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## BEHIND THE VEIL OF MARRIAGE: LEGISLATURE'S BLIND EYE TOWARDS MARITAL RAPE

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### **ABSTRACT**

India being one of the fastest developing nations and one of the most important forces in the world is not an exception for a state with nonsensical beliefs and practices which are considered as social evils. One such shadow in the light of progression prevailing in our society is marital rape and this practice has been in existence since the ancient times. Being such a huge detrimental practice the Indian legislature has still not taken any step regarding the issue. Marital rape is a form of rape and it requires every bit of attention and legislation for the protection of the victims as much as the victims of rape required. The legislature's reluctance to criminalize marital rape appears to be rooted in concerns about potential impacts on the institution of marriage but it's a huge misconception and must be criminalized to bring justice to all the victims. While many countries around the world have criminalized marital rape, India's legal framework still lacks specific provisions on this issue, limiting the judiciary's ability to address it comprehensively. This paper seeks to bring out the challenges that are faced by women by highlighting the detrimental effects of viewing marriage as an automatic green light for non-consensual sex, and proposes legal frameworks that uphold their right to consent and freedom from sexual violence within marital relationships. The paper analyses different nations legislation regarding marital rape and aims in providing suggestions for the solution regarding the same.

*Key Words: Marital rape, sexual violence, legislation*

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## INTRODUCTION

*“The day will come when men will recognize woman as his peer, not only at the fireside, but in councils of the nation. Then, and not until then, will there be the perfect comradeship, the ideal union between the sexes that shall result in the highest development of the race.”<sup>4</sup>*

Marriage in Indian culture is considered to be a sacred establishment; it is the primary and most important foundation of a steady family and an enlightened society. The institution of marriage has also become a safe chamber to cover acts like sexual cruelty and different types of ruthlessness in the family unit. Marital rape is one such brutal offence and can be characterized as any undesirable intercourse acquired by drive, danger of power or when wife does not or is unable to give consent. It is a non-consensual demonstration of vicious corruption by a husband against the wife where she is physically and sexually manhandled. The term marital rape was never heard of in the conventional times. There were no incidents of marital rape because it was never acknowledged and it was not considered offence. Historically speaking, socially as well legally there was no term as marital rape. The women concerned were treated as a subject of their guardians (father or husband). The husband could never be held guilty of committing rape upon his wife because it was thought that once married, woman is bound to treat her husband with utmost respect and pay due consideration to all his wishes. There have been no laws in the past which could penalise a man committing such an offence. There was no prosecution for a man for forcibly committing sex upon his wife. It was held that the woman is obligated to perform all duties without saying a word because she was strangled with the ties of marriage and it was the wife who had to prove her loyalty towards her husband by doing everything she was asked for. Once she had agreed to everything now, she was not allowed to retract from the same and her sexual privacy was not hers but was dependent upon her husband.<sup>5</sup>

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<sup>4</sup> Christina. “The Day Will Come When Men Will Recognize Woman as His Peer....” – Susan B. Anthony.” Christina Freudenthaler, 23 Feb. 2016

<sup>5</sup> Ankita Sen; Marital Rape And The Law In India; Ipleaders blogs 15 Sep 2022

**LEGAL POSITION IN INDIA:**

In spite of our advancements, in India, a spouse is still unpunished for committing a crime of marital rape. A horrible crime is still not classed as a crime, even after numerous changes, law commissioners, and new laws. Rape has been considered as an international crime and in India rape is a serious crime for which the offender is punished with imprisonment not less than seven years but which may extend up to 10 years and shall also be liable to fine under “Section 375 of the Indian Penal Code”. By virtue of exception 2 to section 375 of the Indian penal code it has been provided that “a man who has sexual intercourse or sexual act with his own wife is not being under the of fifteen years of age, is not rape”. The position of law on marital rape under section 375 has twofold dimensions. First dimension is this that Penal code makes demarcation that rapes outside marriage are to be considered distinct from those within a marital setup. Another dimension is provided under exception 2 of section 375 which provides that sexual intercourse will not amount to rape if the wife is above fifteen years of age. Thus, it is clear that an act which is an offence in the normal circumstances changes its nature when committed within a relationship of a husband and wife when the wife is above the age of fifteen years. The lack of consideration given to such a detestable setting is disturbing.

