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# Critical Analysis of Spousal Rape: A Fortunate Crime

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## ABSTRACT

*“A killer kills the body but a rapist kills the soul”*

*- Justice Krishna Ayer*

*Spousal rape is also known as rape, victim rape, marital rape, or inmate rape. Marital rape is same as rape. In relationships when there are women who get unwanted or forced sex with their husband's they are called as spouse's rape. Since, a very long time marital rape is a crime which women's are tolerating from a long back which really needs to get addressed. Marital rape should be a crime in India as rape is rape whether it is committed by an unknown person or spouse and I do not stop here that marriage rape should be criminalized it should be criminalized but there should be many changes to current rape laws. Marital rape is a crime that outrages the dignity of a women .according to the teachings of the bhagvatagita no one has the right to violate or humiliate women, nearly 7.8 million women are raped by their partners every day, the fact that there is no physical evidence of violence does not mean that a women was never raped. - About 2/3 of the crimes are taken against a person known to the victims. Marital rape also violates the fundamental right of women to live with dignity , right to life and right to privacy is also violated covered under Article 21<sup>2</sup>, and also Article 14<sup>3</sup> – right to equality of Indian constitution Since, a very long time marital rape is a crime which women's are tolerating from a long back which really needs to addressed.*

**Keywords-** *marital rape, basic right, forced sex, human dignity, equality.*

## I. INTRODUCTION

It is an act of having sexual intercourse with your spouse without the consent of your spouse. It is an example that whenever a view of the Mahabharata or the Ramayana there is always the outrages of woman modesty when at some point it has led to a great disaster in the life of the accused either Ravana or Dushashana. Marital rape has been developed in our country from a very long time; Criminalizing spousal rape is a need of the society to save the girls

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<sup>2</sup> INDIA CONST. art. 21.

<sup>3</sup> INDIA CONST. art. 14.

from forced sex, unwanted sex, and sexual abuse. As when a woman is raped by a stranger, she has to live with horrifying memories which is really tough, but when a woman is raped by her own spouse, she has to survive with the rapist. Out of 195 countries except India, china and other 55 countries have not recognized marital rape as a crime according to them raping your wife against her will is okay as marriage is a sacrament but there are other 140 countries who have recognized marital rape as an offence.

It is a crying misfortune humiliation that even after so many years spousal rape is still not a crime in India. Spousal rape is a huge issue in India. It is an unwanted sexual intercourse which is acquired by threatening the women or forcefully forcing her for sexual intercourse against her will, without her consent is known as inmate rape or spousal rape. it is difficult to accept that we are living in 21<sup>st</sup> century and still fighting for criminalizing marital rape is a big upset for us and not only men but also women does not consider marital rape as crime, it is the most less reported crime in India. Marital rape is a crime which is hidden behind the curtains of marriage a sacrament. 1 in 3 men admitted to raping their wives, and 1 Indian women is raped by her husband in every 3 seconds .almost 75% of men admitted that they forcefully had sex with their wife and among married women who were victims of sexual violence, over 83% reported their husband as perpetrator data from the national crime bureau show that 85% per cent of the marital rapes are reported this year,. After nirbhaya gang rape case in 2012 justice verma commission report also suggested to criminalize marital rape. Modesty of a women is considered as an important accredit of a women since her birth which should not get violated. Having sexual intercourse with his wife against her will and not declaring it an offence or illegal is only promoting the concept of spousal rape. anything which is being forced in a negative way which deteriorate a women's modesty whether be it marital rape or rape, whether done by an stranger or by her own husband it should be considered as crime same as rape because in both modesty and self respect of a women is infringed. Change should be brought in the minds of our man in our society they have no right to outrage a women's modesty just because they are married to them, man have a mistaken idea that marriage changes the rules. It doesn't, if a husband pulls his wife down, pushes her, or imposes sex hurting her, sex by taking a women hostage its rape.

## II. TYPES OF MARITAL RAPE

- **Battering rape-** which literally means use of any kind of violence during sexual intercourse with the spouse.

- **Obligatory rape** - occurs when a women refuses to have sexual intercourse with her man, at that time man uses force to have sex which is totally against her will is known as forced rape.
- **Obsessive rape**- these type of rape is done by those men's who are prone to sex, thus it involves a lot of different ways or techniques to have sex it is a type of torturous and violent sex.

