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Marital Rape: Screams Unheard

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ABSTRACT

India has experienced many precedents of what is referred to as hate crime or communal violence since independence. This communal violence has badly affected India's religious minorities like muslims, Sikhs and Christians. This type of violence is mainly for used for social, economic and political gains. This type of violence is frequently met with mobs and in certain cases direct collaboration with state actors, ranging from exhorting violence through hate speech and denying to properly investigate the incidents after they have occurred. It follows that communal violence further exhorting the disparage of those affected and to those who face high levels of uncertainty alongside merger access to justice. These minorities have long been the target of different types of persecution such as threats, hate crimes, forced conversions and attacks on places of worship. Although in recent years there has been rise in incidents of communal violence against India's religious minorities. Threats, hate speech and a wave of attacks around cow slaughter have particularly targeted muslims as well as to people who belongs to lower castes. Now a days, this violence has led to greater fear amongst religious minorities in particular muslims. Also christians have recently faced communal violence at the hands of mob who have attacked churches with false claims of forced conversion; reports of some minor cases of violence against sikhs community have recently emerged as well.

I. INTRODUCTION

Imagine being an eighteen-year-old girl, meeting a stranger twice, and being told that you simply are going to get married to him. Picture that the dreams she had cultivated of love, care and companionship are shattered on the very first night of the wedding when she is subjected to verbal and sexual assault from the very person that had vowed to love and protect her just a few hours prior. Every single night, she faces an ordeal, from being forced to mimic pornographic videos to forcibly having a candle or flashlight or any object inserted into her vagina. If she complains to her family, they advise her to "try and adjust." If she complains to the police authorities, they rebuke her and tell her to be grateful and proud that her husband is coming home to her rather than visiting a brothel. And when she

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tries to require her woes to the Supreme Court, they tell her that she is bringing a private claim, not a public concern and intrinsically, they can't change the law for one single person. This is often the unfortunate reality for countless Indian women living among the culture of arranged marriages and otherwise and remaining legally unprotected from the realities of marital rape.³

II. POSITION OF WOMEN IN INDIA

Here is a very sad and bitter truth about India. A woman is raped every 10 minutes. The females are not tortured in a single mundane manner. There are variety of ways to ravish her which includes acts like rape⁴, assault⁵, bride burning⁶, etc. often the victim is too scared to report the crime. She may think of the consequences of revealing her identity and bringing shame to herself and to her family or she lacks confidence in the system. Sexual violence, particularly rape is a worldwide issue which is almost like a nightmare for any woman.

People often sarcastically say that marriage is a license to have sex, but this society has taken it to an extreme version and now in many of the cases marriage is now a license to rape too but this rape is beyond the protection of law.

The word 'rape' has been derived from the Latin word 'rapio' which means 'to seize'. Rape is forcible seizure or ravishment of a woman without her consent, by fear, force or fraud. Rape is a coercive, non consensual sexual intercourse with a woman.⁷

Rape is the most heinous offence committed on a woman. It is worse than any of the crimes. The prosecutrix dies thousand deaths even when she's alive. It doesn't take a lot for the society to accept the accused but it takes them a lot to accept the victim in the society. After the criminal amendment act, 2013 the definition of rape has been widened which leaves no room for the escape of the accused.

According to Section 375 in The Indian Penal Code:⁸

³ 'Night After night, torture grew': A survivor speaks up, DailyO, (5th January, 2016) <https://www.dailyo.in/voices/women-marital-rape-sexual-harassment-abuse-arranged-marriage-divorce/story/1/14390.html> (Last visited on 16th May, 2020)

⁴ Section 375, IPC, 1860

⁵ Section 354, IPC, 1860

⁶ Section 304B, IPC, 1860

⁷ Merriam Webster, <https://www.merriam-webster.com/dictionary/rape>

⁸ 375. Rape.—A Man Is Said To Commit "Rape" Who, Except In The Case Hereinafter Excepted, Has Sexual Intercourse With A Woman Under Circumstances Falling Under Any Of The Six Following Descriptions:-

(First) — Against Her Will.

(Secondly) — Without Her Consent.

So, to prove that any particular intercourse falls into the category of rape or not, the absence of consent is an essential element. Also, it must be proved that if the consent was there then it was a free consent. Hence, if it is proved that there was no consent, or if the consent was a forced consent then it would fall in the category of section 375 and would amount to rape.

The above definition has gone through various amendments in the past few years. Some of the cases that acted as a catalyst for bringing changes in the laws made on rape are:

“Mathura Rape Case”

Mathura, was a young orphan girl who lived with her brother. She was raped in the police station by two police constables while she walked in to the station to settle a domestic dispute. However, the constables were acquitted by the sessions court. On further appeal, they were found guilty by the high court of the state. The judgment however was again reversed by the

supreme court. The constables were acquitted by the highest court of India. It led to a very heavy turmoil in the country. It sparked a very heavy protest for the first time about rape in India which led to the reform of sexual assault laws. It also created a spark to the women’s movement in India.