Another provision (Section 376B of the Indian Penal Code) states whoever has sexual intercourse with his own wife, who is living separately, whether under a decree of separation or otherwise, without her consent, shall be punished with imprisonment of either description for a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine. These laws, stemming from British colonial rule, mirror outdated English legal views. England abolished the marital rape exemption in 1991, but India continues to struggle with its consequences even today.

In 2005, the Protection of Women from Domestic Violence Act, now recognizes marital rape as a form of domestic violence. Under this Act, a woman can go to the court and obtain judicial separation from her husband for marital rape. The Protection of Women from Domestic Violence Act of 2005 failed to criminalize marital rape rather, it has only established a civil remedy for it. The PWDVA has played a crucial role in providing legal recourse and protection to women facing domestic violence in India.

## INFRINGEMENT OF FUNDAMENTAL RIGHTS:

### Article 14 of the Indian Constitution

“Article 14” grants each and every citizen of India a “fundamental right to equality before the law and equal protection under the law”. Discrimination against married women is based on the notion that married women have given their husbands irrevocable approval to sexual relations. According to the presumption, married women are not entitled to state protection against violence and sex offenders, unlike everyone else. According to critics, it's erroneous and unjustified to assume such. Men and married women, in the view of lawmakers, both need privacy protections in their personal lives. As a result, this exemption 2 of “Section 375 of the IPC” is in conflict with “Article 14 of the Constitution” because rape against married and unmarried women receives different treatment.

### Article 21

“Article 21 of Indian Constitution”: The Indian constitution guarantees the “right to life and personal liberty in Article 21”. The Supreme Court has interpreted this article in a number of rulings and has started to accept in recent years that the right to life and liberty includes the right to refrain from unwelcome sexual behaviour. In *Bodhisattwa Gautam v. Subhra Chakraborty*,<sup>6</sup> the Supreme Court said that; “rape is a crime against basic human rights and a violation of the victim: most cherished of fundamental rights, namely, the right to life enshrined in Article 21 of the Constitution.” However, the very same court negated the judgement by not recognizing it to be a crime.<sup>7</sup>

The Supreme Court ruled in *K.S. Puttaswamy v. Union of India*<sup>8</sup> that the right to privacy includes decisional privacy, which is represented by the ability to make personal decisions regarding one's intimate relationships and sexual or reproductive nature..

The Supreme Court ruled in *State of Karnataka v. Krishnappa*<sup>9</sup>, that “sexual violence is an unlawful intrusion on a woman’s right to privacy and sanctity, in addition to being a demeaning act. It went on to say that non-consensual intercourse is equivalent to both physical and sexual abuse. In light of this evolving law, the concept of a marital exemption from rape contradicts with a number of rights that have arisen under Article 21.

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<sup>6</sup> Bodhisattwa Gautam v. Subhra Chakraborty , (1996) 1 SCC 490

<sup>7</sup> Tandon, N. & Oberoi, N., Marital Rape: A Question of Redefinition, Lawyers Collective, March 2000, p. 24.

<sup>8</sup> Justice KS. Puttuswamy (Retd.) v. Union of India (2017) 10 SCC 1

<sup>9</sup> India legal S (Change in definition of rape in India)

<<https://legalservicesindia.com/article/880/article/article/changing-definition-of-rape-in-india-880-1.html>>

In the case of *Independent Thought vs. Union of India, 2017*<sup>10</sup> it was observed by the honorable Supreme Court that, “ there shall be no observation on the first matter which deals with spousal rapes with wives who are of the age of eighteen years or more than eighteen years.”

In the case of *State v. Vikash (2014)*<sup>11</sup> after a thorough discussion of the topic, the court determined that 498-A provides adequate legal protection against marital rape, hence there is no need to criminalise it in India at this time. It is not necessary to enact additional legislation, separate laws, or remove the exemption provision.

In *Nimeshbhai Bharatbhai Desai vs State Of Gujarat*<sup>12</sup>, 2018, the Gujarat High Court went a step further and observed, “Before anything else, society must be educated that the dehumanising treatment of women will not be accepted and that marital rape is a violent act and an injustice that has to be criminalised. This can only be accomplished by completely abolishing the marital rape exception by statute.