### III. REPARATION OF MARITAL RAPE

- Unwanted pregnancy
- Sexually transmitted disease like HIV- AIDS
- Low self- esteem
- Fear
- Anxiety
- Self hatred
- Irritation
- Depression
- Mental illness

### IV. WHY DOES INDIA REFUSES TO CRIMINALIZE SPOUSAL RAPE

*“Forced consent is not consent”*

India is a country where the total population is about <sup>4</sup>1,387.297,492 crores. It is considered that the concept of spousal rape, as understood intentionally, cannot be suitably applied in the Indian context due to the orthodoxy mindset of the people. It is a country where people speak different languages, India is full of different religion, cultures, and castes but, they live together. In India people don't even discuss about marital rape it is a taboo for them. In India we give preference more to our culture in a marriage than to a women's consent. India is famous for its different cultures so We have always seen that India has always been a patriarchal society a male dominating society where women's are treated as slaves even now in 21<sup>st</sup> century. People consider women even now just as home maker. Women's are always treated inferior to men in our society they also think that husband can take their women's decision. Women's have lost their individuality they are not even allowed to take their own decision also women's are not treated equally or with full dignity because of different religious orthodoxy beliefs, actual willingness of women for sexual intercourse man needs to

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<sup>4</sup><https://www.worldometers.info/world-population/india-population/>

understand the meaning of no and must respect the word “NO”. forced sex should not be bearable notwithstanding of the relation. Marriage is being used as an excuse for having sexual intercourse with his wife irrespective of her consent. Here also article 14 of constitution of India is violated as it states that state shall not deny to any person equality before the law or the equal protection of the law within the territory of India. If the constitution itself promises equal treatment then why women in our country are not treated equal as men why women’s does not have right to say NO for sexual intercourse. It is automatically assumed from long back time that Indian women’s are binded to have sexual intercourse with their husband they do not have any option to deny for sexual intercourse. Husband thinks that they have got an unfortunate licence to involve in sexual intercourse with his wife. Man really need to understand that marriage does not mean that wife will always be prepared or pleased for having sexual intercourse whenever they want. Government says that in India they cannot criminalize marital rape because marriage is a sacred institution like values, customs. I can accept that India is known for its culture and marriage is sacred, pure institution but, If we can make strict laws for taking dowry- dowry prohibition act , laws for sexual assault, then why can’t we make laws for those women’s who are forced for having sexual intercourse when they don’t want to have sex. They are not even asked for their choice, her decision is considered as implied “yes” why?, they think that as she said yes I do for marriage she is also ready for sexual intercourse. Marital rape is one of the heinous crimes which is being committed openly which needs to be criminalized.

## V. JUDGEMENTS

- <sup>5</sup>A special fast track court in Delhi in one of his decision stated that marital rape is not to be considered as rape even if it is forcible ,means sex between husband and wife, even if forcible, is not rape. Vikash, who allegedly drugged and raped his wife, was discharged after the judge proved that Indian rape laws don’t apply to bride and groom. The woman in the present case declared that her marriage was not legal because she had been kidnapped against her will, after being sedated by the accused and his father. She said that she was kidnapped by a man, who coerced her to sign a marriage certificate while she was intoxicated, in a registry office situated in Ghaziabad. He then raped her on several occasions and threatened her if she tried to complain to anybody.

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<sup>5</sup><https://www.livelaw.in/marital-sex-even-forcible-rape-delhi-court-read-judgment-close-look-law-relating-marital-rape-india/>

- <sup>6</sup>Delhi high court on 12<sup>th</sup> may in 2015 has refused to entertain PIL on marital rape.

## VI. INITIATIVES FOR CRIMINALIZING MARITAL RAPE

- RIT foundation<sup>7</sup> is a non- profitable foundation under the guidance of chitraawasthi. the only foundation which is fighting for criminalizing marital rape as a crime since 2015 it was established in the year 2009.RIT foundation claims that about 83% married women have been subjugated to sexual violence by their spouse<sup>8</sup> a 31% of married women between the ages of 15 and 49 who have ever suffered sexual abuse cite their current husband as the perpetrator.<sup>9</sup>RIT\_foundation has filed a petition in the Delhi high court to criminalize spousal rape since 2015 but high court keeps on postponing the hearing.
- <sup>10</sup>Shashi tharoor he is a congress MP he also proposed a bill in 2019 to criminalize marital rape and to delete exception 2 of section 375 which says, that having sexual intercourse with his own wife by her husband is not rape.
- <sup>11</sup>172<sup>nd</sup> law commission report had asked to delete explanation2 of section 375 of IPC. and also suggested to criminalize marital rape and said there's a need to change the legislature to protect the rights of the women but the government did not accept the recommendation.
- <sup>12</sup>Sahiyar from stree sangathan said that “we believe that right over one’s own body is a fundamental right, and marital rape violates the basic human right of women. She also stated that they also forwarded this recommendation to justice verma report.
- <sup>13</sup>Justice Verma committees recommendation- he was a former chief justice of India. it was made to make more stringent laws against the offenders who have been committed sexual crimes with the women. it was basically made to safeguard the modesty of a women and also to fast track the criminal trial process which is a need

