integrity and sexual autonomy.

## **VI. Infringement of constitutional provisions**

The conflict between two or more fundamental rights guaranteed by the Constitution of India is not unheard of. There have been countless cases decided by the Supreme Court of India, in which it has interpreted its role as an interpreter capable of constituting itself by harmonizing conflicting fundamental rights. However, the challenges the court faces in issuing its verdict using the doctrine of harmonious construction when one of the fundamental rights is the right to religious freedom are magnanimous. Religion and personal laws have always been very sensitive issues in India and it is difficult to draw a line of demarcation between them. Any reform concerning personal laws has the ability to create chaos in the country in the name of religion. With its solid roots in patriarchy, marriage is one of those problems. Marriage in India is regulated by the personal laws of every religious community.

The reform of the marriage system, also in the name of human rights, is interpreted as an interference in the institution of marriage. Similarly, the question of marital rape has always faced the violent reaction of Indian society. In the words of Eugen Ehrlich, "the center of gravity of legal development is not in legislation, nor in legal science, nor in judicial decisions, but in society itself. There is a "law of life" that underlies the formal rules of the system legal and it is the duty of the judge and the jurist to integrate these two types of laws ". He believes he has the ability to destroy the institution of marriage. It reflects a struggle between the right to life (Article 21) and the right to freedom of religion (Article 25). This struggle was also visible in the case of independent thought v. UOI. In the present case the aberrations in the Indian The penal code came to light. Stresses the serious problem of marital rape of girls in the age group of fifteen to eighteen. In this case, the exception<sup>2</sup> of Section 375 of the Indian Penal Code has been questioned in court. The sixth description attached to the definition of the therapeutic subsection 375 states that the consent of a girl under the age of eighteen will be an irrelevant factor when the crime of rape against a defendant is claimed. However, abnormal to this description, exception 2 states that the sexual relations or sexual acts of a man with his wife, the wife is not less than fifteen years old, are not rapes. The case revolved around the age of a girl's consent to

have sex and what constitutes a boy according to the definitions provided under the various Indian laws that have been legislated taking into account the protection of the girl. The points raised by the Union of India in relation to marital rape that have the potential to destroy the institution of marriage and the exemption from explicit responsibility given by the Supreme Court that will not address the broader issue of marital rape of women adults underline the constant struggle between Article 21 and Article 25 of the Constitution of India.

## **VII. CRIMINALISATION OF MARITAL RAPE: A Comparative Analysis**

The history of almost all societies in the world shows the unequal relationship that existed between a husband and wife in a marriage. Women have been portrayed as their husband's property since time immemorial. The coherence of the representation of women as chattel has been the common point of all the most important religions of the world. This representation was found in Victorian style.

read, as in Manusmriti<sup>23</sup>. Polygamy and other regressive practices in almost all religions reiterate the fact that women have never been seen as equals within marriage. The entire second wave of feminist movements has focused on equal rights for women in different aspects of their lives, including family, sexuality and work<sup>24</sup>. The superior position granted to the husband in a marriage led to the granting of immunity to the husband in the case of marital rape. The explicit mention of the issue in the law was made for the first time by the president of the Supreme Court of Justice, Sir Matthew Hale, in the history of the crown motives, published in 1736, in which he stated that "the husband cannot be guilty of rape committed alone for his legal wife ". because, thanks to mutual consent and the marriage contract, his wife gave herself in this way to her husband, who cannot withdraw ". This opinion remains the reason for the non-criminalization of marital rape in many countries of customary law, including "India. Hale dictated ambivalent views of the UK courts whenever it was questioned. However, in the historic Rv.R<sup>25</sup> ruling, the House of Lords eliminated the exception of the marital violation of customary law and held<sup>26</sup>

Marriage is in modern times regarded as a partnership of equals and no longer one in which the wife must be the subservient chattel of the husband. Hale's proposition involves that by marriage a wife gives her irrevocable consent to sexual intercourse with her husband under all circumstances and irrespective of her state of health or how she happens to be feeling at the time. In modern times any reasonable person must regard that exception as quite unacceptable

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<sup>23</sup> Samparna Tripathi, "Marital Rape and not its criminalization, debases society", The Wire, Sep.5, 2017.

