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How to Define Consent in Marital Rape

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ABSTRACT

When two persons get married, they are meant to live life with dignity, health, interpersonal understanding, love, freedom, respect and comfort. All these are the essentials one aims for in a married life. In a country like India, we can see that there is certain kind of male dominance in the society. Due to do this prevalent male dominance, the spousal relationship of men and women is affected. People are of the opinion that, women are property of men and they hold complete control and supervision on them (women). This thinking is also accompanied with male chauvinism. Now, if we closely look at the purposive essentials of married life, (discussed above) and match it with the male dominance, then can we say that married women are living a healthy and happy married life?

Men, treating women as their property, end up doing exploitation of women in numerous ways. This exploitation can be of mental harassment nature, sexual harassment nature and also exploitation relating to freedom, respect in the family and all around in the society. Now, people may say that, yes! Domestic violence is a kind of exploitation of women, not giving enough freedom, being disrespectful towards them and torturing them all these are ways mental exploitation or mental harassment. But how sexual harassment is possible in married life? When a woman legally married to a man, has sexual intercourse with her own husband, how can this be dealt as sexual harassment? How a sexual intercourse between a legally married couple lead to Rape? Is the consent not implied in sexual intercourse between a married couple?

All these questions highlight the point of concern and aim behind writing this research paper.

The paper aims to throw a light on the serious issue that directly impacts the women of our country i.e., what actually marital rape is, the definition and importance of consent in marital intercourse, why marital rapes being heinous offences are still not criminalized and what norms and laws can be implemented in order to protect women against marital rape. We will also have a look on certain petitions, debates and key judgements to get a clear picture of the present scenario and find ways to get rid of it.

We are aware about rapes being serious and prevalent form of violence against women but we also need to understand that Marital rape is also a global and traumatizing problem affecting millions of women round the world. In the countries where marital rapes are not criminalized, there marital rapes are frequently underestimated because the concept of

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extremely challenging passive permission or consent, supports the legitimate and societal implications of sex in marriage. Looking deep into the definition of consent and elaborative view of marital rape, this paper tries to present all the necessary aspects one should must be aware of.

I. INTRODUCTION

For each resident of India, the fundamental right to equality and the right to life has been respected by the Indian Constitution. This means that every citizen of our country has the choice to live a life of fairness, dignity, and respect free of discrimination, difference, misuse, or infringement of these rights. In any case, the essential notion behind these important freedoms is taken advantage of glaringly and for a vast scope, notably when it comes to orientation-based violations or minority wrongdoings, due to the to a large extent male centric confines of the Indian marriage legislation. According to Section 375 of the Indian Penal Code (IPC), the term "*rape*" encompasses all forms of rape, including non-consensual intercourse with a lady³.

The term '*spousal assault or rape*' refers to forcibly, by threat of force or physical abuse, cruelty, or when she refuses or is unable to consent to unwanted intercourse by a man on his wife. The term 'undesirable intercourse' refers to any type of penetrating (vaginal, anal, or oral) carried out without his wife's consent or will. Depending on the age of the wife, the Indian Penal Code (IPC), 1860 exempts a spouse from being charged for sexual assault of rape on his better half. In India, where the spouse is granted a definitive unequalled quality or we may say ultimate supremacy and legal acknowledgment over the wife's freedoms, this is an unmistakable demonstration of the prevailing norm being archaic and violently one-sided against women. Sexual intercourse between a man and his wife, if the spouse is not under the age of fifteen, is not a rape, according to exception 2 of Section 375 of the IPC. Furthermore, the provision for age was inserted into the IPC as a result of a few instances of child weddings in which the little kid brides died as a result of excessively early or premature sexual intercourse with their husbands. As per IPC, Marital rape, the case of Phulmoni Dasi⁴ in 1891 was one of the most heinous cases of marital rape ever recorded. This case is expected to be highly recognised because it drew a lot of attention from officials, legislators, and the general public. Phulmoni Devi, an eleven-year-old young woman of the hour, died of significant blood loss (bleeding) after her husband Hari Mohan, in his mid-thirties, tried to consummate their marriage despite the fact that his wife was only eleven years old. Despite the fact that the examination report

³ The Indian Penal Code 1860, Section 375, Rape. A man is said to commit "rape" ...