<sup>6</sup><https://www.livelaw.in/delhi-high-court-refuses-to-entertain-pil-seeking-criminalization-of-marital-rape/>

<sup>7</sup> Dr. Chitraawasthi, <http://www.ritfoundation.in/>

<sup>8</sup><https://www.maritalrapeisrape.com/>

<sup>9</sup><https://www.maritalrapeisrape.com/>

<sup>10</sup> Live Law News Network ,ShashiTharoor Introduces Bill To Make Marital Rape A Crime [Read Bill],2 Jan 2019 1:00 PM , live law , <https://www.livelaw.in/news-updates/shashi-tharoor-bill-seeks-to-make-marital-rape-a-crime-141823?infinite-scroll=1>.

<sup>11</sup>Apoorvamandhan , Marital Sex even if forcible is not Rape; Delhi Court [Read Judgment and a close look at the Law relating to Marital rape in India] , 14 May 2014 1:29 PM , <https://www.livelaw.in/marital-sex-even-forcible-rape-delhi-court-read-judgment-close-look-law-relating-marital-rape-india/?infinite-scroll=1>.

<sup>12</sup>TNN ,Women organizations slam move on marital rape , Mar 3, 2013, 22:35 IST ,<https://timesofindia.indiatimes.com/city/vadodara/Women-organizations-slam-move-on-marital-rape/articleshow/18782107.cms>.

<sup>13</sup>Prasad Sanyal, Recommendations of the Justice Verma Committee ,January 24, 2013 06:21 pm IST , <https://www.ndtv.com/cheat-sheet/recommendations-of-the-justice-verma-committee-10-point-cheat-sheet-511292>.

as we have seen in nirbhaya case one of the accused who has brutally raped her. He committed suicide inside the jail because he knew that he will be getting very severe punishment. As our justice system is slow and involves a lot of process he got a chance to commit suicide he unfortunately got benefited yes judiciary delivered justice but not full justice to nirbhaya in 2020 that is why fast track courts is a need of India .

- Gujrat high court surprisingly has ruled that the non-consensual act of marital rape infringes the trust on institution of marriage and marital rape itself is abridging the trust on the institution of marriage.

## **VII. WHY SECTION 375 SHOULD GET AMENDED**

We should not stop here criminalizing marital rape it should get criminalized with some changes in section <sup>14</sup>375 of IPC in exception 2 this needs to get changed as why it is an offence if a man commits sex intercourse with his minor wife only there can be instances when man forces his wife for sexual intercourse by threatening her , by use of violence, by torturing her, section 375 of IPC must be declared as unconstitutional only because of its exception 2 as we are biased between married women and unmarried women somewhat we can say that we are providing immunity to marital rape or promoting rape. section 375 exception 2 of IPC needs to get amended which is rape and in 2013 there were amendments in section 375 but they did not cover all the aspects related to rape. As , many international women foundation and also Indian women's have disparaged the narrow interpretation of section 375 and whenever any wife tries to file a case of marital rape against her husband she has to face many challenges like answering weird questions asked by police officer which is not very easy for her, police asks for evidence these women's should get equal treatment as rape victim's.

## **VIII. WHY UNION GOVERNMENT SHIELD'S THE MAN**

Union government claims that criminalizing marital rape will affect the Indian culture, customs. It cannot be applied in India because of illiteracy as well. as women's from the usual time is considered to be lower than the men and religious beliefs plays an important role to conceal the rights of women and will also break the family system and trust on marriage as in India marriage is considered as a sacred institution and marriage is followed by tying the pair with a thin knot of thread which is "trust". And also they claimed that if marital rape gets criminalized than women's will misuse the law against her husband and will

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<sup>14</sup><https://indiankanoon.org/doc/623254/>.

make false accusation just like the reports shown in past about some women falsely accusing their husband's. I can accept that women may misuse the law but we cannot ignore the fact about increasing percentage of rape victims and the percentage of sexually abused women than the percentage of women's who have made false complaints of dowry or domestic violence on their husband so, does this makes any sense of not criminalizing marital rape just because of wrongs done by minority of women because of them the women's who are actually getting traumatized and abused by their husband's suffering not only physically but also mentally., also government claims that it will be really difficult to prove in court marital rape. Lawyer's do their best to prove the culprits wrong all the time then why not this time? just because it's difficult to prove? maybe the government is worried about making the law because lawyers are here studying a lot about how to manage a case. And if government is thinking about the misuse then they should also think about the good usage from that law which will save many women's life and just because it's difficult to prove than where is the justice to those women's who are having forced sex just because they cannot file a complaint as India believes that it is okay to force your wife for sex against her will, also union government argued that there is no need to bring another law for marital rape as it is covered under section 498A IPC but if a person is guilty under section 498A . He only gets punishment for 3 years which according to me is not enough as rape is rape whether it is done inside the wedlock by a husband or done by a stranger punishments should be more severe or should be same as rape.