<sup>24</sup> Elinor Burkett, Women's Movement, Political and Social Movement, available at <https://www.britannica.com/topic/womens-movement>, (

<sup>25</sup> (1992) 94 Cr App R 216.

<sup>26</sup>Ibid



### **VIII. CONFLICTING NATURE OF SEC 375**

In India a marriage with a girl below 18 years of age is punishable (only voidable) under the PCMA. But if the husband of a girl child commits penetrative sexual assault on his wife, he actually commits aggravated penetrative sexual assault punishable under Sec 6 of the POSCO Act. However IPC by virtue of Exception 2 to Sec 375 makes sexual intercourse with one's wife below 18 years of age, not punishable and an exception to the offence of rape. The two provisions are contradictory in nature and the same needs to be resolved.

The Harmonious interpretation employed by this Court in this regard is not at all an apt solution to the problem. Because this new reading of the provision can in no way protect child brides from the huge emotional and physical turmoil that they face as a result of the early marriage. A very good option would have been to make child marriages void ab intio ( as provided by the State of Karnataka) and then invalidating Exception 2 to Sec 375 of IPC.

Moreover the justifications like child marriage is a tradition and it is prevalent in many parts of the country is no good justification to continue such exploitative practices and it's the need of the hour to regulate such practices by law<sup>27</sup>.

Theres a famous case law regarding which arose question on this discriminatory nature of sec 375

In modern times, marriage is considered a society of equals and is no longer a society in which the wife must be the subordinate of the husband. Hale's proposal implies that, by marriage, the wife gives her irrevocable consent to sexual relations with her husband and partner in any circumstances of health or, therefore, is very reasonable. unacceptable. South Australia became the first jurisdiction in the common world that ravaged except for marital rape in 1976. In 2012, the High Court of Australia reiterated this abolition. It was followed by Canada in 1983 and New Zealand in 1985. It should be noted that US courts did not criticize Hale's request only in the New York Court of Appeals ruling of 1984 in *People v. Freedom*, the exception of marital rape was considered unconstitutional and the hypothesis of a continuous consent was rejected. At the end of the 20th century, all states have eliminated the exemption from civil marriage, however, the criminal justice system continues to address marital rape differently from non-marital rape. It should be noted that in South Asia, Nepal and Bhutan are the only two countries that criminalize spousal rape. According to the 2011 United Nations Women's Report, only 52 countries in 179 countries had committed a conjugal or criminal offense and concluded that over 2.6 billion women live in countries where they have not been explicitly criminalized. To date, 70 countries around the world have criminalized marital rape.

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<sup>27</sup> <http://lawtimesjournal.in/independent-thought-vs-union-of-india/>

## **INDEPENDENT THOUGHT VS UOI**

The petitioner a registered society working for child rights, filed a petition under Art 32 in public interest with a view to draw attention to the violation of the rights of girl children married between the ages of 15 and 18 years. Sec 375 of IPC prescribes the age of consent for sexual intercourse as 18 years thereby any person having sexual intercourse below 18 years of age would be statutorily guilty of rape even if with the consent of the girl.

But by Exception 2 to Sec 375, if a girl child between 15 and 18 years of age is married, her husband can have non-consensual sexual intercourse with her, without being penalized under the IPC, only because she is married to him and for no other reason. The right of such a girl child to bodily integrity and to decline to have sexual intercourse with her husband has been statutorily taken away and non-consensual sexual intercourse with her husband is not an offence under the IPC. The provision is violative of rights of children and Art 14,15 and 21 of the Constitution of India.

The provision is in contradictory to Sec 5 and 6 of the POSCO Act, it states that if the husband of a girl child commits penetrative sexual assault on his wife, he actually commits aggravated penetrative sexual assault as defined in Sec. 5(n) of the POSCO Act and is punishable under Sec 6 by rigorous imprisonment of not less than ten years and may extend to imprisonment for life and fine.

Finally the Court observed that the provision is arbitrary and violative of child rights and Art 14, 15 and 21 of the Constitution. It was also found to be in contravention to the provisions of POSCO Act<sup>28</sup>, which will prevail over the other laws. Then the Court brought a harmonious interpretation of the two provisions and held that “Sexual intercourse or sexual acts by a man with his own wife, the wife not being under 18 years of age, is not rape”.