⁴ Queen-Empress vs Hurree Mohun Mythee, (1891) ILR 18 Cal 49

revealed a broken vagina as the cause of death, the spouse was cleared of rape charges since the rape laws did not apply to marital rape because it was not a common occurrence and Penal laws did not apply to this situation. Rape laws in a sense made it legal for a man to have intercourse with his wife regardless of her will or consent, as long as she was over the age of ten at the time. Later, Hari Mohan, was prosecuted under the IPC's Sections 304, 304A, 325, and 338. In this case, the Court determined that a man did not reserve the right to treat a woman as his wife with little regard for her safety and well-being.

The case of Phulmoni Dasi⁵ sparked concerns about the legal age of consent for underage little brides in particular. With an amendment to the Age of Consent Act of 1861, the colonial administration increased the time of will and consent from ten to twelve years in both marital and non-marital instances, ostensibly to protect female youths from such immature cohabitation and prostitution later on. However, when the Amendment Act of 1925 was enacted, a distinction was made between the age durations of consent for marital and non-marital rape, for example fourteen and thirteen years, respectively, despite the fact that the impact of this change was weakened because the spouse's discipline was limited to two years. Furthermore, the express exemption for married women between the ages of fifteen and eighteen continued until 2018, when the Supreme Court of India (SC) in a landmark judgement held that a man is committing rape if he engages in any type of sex with his wife if she is between the ages of fifteen and eighteen. This was the first time that a legal acknowledgment was given to the fact that rape on a young lady under the age of eighteen by a man, regardless of whether he is her significant spouse, constitutes rape⁶.

This, however, provides no protection for any female over the age of 18 who may be subjected to marital rape by her spouse, and such cases are all too common across the country and go unnoticed or excused because no law provides any type of penalty or discipline for marital rape against a female over the age of 18. As a result, if the woman is over the age of eighteen and married to a sexual man, committing marital rape, the case is irrelevant, implying that there is no legal remedy for female survivors of rape if the one who submits the evidence is their spouse. This subject has been studied and debated by women's groups on numerous occasions, with the National Commission for Women even recommending that marital sex between a man and his spouse without their consent be deemed rape⁷.

⁵ *ibid*

⁶ Mohd Aqib Aslam, Marital Rape And Its Current Legal Status, Link: <https://www.legalserviceindia.com/legal/article-7032-marital-rape-and-its-current-legal-status.html>

⁷ *ibid*

Aspect of marital rape was also acknowledged by the Verma Committee, which was created on December 23, 2012, in the aftermath of the infamous *Nirbhaya case. Justice J.S. Verma*, the previous Chief Justice of the Supreme Court, presided over a three-part bench. The primary function of this board of trustees was to recommend modifications to Indian criminal law in order to allow faster preliminary examinations and enhanced penalties for lawbreakers accused of rapes against women. We will discuss the recommendations in solutions part of this research paper⁸.

II. HISTORY OF MARITAL RAPE AND ITS EFFECTS

The history of sexual brutality in marriage is as old as the institution of marriage itself. However, for the millennial generation, marital rape, like other forms of sexual assault, is seen as a private problem rather than a public one. Tragically, sexual violence against women and young women is still deeply entrenched and politicised all across the world. Perhaps no other claim of misbehaviour has exposed a woman's credibility to such incredible hostility and forced the consequences of disgrace and shame to a greater extent than rape charges. Such insignificant places of study not only contribute to the creation of an environment of shame, humiliation and dishonour associated with sexual brutality, but they are also seen as critical point in establishing positive protection and inevitably creating the body of evidence against rape victims. India's rape culture has recently been in the focus in the world media. *The 2012 Delhi attack, the 2017 Unnao rape case, the 2018 Kathua rape case, and several other incidents have sparked international outrage and drawn attention to India's outdated laws that fail to protect women from rape.* In the ocean of difficulties surrounding sexual violence, one notable yet frustrating issue is the overall set of laws' constant recognition of the legal invulnerability granted to men who rape their wives.