Rape is a heinous act that degrades and humiliates a woman's integrity, modesty, and dignity. It cannot only be seen as a sexual offence. However, the section 375 of the IPC's provision for marital rape fails to recognise this, violating some of the most cherished fundamental rights established by the Indian Constitution.

### **VICTIMOLOGY ASPECT OF MARITAL RAPE :**

The United Nations has urged countries to end marital rape by closing legal loopholes, saying that “**the home is one of the most dangerous places for women**”. An unmarried woman who has been raped has a number of legal options available to her. However, a married woman who has been raped by her own husband has no legal recourse, despite the fact that she has also been raped. There is a common perception that marital rape is less traumatic than stranger rape, and it is this presumption that encourages courts towards lenient treatment of husband rapists than other rapists. Rape by a stranger, is recognized as a crime, not only by the domestic laws of each nation but also as a crime internationally. Diana Russell in her study compared the trauma suffered by the survivors of marital rape to the survivors of stranger rape and the data indicated that 52% of women raped by their husband, had a great effect on their lives as compared with 39% of the women raped by a

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<sup>10</sup> Independent Thought vs. Union of India (2017) 10 SCC 800

<sup>11</sup> State vs . Vikash, on 7 May, 2014

<sup>12</sup> Nimeshbhai Bharatbhai Desai v. State of Gujarat, 2018 SCC OnLine Guj 732

stranger.<sup>13</sup> Marital rape is a very serious offence that, by its very nature, weakens a person's right to protection of their psychic and mental health as well as their sexual freedom. In addition to the physical wounds it causes, it also generates a deep mental lesion, this wound is not aware of the aggressor, it is blurred by the pressure of bodily desires. For women who are victims, this injury is not only the product of the brutality of the physically endured cruelty, but also the product of helplessness and shame. The victim of rape has a devaluation and a significant impact on her self-esteem, which is sensed by people around her, thus aggravating the consequences that follow. The process of personal degradation that the victim goes through turns into an obstacle that prevents her from taking steps to escape the abusive relationship. From a psychological point of view, the self-image of victims of marital rape is extremely affected, it is manifested by anxiety as regards sexual intercourse and partners, in some cases triggers mental illness that requires the administration of drug treatment and psychiatric observations: panic attacks, neurosis, depression (post-traumatic stress disorder). The physical and psychological abuse that follows non-consensual sexual activity includes ridicule of the ability of women for intimate relationships.<sup>14</sup> The impact of abuse on the physical and mental health of survivors was assessed by counsellors. Physical health consequences such as injuries were reported by 82% of women while reproductive health problems like abortion, miscarriage, RTIs, and prolapse of the uterus were reported by 22% of women. Mental health consequences were reported by 98% of women, among whom 26% had attempted to end their life while 29.4% reported thoughts of ending life (suicidal ideation). Other mental health consequences experienced by survivors included nervousness and tension (72%) and feeling afraid all the time (36%). According to data from three public hospitals in Mumbai, at least 18 women reported marital rape and requested medico-legal support out of 1664 rape survivors between 2008 and 2017.

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<sup>13</sup> Diana E. H. Russell, *Rape in Marriage* 191 (Macmillan Publishing Company, U.S.A, 1982).

<sup>14</sup> L.E. Popp, F. Andrioni, I. Petrică, *Domestic violence - causative vector of necessity of implementing the intervention project in crisis situations in Probation as a field of study and research: From person to society* (ed. Tomita M.), Filodiritto Editore, Specto Bologna, 183- 189, (2016)

**RECOMMENDATIONS OF VARIOUS COMMITTEES :****Justice Verma Committee:**

The Justice Verma Committee was set up in 2012 following the horrific gang rape and death of a young woman in Delhi<sup>15</sup>. Their mandate was to recommend amendments to criminal laws to address sexual violence. One key issue they tackled was marital rape, which wasn't criminalized in India at the time.

The committee unequivocally rejected the exception in the Indian Penal Code (IPC) that exempted husbands from prosecution for rape within marriage. They declared that forced sex without consent, regardless of marital status, constitutes rape. The report argued that the marital rape exception violated the fundamental right to equality and the right to life and liberty enshrined in the Indian Constitution. Criminalizing marital rape was deemed essential to achieve gender equality and protect women's dignity and bodily autonomy. The committee proposed that marital rape be included as a crime however, in the Criminal Law Amendment Act, 2013, the proposals were rejected, and marital rape was not recognized as a criminal offence.