## **JUDGEMENT ON THE ABOVE CASE**

On considering these matters in detail the two judges have come with concurring but separate judgment. It says that Exception 2 to Sec 375 IPC in so far as it relates to a girl child below 18 years is laible to struck down on the following grounds:-

1. It is arbitrary and violative of rights of girl child and not just or reasonable and therefore violative of Art 14, 15 and 21 of the Constitution of India.
2. It is inconsistent with the provisions of POSCO, which must prevail.

Therefore, Exception 2 to Sec 375 is read down as follows;

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17 Protection of Children from Sexual Offences Act, 2012 (No. 32 of 2012).<sup>28</sup>

“ Sexual intercourse or sexual acts by a man with his own wife, the wife not being under 18 years of age, is not rape”

However, it was clearly stated that the judgment will have only prospective effect.

It is also clarified that Sec 198(6) of the Code will apply to cases of rape of “wives” below 18 years, and cognizance can be taken only in accordance with the provision of Sec 198(6) of the Code<sup>29</sup>.

### **Marital rape statistics**

India is one of the thirty-six countries that still have not criminalized marital rape<sup>30</sup> Out of the total number of rapes reported to NFHS (though it is an informal survey whose premise was to provide anonymity), 97.7% rapes were committed by the people known to the victim, out of which marital rapes accounts for 2/3rd. UN study has established the fact that 75% men want their wives to agree to sex. There have been many heartrending stories of women raped every night, even during pregnancy and child birth. It is a physical as well as mental trauma because the perpetrator is known to the person, often very close. It is a bitter reality even in developed nations<sup>31</sup>

### **INTERNATIONAL SCENARIO**

Countries have made it a crime for a husband to force his wife to have sex in recent years. Malaysia changed Many its laws to that effect in 2007; Turkey in 2005; and Bolivia in 2013. The United States began criminalizing marital rape in 1970s and most European countries in the 1990s. The United Nations has also recommended India to criminalize marital rape. Though we try to emulate US in many areas to prove ourselves as progressive, doesn't this law provide the opportunity for the same?<sup>32</sup>

### **IX. Arguments against criminalization of marital rape**

**- It is not necessary to pay legislative attention to marital rape, as it is rare.**

**- Due to the near impossibility of proving marital rape, its criminalization would only serve as a serious burden for the already overloaded legal system.**

**- Dissatisfied, angry and vengeful wives can accuse their innocent spouses of the crime of marital rape.**

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<sup>29</sup> <https://www.news18.com/news/india/delhi-hc-declines-plea-to-direct-centre-to-make-marital-rape-a-ground-for-divorce-2223529.html>

<sup>30</sup> Marital Rape in India: 36 countries where marital rape is not a crime, India Today, Mar. 12, 2016.

<sup>31</sup> <http://www.simplydecoded.com/2015/05/23/marital-rape-trivialisation-vs-criminalisation/>

<sup>32</sup> <http://www.simplydecoded.com/2015/05/23/marital-rape-trivialisation-vs-criminalisation/>

- **There is an implicit consent to have sex when a woman marries a man.**

- **The marital rape laws would destroy many marriages avoiding any possible reconciliation.**

**Supporters of the marital rape exemption argue that if legalized, this law is subject to improper use, as in the case of The Dowry law. I agree with the same thing because it is really difficult to prove the allegations of spousal rape. It's worse when we rely on methods like the two-finger test to prove rape accusations in general.**

**Here, I would say that every law is subject to improper use, whether it is an act of dowry or a law against defection, however, we must accept that the abuse is part of the investigation.**

**Furthermore, do we not have acts such as Atrocities Prevention Act (SC & ST), 1989 and similar anti-discrimination laws? Aren't they prone to misuse? Because here you also have to rely on the declaration of victim prima facie. It can also be used to harass someone. Just because of this lame skepticism, we should not try to evade from our responsibility<sup>33</sup>.**

## **X. Lacunae in Indian law**

The entire legal system related to rape is in a disaster, full of paradoxes. The main legal gaps that hinder the emancipation of women against marital rape are:

- The judicial interpretation has extended the field of application of Article 21 of the Constitution of India in leaps and bounds and "the right to live with human dignity"<sup>34</sup> falls within the scope of this article. Marital rape clearly violates the right to live with the dignity of a woman and, to this end, it is stated that the exception provided by Section 375 of the Criminal Code of India, 1860, violates Article 21 of the Constitution.