Marital rape should be by sole utilization through the use of force. An individual may use actual power, the threat of actual power on his life partner or another individual, or implied harm as a result of previous attacks, making the woman fear that actual power would be used if she resists. It is essentially a non-consensual display of brutal depravity by a spouse against his wife, in which she is physically mistreated. The crime of marital rape is not effectively recognised in the law in many countries, including India. If the woman is over the age of fifteen, the law does not prohibit rape within the marriage. Only when the woman is living independently from her better half under legal partition/custom is constrained sex a violation. It's also worth remembering that most occurrences of marital rape occur within the confines of the home,

⁸ Justice Verma Committee Report, January 23, 2013.

where there are often no witnesses to the wrongdoing. Looking into past, 'To seize' is the most common meaning of the term '*rapio*'. Persuasive seizure, or the ravishment of a woman without her consent, forcibly, fear, or fraud, are all examples of rape. Rape can be viewed as a display of brutality on a female's private individual, a shock in any case, and a definitive infringement of a lady's self. It has been appropriately described by the Supreme Court of India as a "deathless shame and the gravest crime against human dignity"⁹.

The patriarchal system that governs families has always considered women to be unimportant property of her life partner. As a result, rape was regarded as a form of theft against women, as well as a crime against a life partner. This conviction framework encouraged councils to disregard marital rape by granting it the protection of marital, and by doing so, they assumed that women can't refuse sexual fulfilment with their spouse because they have no control over their own sexuality. This wisdom has devalued women's ability to be consistent and valuable.

For a long time, government officials, lawmakers, and judges claimed that marital rape didn't exist under the law and couldn't happen as a matter of public policy. Rape is a significant invasion of an individual's inherent ideal to life and independent opportunity, not just against women. The fact that there is a link between the loss and the guilty party has no bearing on the outcome. As a covered woman's voice against her spouse, who uses his perfect circumstance to shatter her trust and individual constancy, social shame is linked to marital rape. Currently, a number of countries have either enacted marital rape laws, revoked marital rape exemptions, or have laws that do not distinguish between spousal and common rape¹⁰.

III. EFFECTS OF SUCH SEXUAL ABUSE

Despite the popular historical belief that assault by one's partner is a small occurrence that causes no harm, research shows that marital rape frequently has substantial and long-term consequences for women. Wounds to private organs, gashes, bruising, soreness, swelling, torn muscles, weakness, and regurgitation are all possible consequences of sexual abuse. Unnatural birth cycles often known as miscarriages, stillbirths, bladder contaminations, barrenness, and the probable restriction of physically transmitted illnesses such as HIV are all explicit gynaecological consequences of marital rape or any kind of sexual assault.

Females who are assaulted by their partners are likely to suffer major mental consequences as well. Nervousness, shock, intense dread, despair, self-destructive ideation, and post-horrendous pressure are some of the temporary effects of marital rape. Sexual abuse being part of cruelty

⁹ Bodhisattwa Gautam v. Subhra Chakraborty AIR 1996 SC 922.

¹⁰ *ibid*

highlights the aspect of Section 498A of IPC that deals with cruelty directed against a married woman by her spouse or his family members, where cruelty refers to any intentional act that is likely to drive the woman to self-destruction or put her life, body part, or wellbeing (whether mental or physical) in danger¹¹.

IV. DEMYSTIFICATION OF CONSENT IN MARITAL RAPE

Some people are of the opinion that the lady's personality, life and existence are absorbed by her husband's. How could a man attack, assault or rape himself when they are one? In this way, her "NO" is unimportant, since her consent is implicit in the marriage contract. Even in voidable unions, the male might assault her and take advantage of the exception until the marriage is declared invalid by the court.

