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# Marital Rape concealed within the Iron Gate of Wedlock

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## ABSTRACT

*When a bride leaves the parental home for the matrimonial home, leaving behind sweet memories with a hope that she will be in a new world full of love in her groom's house. But the alarming rise in the number of cases involving harassment to the newly wed girls shatters the dreams. Indian society is patriarchal and dynamic towards men who are still considered privileged to enjoy much of a better status than women. Woman's role is still regarded as submissive, docile, homemaker and many other derogatory positions one can only imagine. Marital Rape is one of the most important issues related to gender-based violence in India. Using the sacrosanct institution of marriage as a cover, marital rape is often disregarded in its recognition as a crime and is even justified, as observable from the mentality of the society towards it. The patriarchal perspective which is still rampant in the society perceives the recognition of Marital Rape as an offense, to be against the culture of India. The Legislation and Judiciary have also failed to trudge upon the subject, with the excuse that such recognition would affect the institution of marriage. The provisions of laws such as the Indian Penal Code or the Domestic Violence Act remain mute when it comes to providing for punishment for the offense.*

## I. INTRODUCTION

Marital Rape is an act which has been conveniently ignored by the Indian society to be recognized as a crime. Due to this ignorance, the existing law in India also tends to turn a blind eye towards this unacceptable act. Under the veil of the institution of marriage, Marital Rape has failed to be identified as a wrong act, and sadly, is even being justified. Marital Rape, also referred to as Spousal Rape, is understood as unwanted intercourse by a man with his wife obtained by force, threat of force, or physical violence, or when she is unable to give consent. It is a non-consensual act of violent perversion by a husband against the wife where she is physically and sexually abused. The wife's role has traditionally been understood as compliant, submissive and that of a housewife. Sex is traditionally considered to be obligatory in marriage. It is considered to be the duty of a woman to provide her husband with sexual gratification,

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even if it is against her will, and this has often been linked to being another precipitant of the dominant patriarchal society. There is immunity for Marital Rape in India. The idea of the “sacrosanct” institution of marriage portrayed in India is contrary and far from the perception of reality. The truth is that under the veil of marriage, there are crimes like Marital Rape and domestic violence which still go unreported due to the stigma surrounding it. Marital Rape is not an offense in India and hence there is no penalization for the same. Despite amendments, law commissions and new legislation, one of the most humiliating and debilitating acts is not an offense in India.

In India, the existing provisions fail to address the offense of Marital Rape as a crime. It is even excluded from the purview of rape. There is no explanation in the provision for the exclusion of Marital Rape that is provided in the exception to Section 375. Since the section talks about consent, it is presumed that there is consent as the relationship between the victim and the perpetrator is that bound by marriage. However, it may also be possible that this was a legislative decision to exclude the operation of this section from married relationships given the sanctity that this institution has assumed in our society. This is probable since there are sections in the IPC where spouses are exempt from its application. The reluctance to classify Marital Rape as rape lowers its form to that of a sexual misdemeanour. There is a presumption that the consent that operates when a husband and wife live together and the differentiation between Marital Rape and other rape, where the former is viewed as less serious.

This is a very unfair situation for women across the country. As for the argument that culture prevents the criminalization of Marital Rape, it is to be understood that culture has supported unfair acts in the past as well, such as Sati which later was resolved and recognized as an unfair crime against women. This argument is purely baseless and must not even be taken into consideration. The laws need to address the issue and move in public interest without justifying a gruesome act in the name of culture. The indifferent attitude towards criminalization of Marital Rape is not restricted to the legislature alone; it extends to the judiciary as well. The judiciary needs to fulfil its duty of providing justice to the victims of Marital Rape and must stop shying away from recognizing Marital Rape as an act that must be condemned and not justify it further. It must contribute to social justice and stop harbouring rapists who commit rape under the protection of the word 'marriage'.

## II. LEGAL POSITION OF MARITAL RAPE IN INDIA

The marital rape in India is *de facto* and not *de jure*. The Indian judiciary has a two sided approach towards this particular issue. Firstly, in the case of ***Bodhisattwa Gautam v. Subhra***