## IX. IMPORTANT JUDGEMENTS

1. <sup>15</sup> **CR V. U.K** - rape is a rape irrespective of whether the accused has any kind of relationship with the victim or not the legislature should have added marital rape also in the definition of section 375 .the fact that the complainant and accused are married should not be used as a diminished factor.
2. <sup>16</sup>**Suchitasrivastava v. Chandigarh administration**- Supreme Court said that right to make choices about her own body and sexual activity comes under the scope of article 21 of the constitution of India.
3. <sup>17</sup>**Independent thought v. union of India**- court said that if criminalizing judicial separation and divorce have not demolished the trust on institution of marriage than marital rape cannot destroy the trust of Indians into the institution of marriage.

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<sup>15</sup>CR v UNITED KINGDOM, (ECHR 1995), 22ND NOVEMBER 1995, EUROPEAN COURT OF HUMAN RIGHTS [ECHR].

<sup>16</sup>**Suchita Srivastava v Chandigarh Administration**, AIR 2010 SC 235.

<sup>17</sup>**Independent Thought vs Union Of India (2017)**.



4. <sup>18</sup>**Nimeshbhaibharatbhaidesai v. state of Gujarat 2019-** this is very recent judgement of Gujarat which deals with a question that whether forcing a wife to involve in sex without her consent amounts to rape is it an offence under section 375 and punishable under section 376 of IPC. Whether there is any abstraction of spousal rape? Bench demonstrated that women can protect their life and liberty but not her body within the marriage bench stated that husband has no right to violate the dignity of a women, forcefully to engage in sex without her free consent. But as we do not have any law against marital rape. Court held that husband is not guilty under section 376 as in our country marital rape is not an offence.

## X. INTERNATIONAL LAWS FOR MARITAL RAPE

In other countries definition of spousal rape is - Marital rape is an active sexual intercourse with one's spouse without the consent of the other spouse. It is the form of domestic violence and sexual abuse. Article 2 of the declaration elimination of violence against women now includes marital rape in the definition of violence against women. But in India we even in 21<sup>st</sup> century we don't consider marital rape as a crime we can say that marital rape is treated as an immunity in our constitution or in Indian laws

Poland was the first country to criminalize marital rape and recognized it as an offence under their constitution in 1932, than Austria became the second country to criminalize marital rape in 1976 and also became first common law country to criminalize marital rape , than many common law countries like united states , Ghana , Israel , Ireland , Canada, South Africa , New Zealand , Sweden , Norway , Russia, Nepal and many more countries also recognized spousal rape as a crime. Why not India? Largely by Indians it's not even seen marital rape as rape as they believe that marriage is a sacred institution .U.S.A was also not ready to criminalize marital rape as a crime but after the case of people of state <sup>19</sup>*Newyork v. Mario liberetta*- it was held that there was no need to differentiate between marital rape and non marital rape effect to this right now in all the states in USA marital rape is an offence.

## XI. CONCLUSION

In India Criminalizing marital rape as an offence is a need as this is a prevalent inhuman act which is performed by Indian men from a very long time, rape should be treated as rape whether it is done by a stranger or a women's husband. We should not discriminate between

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<sup>18</sup>[**Nimeshbhai Bharatbhai Desai v. State of Gujarat**,2018 SCC OnLine Guj 732.

married women and a girl. Laws should be same for all according to <sup>20</sup>article14 of our constitution. Laws for marital rape should be formed but it should be balanced or made with valid restrictions so, that law should not get misused by any women and there should also be made strict laws for those women's who files an false complaint these women's also get punished, India should learn from other countries how they have to save / protect their marriage institution as well as the rights of women's so that their human rights are not violated. Marital rape goes against the constitutional right of equal protection, and right to privacy of a woman. government must look into the issue with an holistic approach .if by criminalizing marital rape violates the trust and confidence within the marriage then let it violates but atleast if marital rape gets criminalized women's who have to perform forced sex that will stop. This is actually the high time when marital rape should get criminalized as it is one of the heinous crimes which actually need to get addressed, as this crime is committed openly without any fear of punishment.

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<sup>20</sup>INDIA CONST. art. 14.