Consent in rape instances denotes an unambiguous conscious understanding when the woman expresses enthusiasm to participate in the sexual activity through words, signals, or any other sort of verbal or nonverbal communication. Consent in the case of a female as a guard to an allegation of assault, on the other hand, necessitates intentional support after having well practised the decision between opposition and consent. Lack of wounds on the attacker or the aggressed may not resolve the problem of whether there was a case of consent or no consent without the help of others, and this scenario must be resolved in the light of the other proof. The victim's consent should also be purposeful, and a simple display of powerless abdication, notwithstanding an unavoidable impulse when the deliberate head is filled with dread, cannot be termed consent within the meaning of Section 375 of the Code. When her consent is obtained by placing her or any individual in whom she is interested in apprehension about death or great harm, such consent is useless. In rape preliminary proceedings, there is an expectation that there will be a lack of consent in the female's interests, and it is up to the defence to show otherwise (S.114A Indian Evidence Act)

Unfortunately, the IPC, 1860, does not define the term 'consent' in very precise terms. It simply states what cannot be considered consent (S.90). As a result, an individual is presumed to have consented only when the consent was made freely, willingly, and without the influence of fear, power, or misrepresentation on the person's mind. A knowledgeable and mature understanding of the nature and outcomes of sexual activity is required to constitute 'consent' under Section 375. Explanation 2 to Section 375 makes it clear that the consent should be voluntarily given and the participation must be a wilful participation¹². Consent is certainly “an act of reason,

¹¹ Ghosh Ritoprita, Marital Rape- Current legal scenario in India in comparison to the world, Legal Service India E-Journal.

¹² The Indian Penal Code 1860, Section 375, Rape. A man is said to commit “rape” ...

accompanied with deliberation, the mind of weighing, as in a balance, the good and evil on each side”.

In a generalized sense, men confuse their 'no' as a 'yes,' or a sign that she believes they should fascinate and persuade her into evolving her 'no,' into a 'yes,' as a result of generalisations that anticipate females to be shy and act extravagantly.' Concerns about unhappy partners using "rape" charges against spouses to acquire power, force, or humiliate them have also stymied the prohibition of the offence. It would be a case of "her statement versus his" because of the sense of wrongdoing and the lack of observers in the bedroom. In spousal relationships, medical evaluation would be worthless unless the demonstration was accompanied by some type of cruelty. Denying women, the right to say "no" reeks of paternalism, in which the voice and decisions of specific groups of people are irrelevant.

V. INDIA'S CURRENT STANCE ON THE ISSUE OF MARITAL RAPE

Marital rape is legal in India, however it is not tolerated. While in other countries, either the legislature has denounced marital rape or the judicial system has played a role in remembering it as a crime, the legal system in India is reportedly facing some confusion. The Indian law in Section 375 of the Indian Penal Code, 1860, has an overall marital rape exception, therefore women who endure and want to confront sexual cruelty from their spouses are currently denied State protection¹³. Rape is punishable under Section 376 of the IPC, with the attacker receiving at least 7 years to life in prison or a period of ten years in prison, as well as a fine. Unless the lady raped by her own spouse, who is under the age of 12, in which case he will be punished with a two-year sentence, a fine, or both.

Subsequently no regulations expressly deny a man from assaulting his lawfully married spouse besides in the accompanying circumstances:

- Sex or sexual demonstrations by a man with his own better half, the spouse being under 15 years old¹⁴.
- Sexual intercourse by the spouse (man) upon his wife during a time of separation¹⁵.

Indeed, even the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), of which India is a signatory, has seen that this kind of victimization ladies abuses the standards of fairness of privileges and regard for human respect. Further, the Commission on Human Rights, at its 51st meeting, named "The end of viciousness against

¹³ Section 375 of the Indian Penal Code (45 of 1860), Exception

¹⁴ Section 375 of the Indian Penal Code, (45 of 1860)

¹⁵ Section 376 B of the Indian Penal Code,(45 of 1860)

ladies', suggested that marital rape ought to be condemned.

The Law Commission of India considered the issue of marital rape in its 172nd Report, but decided to ignore the voices that demanded the cancellation of Exception 2 to Section 375 IPC on the grounds that it "might cause unnecessary impediment to marital relationships" and may obliterate the marriage institution."¹⁶

India's Judicial Stance

The spouse was sentenced under section 304A Indian Penal Code for causing the death of his child wife by rash or careless demonstration of sex with her, following the historical backdrop of legal decisions on curse of genuine injury by the spouse on the wife by the court in *Emperor v. Shahu Mehrab*¹⁷.