**Chakraborty**, The Supreme Court laid down that one of the basic fundamental right i.e. Right to life conferred by Article 21 of the Indian Constitution is being violated and also said that rape is a crime which violates 'basic humanitarian rights'. Still, marital rape stands unrecognized in Indian legislation. The current status of legislation has advanced but it is confined just to 'physical abuse' but not 'sexual abuse'. Therefore women are denied protection by the state since marital rape is expressly recognised as not an offence under Section 375 of the Indian Penal code. However regarding certain provisions where the wife of the man under 15 years of age which would amount to rape in any cases. Secondly, for those who are separated from their husbands? The punishment of marital rape is discriminating from the rape of an unmarried girl under the age of 12 which gives rigorous punishment for a term of 10 years or more whereas the rape of a married girl below 15 years of age carries a sentence of lesser harshness as compared to the former, if the accused is the husband of the victim. This principle in Section 375 of the said code has been obtained from Sir Matthew Hale's judgement in 17th Century England which stated that "Husband cannot be held guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife hath given herself unto the husband whom she cannot retract." The Law Commission has made several recommendations in different reports on criminal liability of marital rape. The joint committee on the Indian Penal code (Amendment) Bill, 1972 in its 42nd report included sexual intercourse by a man with his minor wife as an offence which was reviewed and nullified. The Committee said "when a man marries a woman, sex is also a part of the package." The Commission has retracted its view in the 172nd report where certain points have been a precursor of considering marital rapes as an offence which is:

1. In *Sakshi Union of India*, sexual assault on any part of the body must be construed as rape.
2. Explanation (2) of section 375 of IPC should be deleted. Forced sexual intercourse by a husband with his wife should be treated equally as an offence just as any physical violence by a husband against the wife is treated as an offence.

In case a court receives a complaint from an aggrieved wife, the court may call upon the respondent i.e. the husband to hear him. There is no compulsion over the husband to hire a lawyer. The court, if possible refers the case to a mediator for resolution. In cases where the case is unable to be resolved through mediation and the complaint is found valid the court can pass a protection order and ask the respondent to regulate his conduct, which is legally binding. On violation of such direction the wife can go back to the court for relief which can lead the respondent to a short imprisonment. However, this process keeps lasting for a long time than

expected. There is a need for possible amendments to the Criminal law to provide for quicker trial and enhanced punishment for criminals committing sexual assault of extreme nature against women.

### III. NEED FOR CRIMINALISATION

The whole legal system relating to rape is supplemented with paradoxes to prove marital rape is a difficult procedure in court of law as there is expressed provision regarding such situations and the petitions filed have met with failure. The loop holes of non-criminalisation of marital rape being that the scope of Article 21 of the Indian Constitution being extended and the right of living with human dignity coming under its ambit. Marital rape violates the right to live with dignity, so the exception to section 375 is *ultra-vies* of Article 21. Article 14 of the Indian constitution guarantees that the state shall not deny, to any person equality before the law or the equal protection of laws within the territory of India, it protects a person from state discrimination. The exception to Section 375 is not a reasonable classification as per Article 14 as discussed earlier. Earlier, the rape victims were free from court rule and the burden of proof was on the woman to show that she didn't consent but in *Karnal Singh v. State of M.P.*, it was held that women should not be construed as an accomplice of the crime but rather as a victim. At present the proof lies on the defendant that the woman consented. The Indian constitution even assigns it as a fundamental duty under Article 51(A) (e) "*to renounce practices derogatory to the dignity of the women*". It appears that the lawmakers have not made it quintessential to legislate for marital rapes.

The United Nations Conventions on Elimination of All Forms of Discrimination Against Women (CEDAW) of which India is a signatory has even rendered the view that the sort of practices of allowing marital rapes amounts to discrimination against the women violating the principles of equality of rights and respect towards the dignity of a human. The Commission had even passed a resolution which was recommended for criminalizing marital rapes. The paradox operating in the Indian law which is ironical in its regulation that a girl below 18 years can't marry but the non-consensual sexual intercourse with a wife of 15 years of age is legalised. The second paradox operating in the Indian penal code is that a girl below 16 years of age with her *consensus-ad-idem* has sexual intercourse with a man who is not her husband amounts to rape, but supposing that she is the wife and above the age of 15 and doesn't consent for intercourse is not under the purview of rape.

### IV. CONCLUSION

In such growing era, it's still disheartening to hear the condition of women in our society. India

being such a developing Nation and evolving with upcoming changes is still trapped in ancient ideology & ways of work. We should value Gender equality and its huge importance for the uplifting of women strata that are subject to most gruesome crimes from the moment they are in the womb. Its government's duty to realize the utter difference between private affair in marriage and violation of an individual person's right. The mere importance of marriage cannot stand in the fact that consent is consent, whether in a marriage or not. Every individual has been blessed with fundamental rights for their protection, what good is it, if government cannot implement them. There is a dire need to change the mind-set of the society as well as our system.

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