- Article 14 of the Constitution guarantees the fundamental right that "the State must not deny anyone equality before the law or equal protection of laws within the territory of India". Therefore, Article 14 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. Therefore, it is stated that, to this end, the exception provided in Section 375 of the Criminal Code of India, 1860, is not a reasonable classification and, therefore, violates the protection guaranteed under Article 14 of the Constitution.

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<sup>33</sup> <http://www.simplydecoded.com/2015/05/23/marital-rape-trivialisation-vs-criminalisation/>

<sup>34</sup> Francis Coralie Mullin v. Administrator, Union Territory of Delhi, (1981) 1 SCC 608

- Although the protection of women's dignity is a fundamental duty under the Constitution<sup>35</sup>, the duty of every citizen is "to abandon the derogatory practices for the dignity of women"; It seems that domestic violence and marital rape do not fall within the definition of dignity.

- The "United Nations Convention on the Elimination of All Forms of Discrimination against Women" (CEDAW), of which India is a signatory, considered that this type of discrimination against women violates the principles of equal rights and Respect for human dignity. Furthermore, the Human Rights Commission, at its fifty-first session, in its resolution no. 1995/85 of 8-3-1995 entitled "The elimination of violence against women", recommended the criminalization of marital rape.

- A husband cannot be prosecuted for raping his wife because consent to marriage presupposes consent to sexual relations. This implies that having sex at any time, in any place and of any kind is an implicit clause of the marriage contract and that the wife cannot break this term.

- The law prevents a girl under the age of 18 from marrying, but on the other hand legalizes sexual relations not agreed with a wife of only 15 years.

- The Criminal Code of India, 1860 states that it is a violation if the girl is not the wife of the man involved and is less than 16 years old, even if she agrees. But if he is a wife, not less than 15 years and does not give consent, it is not rape.

- Another paradox is that, according to the Indian Penal Code of 1860, it is a violation if there is a sexual relationship not agreed with a wife between 12 and 15 years. However, the punishment can be a fine or a prison for a maximum period of 2 years or both<sup>36</sup>, which is considerably less than the penalty for rape outside marriage.

- Although in 1983 the defenders of women's rights obtained a clause according to which it is illegal for a man to have sex with his separated wife awaiting divorce, the courts are reluctant to condemn the spouses despite the fact that

## **XI. LEGISLATIONS' PERSPECTIVE**

The reactionary position of the Narendra Modi government according to which criminalizing marital rape "would destabilize the institution of marriage" and could become a simple tool for "harassing husbands" in the RIT Foundation against the Union of India, which is pending before the court Superior of Delhi, it is disappointing. The government seems to have found a strange correlation between saving the institution of marriage and not criminalizing marital rape. It is difficult to understand how the rape of a woman by her husband is less brutal than triple talaq or

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<sup>35</sup> Article 51-A(e) of the Constitution of India

<sup>36</sup> Section 376 of the Indian Penal Code. [Return to Text](#)

polygamy, so the current government seems to be very worried. This ignominious behavior of the Center echoes our innate social misogyny, which over the years has led to greater submission of women.

The Center also presented to the Delhi Superior Court that "what may seem to be a marital rape to an individual wife may not appear to others". These arguments derive from the basic structure of criminal law which prescribes the standard of "reasonableness" or "reasonable person" as one of its cornerstones. In criminal law, the act or omission of the accused must be judged from the point of view of "reasonableness" or "reasonable person", which is generally the perspective of "an ordinary person who is a representative of the community in general" . Such an approach seems to be problematic in particular for marital rape, due to the widespread perception that marriage gives the husband a constant consent for sexual relations.

To put it another way, in a patriarchal society, that "reasonable person" is always a man, who judges a woman's place in the social process. Therefore, women end up being perceived as machines for making children, in which their right to bodily autonomy and reproductive rights are inconceivable and absurd. According to Morton Hunt, an American psychologist who considers himself one of the first to be involved in the issue of marital rape, "the typical spousal rapist is a man who still believes that husbands should" govern "their wives. He feels, for sexual reasons : when she wants it, she should be happy, or at least willing, if she isn't, she has the right to force her in. But forcing her, she earns much more than a few minutes of sexual pleasure, humiliates her and reaffirms her, in the most emotionally possible way , that he is the sovereign and that she is the subject " .