The Andhra Pradesh High Court held in *Saretha v. T. Venkata Subbaih*¹⁸ that "there can be no doubt that a pronouncement of compensation of intimate privileges along these lines implemented insults the sacredness of the body and brain exposed to the announcement, outrages the uprightness of such an individual, and attacks the marital protection and homegrown affections of such an individual."

In the landmark case of *Independent Thought v. Association of India*¹⁹, the Supreme Court of India established a significant way to protect young woman children by denouncing sex with a spouse under the age of 18 as being unjust and violating the Constitution of India's essential privileges.

The **Protection of Women from Domestic Violence Act of 2005** was passed in 2005, which, despite the fact that it did not consider marital rape to be a crime, considered it to be a kind of domestic violence. If a woman has been the victim of spousal rape, she can go to court and seek formal separation from her spouse under this Act.²⁰

However, the equivalent does not completely protect the females from harm and provide them with insurance and equity. The entire body of rape laws is shattered, riddled with ambiguities, and huge legal flaws stand in the way of enabling women to defend themselves against marital rape. While examining the law relating to sexual offences, the Gujarat High Court recently issued a new verdict in *Nimesh Bhai Bharatbhai Desai v. Province of Gujarat*²¹, which stated

¹⁶ Law Commission of India, 172nd Report on Review of Rape Laws (March, 2000)

¹⁷ AIR 1917 Sind 42

¹⁸ AIR 1983 AP 356

¹⁹ (2017) 10 SCC 800

²⁰ The Protection of Women from Domestic Violence Act, 2005 (Act 43 of 2005), Section 3 Exp.1 (ii)

²¹ 2018 SCC OnLineGuj 732

that husbands should be reminded that marriage is not a licence to coercive force rape their wives. In India, there is a problem with marital rape, a horrifying crime that has harmed people's faith in the institution of marriage. The burden of the crisis has been felt by a large number of women.

VI. DEBATES AND REFORMS TO FIX LACUNAE IN LAW

The petitions, which are being heard by the Delhi High Court, are a result of the government's unwillingness to take notice of the Justice J. S. Verma Committee's landmark report, which was constituted in the aftermath of the horrific Nirbhaya assault in 2012. Despite the fact that the government has stated on multiple occasions that such a move would jeopardise the foundation of marriage, experts claim that ongoing decisions, based on the right to security, have rendered this argument nonsensical.

The Delhi High Court is hearing a slew of petitions related to Section 375 of the Indian Penal Code, which exempts strong sex between a man and his own better half from the charge of rape if the spouse is his or her own better half from the offence of rape if the spouse is over the age of 15, often known as the "marital rape exception." The **RIT Foundation, the All India Democratic Women's Association (AIDWA)**, and a survivor of marital rape abuse are among the nominees²².

Seven days after a paramedic understudy was assaulted on December 16, 2012, sparking nationwide outrage, the then United Progressive Alliance (UPA) government formed a board led by Justice (Retd.) J. S. Verma to propose "potential alterations to the Criminal Law to accommodate faster preliminary and upgraded discipline for hoodlums carrying out rapes of outrageous nature against ladies" seven days after the assault of a paramedic understudy on December 16, 2012, which sparked cross-country dissent. In just 29 days, the Commission gathered 80,000 suggestions and completed its 644-page report, which is now considered a valuable archive, and proposed far-reaching changes. While some of its proposals were incorporated into the Criminal Law (Amendment) Act of 2013, its most radical ideas, such as remembering for marital rape, were kept out of the public eye.

The Verma board recommended that "the exception for marital rape be deleted" and that the law "establish that a marital or other connection between the perpetrator and the victim is surely not a legitimate shield against assault or sexual infringement wrongdoings."

Despite assurances from then-Finance Minister P. Chidambaram that all of the J. S. Verma

²² RIT Foundation v. Union of India, 2022 SCC OnLine Del 1404

board's recommendations had been accepted, the Act earlier promulgated as an Ordinance did not specify the repeal of the marital assault exception. "The entire family system will be under exceptional pressure" if marital rape is denounced, according to a Parliamentary Standing Committee on Home Affairs led by Venkaiah Naidu.