**Pam Rajput Committee Report:**

Pam Rajput, a professor at Panjab University and chair of the Pam Rajput Committee, was one of the 14 members appointed by the Ministry of Women and Child Development in the year 2012. In 2015, it submitted its recommendations, based on the current needs of women and made a number of policy proposals. According to the committee's recommendations, marital rape should be criminalized regardless of the woman's age or her connection to the alleged abuser. By failing to criminalize marital rape, the Criminal Law Amendment Act of 2013 came under fire. Justice Verma's committee had recommended making marital rape a felony, but Indian legislators ignored the findings and did not criminalize it. However, a growing number of women are being raped by their husbands because of a lack of prosecution of marital rape, according to recent studies.<sup>16</sup>

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<sup>15</sup> Mukesh and Anrs. v NCT Delhi (Nirbhaya Case)(2017) 6 SCC 1

<sup>16</sup> "Pam Rajput Committee (National Women Policy)" (IAS4SureNovember 23, 2016) accessed May 11, 2022

Law Commission report:

The Law Commission of India has considered the issue of marital rape in several reports, most notably:

The 172<sup>nd</sup> Report (1999) acknowledged the existence of marital rape and argued that the exception in the Indian Penal Code (IPC) that exempted husbands from prosecution for rape within marriage was discriminatory and violated a woman's right to life and liberty. However, the Commission ultimately opposed criminalizing marital rape due to concerns about potential misuse of the law and disruption of family harmony.

The 183<sup>rd</sup> Report (2000) report reiterated the Commission's opposition to criminalizing marital rape, citing similar concerns as in the 172<sup>nd</sup> Report.

**DATA ANALYSIS :**

In India, the absence of legal protection against marital rape is a serious violation of women's rights. The data analysis discloses some disturbing facts and figures regarding the marital rape in India.

- According to the 5th round of the survey, which was conducted in 2019–20 in roughly 637,000 sample households across 707 districts of 28 states and eight union territories, 1 in 3 Indian women aged 18–49 report experiencing spousal violence, with at least 5%–6% of the women reporting sexual assault.
- A breakdown of the findings shows that 5.6% of married women were physically forced to have sexual intercourse with their husbands, 2.7% of women were physically forced to perform sexual activities that they did not wish to perform, and 3.7% of the women were forced to perform sexual activities against their will through threats of physical violence.
- The NFHS revealed that according to the data collected until 2021, 82% of married men and 13.7% of ex-husbands had a violent sexual relationship with their wives. It also revealed that 90 percent of survivors of spousal sexual abuse were unwilling to disclose the incident or seek assistance. The study likewise expresses that 83% of wedded ladies between the ages of 15 and 49 who have ever endured sexual manhandle refer to their present husband as the culprit, while 7% allude to a previous life partner.<sup>17</sup>

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<sup>17</sup> "National Family Health Survey." National Family Health Survey

**RECENT TRENDS:**

The Gujarat High Court has said that rape continues to be a grave crime even when the victim's husband commits it, and has pointed out that marital rape is illegal in a number of nations worldwide. In a judgement on December 8, where he rejected bail for a man accused of rape, Justice Divyesh Joshi of the Gujarat High Court stated that "a man is a man; an act is an act; rape is rape, be it performed by a man, the 'husband' on the woman 'wife'".

In fact, the Indian Supreme Court is currently considering a number of cases concerning the exemption to section 375 of the Indian Penal Code, which absolves a man who has forced sexual relations with his own wife of any criminal responsibility. While a number of public interest litigations (PIL) have challenged the immunity clause's validity on the grounds that it discriminates against married women who have experienced sexual assault at the hands of their husbands, the Delhi High Court's split decision from May 2022 is still pending before the top court for a final ruling.