Feminist academics recognize the ubiquitous influence of patriarchy and the virile nature of legal norms and demonstrate their effects on the material conditions of women and on those that do not conform to "cisgender standards". The inability of the law and legal institutions to deal with marital rape exposes the limits of the law. It shows that the law primarily serves the aspirations of the ruling class, at the expense of the marginalized and the weak. In a society dominated by men, therefore, women's struggle is not limited only to the existing social structure, but also to the institutions that present themselves as the epitome of neutrality and reasonableness

## **XII. RECENT UPDATE ON MARITAL RAPE**

The Delhi High Court on Tuesday declined to entertain a plea seeking direction to the Centre to frame guidelines for registration of FIR for marital rape as also laws for making it a ground for divorce.

A bench of Chief Justice D N Patel and Justice C Hari Shankar disposed of the PIL saying the court cannot direct framing of laws as it is the domain of the legislature and not the judiciary. The court also observed that one after another, PILs are filed in the court for framing of laws. The PIL

had sought that there should be a clear guideline for registration of cases related to marital rape under framed guidelines and laws, so that accountability, responsibility and liability of the authorities concerned can be fixed.

The plea was filed in the high court after the Supreme Court refused to entertain it and asked the petitioner, advocate Anuja Kapur, to approach the high court for relief. She had also sought direction to the government for fixing appropriate punishment/ penalties for violation of the guidelines and laws to be framed and enacted respectively.

On Tuesday, the Delhi High Court refused to present a guilty appeal to the Center to frame the guidelines for the registration of the FIR for marital rape, as well as the laws to motivate the divorce. A bank of the Supreme Court President D N Patel and Judge C Hari Shankar got rid of the GDP by saying that the court cannot direct the development of the laws, since it is the domain of the legislator and not of the judiciary. The statement was filed with the higher court after the Supreme Court refused to entertain her and asked the petitioner, lawyer Anuja Kapur, to appeal to the superior court for relief.

He had also requested government guidance to establish adequate penalties / penalties for violation of guidelines and laws that are framed and promulgated, respectively.

"Marital rape is not a crime of murder, culpable homicide or rape per se. It denigrates the honor and dignity of a human being and reduces him to a chat room to be used for his own comfort and convenience. He reduces a woman to a corpse that lives under the constant fear of injuries. Medical evidence shows that rape has serious and lasting consequences for women," the statement said.

Kapur stated in his accusation that there is currently an ambiguity in the implementation of the context of marital rape as a ground for punishment or punishment during the registration of such a case in the field of law. There is a great deal of confusion with the authorities involved on which law should register a FIR / marital rape case. There should be a clear guideline for recording the marital rape case according to the guidelines and laws framed, so that the responsibility, responsibility and responsibility of

"Marital rape is not a crime of murder, culpable homicide or rape per se. It denigrates the honor and dignity of a human being and reduces him to a chat room to be used for his own comfort and convenience. He reduces a woman to a corpse, which lives under the constant fear of being hurt. Medical evidence shows that rape has serious and lasting consequences for women," the statement said. Kapur stated in his accusation that there is currently an ambiguity in the implementation of the context of marital rape as a ground for punishment or punishment during the registration of such a case in the field of law. "There is a lot of confusion with the authorities concerned that, based on which law, they must register a FIR / case related to marital rape. There

should be clear guidelines for the registration of the marital rape case according to the guidelines and laws framed, in such a way that the responsibility, responsibility and responsibility of the concerned authorities can be assigned and, sanctions and punishments will be granted to safeguard the fundamental right guaranteed by the Constitution and the dignity of women in marriage ", the note said.

Since spousal rape is not currently a crime, there is no FIR registered by a wife against her husband in any police station, he said, but the police authorities commit him to maintain the sanctity of marriage between the victim. and her husband, he had added.

Men, as a ruling class, have internalized this belief that women are their property and the value of women as property is largely measured by their "sexual purity". Rape, therefore, can be theorized as a crime against property against a woman's husband or father. In ancient times, a woman raped was considered relatively less valuable as property and the penalties for that crime often involved fines or other reparations paid not to her but to her husband or father. The exemption from marital rape is obviously a legacy of this approach. Since an act against one's property is generally not considered a crime, therefore, it is assumed that no crime is committed when a man forces to have sex with his wife, since he is under his possession and ownership.