When the Delhi High Court was hearing three petitions in August 2017, the public authority stated in its oath that it must be ensured that marital rape does not become a "simple machinery for badgering the spouses" and that it does not undermine the foundation of marriage. "What may have all the earmarks of constituting marital rape to a single spouse, it may not show up in the same way to other people," it continued. The argument that prohibiting domestic violence will jeopardise marriage's foundation is difficult to justify, especially in light of the Supreme Court's recent central freedoms act. The SC overturned the marital rape special case for minor couples because of Independent Thought. "I feel the argument for striking it down should apply to grown-up girls as well," said Rahul Narayan, AIDWA's director. Advocate Karuna Nundy, who is currently representing RIT and AIDWA before the High Court, said in the *K.S. Puttaswamy case*²³ that "protection should not be a veil to mask male centric ideas." Another notable judgement that has provided relief is the *Joseph Shine v. Union of India*²⁴ from October 2018, in which a five-judge bench of the Supreme Court of India declared adultery to be a crime. Taking in account both the cases, criminalization of marital rape was demanded.

The need for dynamic interest in legitimising marital rape is significant in a country where a woman is raped on a regular basis and the possibility of an Indian wedded lady suffering sexual brutality is multiple times higher. Despite the fact that the Justice Verma Committee and the 42nd Law Commission Report have called for the criminalization of spousal abuse in the recent past, the main relief now available is the common cures spread out under the Domestic Violence Act of 2005. There is a pressing need for the legal system to recognise marital rape as a crime under the Indian Penal Code. The repeal of Exception 2 of Section 375, as well as a punishment for marital rape that is equal to that advocated under Section 376, would lead to a more complete advancement of criminal law enforcement in the country.

Whatever the character of the culprit or the age of the victim, the fact that it was a rape remains the same. A woman who is assaulted by a stranger carries the memory of a harrowing incident with her; nevertheless, a woman who is assaulted by her own better half lives and needs to lie down with her assailant. It is past time for Indian women and their essential liberties to be

²³ *JUSTICE K.S. PUTTASWAMY VS. UNION OF INDIA*, (2017) 10 SCC 1

²⁴ *Joseph Shine v. Union of India*, 2018 SCC OnLine SC 1676

respected, especially by the judicial system, which has pledged to protect each individual's fundamental rights.

Several Rights are Guaranteed by the Constitution

- Right To Equality and Non-Discrimination
- Right To Live with Dignity
- Right To Personal Liberty
- Right To Sexual Privacy
- Right To Health

All these rights of a woman are infringed whenever she becomes the prey of marital rape. Just because marital rape is not criminalized, she is forced to suffer that horrifying lifestyle and has no way of getting rid of it. Not only the fundamental rights of the women are infringed, but also in a way she is traumatized and loses her good conscience. She suffers both mental and physical trauma, giving her scars for the rest of her life.

VII. CONCLUSION

Currently, the major recourse in India to non-consensual sex for married women is reasonable arrangements made under the Protection of Women from Domestic Violence Act or Section 498-A of the Indian Penal Code on cruelty towards a spouse by the husband or husband family members.²⁵ A few countries throughout the world are enacting strict laws against conjugal assault and treating it as a criminal violation. Countries such as Denmark, Sweden, Poland, Norway, and the Czech Republic have previously condemned marital rape, while others are still battling to make it a criminal offence due to the complexities involved, as well as the potential consequences for marital relationships and the backlash from unjust accusations.

The majority of proponents of the current laws on marital rape argue that criminalising the act will give women an unfair advantage, resulting to a slew of false accusations being levelled against males. However, it cannot be denied that India's present rape law, which exempts the husband, completely violates Articles 14 and 21 of the Indian Constitution. Marital rape is not only unjust, but it also violates a spouse's right to live in peace. When a woman marries, she never relinquishes her fundamental liberties. In this approach, every regulation that opposes the Constitution's provisions should be completely repealed.

²⁵ The Indian Penal Code 1860, Section 375, "Whoever, being the husband..."