**Rise in the Cases of Marital Rape during Covid-19 Pandemic**

According to official data released by the National Commission for Women (NCW), India domestic violence reports have climbed 2.5 times since the country's lockdown started, this is being referred to by some scholars as India's next pandemic or "shadow pandemic." Between March and May of 2019, the commission received 607 cases; in 2020, 1,477 cases were registered. Lockdowns and quarantines are essential to curb the COVID-19 virus from spreading over the world, but they were imprisoning vulnerable women who had abusive partners. Means of fleeing marital violence have been severely hindered by being stranded at home during the pandemic. The number of women and girls experiencing abuse has significantly grown in almost all nations as a result of the pandemic's effects on the economy, society, and mobility. In the year 2020, 243 million women and girls (aged 15-49) across the world have been subjected to sexual or physical violence either by their husbands or by intimate partners.

**The New IPC**

Bharatiya Nyaya Sanhita 2023 which has received the supreme assent of the president and is ready to come in to force, is the new law replacing the Indian Penal Code.

Section 63 Exception-2 of the new law states:

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

The government claimed the law would dismantle the outdated and colonial underpinnings of the Code. However, the legislature has failed to criminalise marital rape, a much needed change. Disappointingly, the government overlooked the need to criminalise marital rape in its modernization efforts.

### **SUGGESTIONS :**

Based on the research’s findings, recommendations are provided to safeguard married rape victims by upholding their basic human and constitutional rights under the governance of laws and regulations.

- To create a separate marital rape law. This would create a clear and unambiguous legal framework for addressing marital rape, and it would send a strong message that marital rape is a serious crime. The clarity and focus of a dedicated law might encourage more victims to come forward and report abuse.
- To expand the scope of existing laws, such as the Protection of Women from Domestic Violence Act, 2005 (PWDVA). The PWDVA currently recognizes marital rape as a form of domestic violence, but the law does not explicitly criminalize it. Expanding the scope of the PWDVA to explicitly criminalize marital rape would create a more robust legal framework for addressing this issue. Even though it won’t be enough to fully eliminate marital rape it will help in reducing the crime significantly.
- Marital rape should be a valid ground for divorce for the wife. It should not only be acknowledged legally (through the case laws) but also clearly defined by the legislations as well. Marital rape should be the most essential reason for divorce under all personal laws.
- The sentence should not make lighter only on the ground of the parties are married. Lowering down the quantum of sentence on the basis of victim and accused relationship as husband and wife sounds absurd. This rationale doesn’t sound as just, fair or reasonable.

- It is suggested that in addition to the framing of proper law with respect to marital rape the government should also provide for women support centres at district level where the women can go and seek the support in case she is a victim of marital rape.
- More police female personnel should be initiated so as to be available at situation relating to marital rape. Victim shall be more comfortable in talking about her grievance and filing complaints related to sexual violence if female work staff are appointed. Moreover, there is a great need to build up sensitivity among the police officials to take up issues in a better humane way.
- All the myths that exist in the society relating to marriage should be busted. The social stigmas should not be made an important factor in deciding the matter related to marital rape. This can be achieved by running a campaign which gives awareness to the people and providing them with knowledge and acceptance towards the offence of marital rape.

### **CONCLUSION :**

In the kaleidoscope of contemporary India, the issue of marital rape stands in blatant relief, a jarring discordance amid the symphony of progress. Despite boasting the world's largest democracy and a robust legal framework, the nation tragically remains among the last bastions where non-consensual sexual intercourse within marriage finds no criminal sanction. This omission, enshrined in Exception 2 of Section 375 of the Indian Penal Code (IPC), casts a long shadow on the promise of equality and dignity enshrined in the Constitution, leaving countless women trapped in a twilight zone of silent suffering.

While the prevalence of marital rape remains shrouded in secrecy due to societal stigma and reporting undercurrents, studies paint a grim picture. The National Family Health Survey (NFHS-4) suggests a staggering 29% of ever-married women have experienced non-consensual sexual violence, hinting at the vast ocean of silent pain beneath the surface. This pervasive silence is further amplified by the exception itself, which effectively denies recognition to the trauma inflicted and shields perpetrators from accountability.

Ultimately, the fight against marital rape in India is not merely a legal battle; it is a societal transformation. It demands dismantling deeply entrenched patriarchal norms, challenging the sanctity of marriage when built on coercion, and recognizing the inherent human right to bodily autonomy, regardless of marital status. The journey towards this transformation may

be long and arduous, but every thread unraveled from the tangled tapestry of denial brings us closer to a future where every woman, within the confines of her marriage or beyond, can claim her right to say "no" and have it truly mean no.