In a survey conducted by the International Center for Research on Women (2011), almost 20% of Indian men reported that at least once they had committed sexual violence against a female partner. In another study conducted by the National Health and Family Survey (NFHS-4) for 2015-16, 5.6% of women were reported as victims in the category "physically forced to have sex with him, even when he didn't want to" . "

It should be remembered that, in the wake of Jyoti Singh's gangrape in 2012, the Verma Justice Committee was established with the aim of strengthening the laws against rape in the country. The Committee strongly recommended eliminating the exception for marital rape. The Committee added that "the fact that the accused and the victim are married or have another intimate relationship cannot be considered as a mitigating factor that justifies lower penalties for the violation". The Committee also highlighted the recommendations made by the CEDAW Committee on India in 2007, which called for "widening the definition of rape to reflect the reality of sexual abuse suffered by women and eliminate the exception of marital rape by defining violation ". However, although most of the recommendations of the Verma Committee have been incorporated, the suggestion to criminalize marital rape has failed to find a place in the 2013 Act to amend criminal law.

The recent ruling by the Gujarat superior court in Nimeshbhai Bharatbhai Desai against the State of Gujarat (2017) addressed the issue of marital rape in detail and stated that "making the rape of a wife or a crime illegal will eliminate the destructive attitudes that promote marital rape "; However, due to the failure to recognize marital rape as a crime in the Indian legal framework,



the court held that the husband is only responsible for insulting his modesty and unnatural sex. Similarly, the apical court of *Independent Thought v. Union of India and Anr (2017)* criminalized sexual relations with a younger wife aged 15 to 18, but refrained from making any observations on the marital rape of a woman over the age of 18. years

While the Narendra Modi government has been exceptionally active in pointing out lacunas within Islamic marital practices, it has failed to address the issue of gender violence in general, one such appalling example being the non-criminalisation of marital rape. The selective sympathy for one particular class of women by the government to fragment the consolidation of Muslim votes for political gain is disgraceful. It's the moment in time when we question why marital rape, despite being one of the most heinous crimes one can commit against a woman, has failed to gain recognition in the eyes of the law.

### **CONCLUSION**

It was concluded that Indian laws did not provide adequate protection to women as before, as women are still treated as husband's property and have every right to exploit it and no remedies have been provided. Although the violent and non-consensual sexual act of a husband can authorize the wife to take actions for criminal aggression, the incorporation of the principle of responsibility for marital rape in our criminal laws is not present. This prima facie violates Articles 14 and 21 of the Indian Constitution. The non-criminalization of marital rape is the main concern in the Indian legal system. To protect women, the judiciary must take initiatives to protect them. Married women should be treated properly and should not be subjected to sexual assault or violence. Therefore, this section has a very limited view on the treatment of sexual assaults and, as such, there is no legal provision to protect married women. Problems of sexual and domestic violence within marriage and family unity and, more specifically, the issue of violence against women, has received increasing international attention since the second half of the 20th century. However, in many countries, marital rape remains outside criminal law or is illegal but widely tolerated. The laws rarely apply, due to factors ranging from the authorities' reluctance to prosecute crime, to the lack of public knowledge that sexual relations in marriage without consent are illegal.

I understand, this problem is delicate. The United States took about 30 years to reach the current law, which began only with the atrocious nature of marital violations. Can't we try to implement it so gradually? At least in cases where it is clearly visible, in which a woman has suffered an enormous injury it should be made punishable as a criminal offence.

Before 2012, it was an odd act to even talk about rape, but it was the solidarity of the nation that came along with Nirbhaya, and today majority of people can condemn the act by taking its name literally. I hope marital rape will also get the same recognition.

Further, though, there is need for substantial changes in the law on sexual offences such as making them gender-neutral and eliminating the inequalities, a radical overhauling of the structure of sexual offences is not advisable.<sup>37</sup>

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<sup>37</sup> . Because radical restructuring in the United States, Canada and New South Wales has proved disappointing. See Nicolson, D. & Bibbings, L., *Feminist Perspectives on Criminal Law* (1st Edn., Cavendish Publishing Ltd. London, 2000), p. 185.