Consequences of the case:

The criminal law amendment of 1983 was made. The main features are:

1. In camera proceedings of the rape trial.
2. Custodial rape was recognized and now it’s an offence under section 376C.

(Thirdly) — With Her Consent, When Her Consent Has Been Obtained By Putting Her Or Any Person In Whom She Is Interested In Fear Of Death Or Of Hurt.

(Fourthly) —With Her Consent, When The Man Knows That He Is Not Her Husband, And That Her Consent Is Given Because She Believes That He Is Another Man To Whom She Is Or Believes Herself To Be Lawfully Married.

(Fifthly) — With Her Consent, When, At The Time Of Giving Such Consent, By Reason Of Unsoundness Of Mind Or Intoxication Or The Administration By Him Personally Or Through Another Of Any Stupefying Or Unwholesome Substance, She Is Unable To Understand The Nature And Consequences Of That To Which She Gives Consent.

(Sixthly) — With Or Without Her Consent, When She Is Under Sixteen Years Of Age. Explanation.— Penetration Is Sufficient To Constitute The Sexual Intercourse Necessary To The Offence Of Rape.

(Exception) —Sexual Intercourse By A Man With His Own Wife, The Wife Not Being Under Fifteen Years Of Age, Is Not Rape.

⁹Tuka Ram And Anr v. State Of Maharashtra, 1979 SCR (1) 810

3. It banned the publication of the victim's identity.

“Aruna Shanbaug Case”¹⁰

Aruna Shanbaug was a junior nurse at King Edward Memorial Hospital in Mumbai. She was raped by a contracted sweeper, Sohanlal Bhartha Walmiki while she was on the late night duty. She was not only brutally raped but was also choked by a dog chain that cut off the oxygen supply to her brain which left her in a permanent vegetative state for the last 40 years. Her euthanasia plea by her friend Pinki Virani was rejected by the supreme court of India in the year 2011. However, the landmark judgement was made to allow passive euthanasia in the country.

Consequences of the case-

The landmark judgement was made to allow passive euthanasia in the country.

“Vishaka v/s state of Rajasthan”¹¹

Bhanvari devi, a young social worker from Rajasthan was brutally gang raped by several men when she tried to rescue a young minor girl from getting married. Bhanvari devi decided to seek justice and approached the court. However, in a shocking judgement the trial court acquitted all the 5 accused men.

Vishakha, an NGO which worked for the women's education and research took up the cause of Bhanvri devi. Vishakha filed a petition before the highest court of India i.e, the supreme court on the matter of sexual harassment at the workplace. On August 13, 1997, the supreme court of India issued the vishaka guidelines that defined the term sexual harassment and put the responsibility on the employers to provide a safe and amicable environment for women at the workplace.

Consequences of the case-

On August 13, 1997, the supreme court of India issued the vishaka guidelines that defined the term sexual harassment and put the responsibility on the employers to provide a safe and amicable environment for women at the workplace. However, If we look at the exception of the definition of Section 375 of the IPC we would find that it doesn't include the girls who are above fifteen and married and hence, if they are sexually assaulted by their husbands then it doesn't amount to rape.

¹⁰ Aruna Ramchandra Shanbaug vs Union Of India & Ors, MANU/SC/0176/2011

¹¹ Vishaka & Ors vs State Of Rajasthan & Ors, AIR 1997 SC 3011

III. LOOPHOLES IN THE CURRENT RAPE LAWS:

- **No Deterrence Theory's Implementation –**

Deterrence theory states that people are more likely to be dissuaded from committing a crime if the punishment is harsh, certain and quick. For example : the Arabian countries, the North Korea, etc are very intolerant when it comes to rape. So the punishments for rape are very harsh. India also needs to adopt the deterrence theory in order to control the crime like rape in India so as to produce a certain kind of fear in the mind of the rapists.

- **Rape Laws are Not Gender Neutral -**

However, one thing should be kept in mind that the charges for rape can be only framed against a man and not against a woman. Which means that it is only a female who is said to get raped and the general interpretation is that males can't get raped. However, the POCSO (protection of children from sexual offences) act,2012 provides relief to both the male and female under the age of 18 years. Today's society is changing in many aspects. On one hand where crimes against women has increased the sexual offences against men has also started to take place. However, there is no relief granted to males against such assault. Amendments should be made to cover males also under the category of rape.

- **Marital Rape is Not Considered To Be Rape –**

The entire event of rape is based on the absence of consent or a forceful consent. However, our legislature as well as the judicial system gives no importance to the absence of such consent in the event of the marital rape. It is presumed that a wife is the commodity of her husband and that her consent doesn't matter to her husband and he can ravish her anytime and it won't amount to rape, which actually defeats the entire purpose of section 375. Section 375 aims at preserving the free will of a woman. However section 375 is biased when it comes to a married woman. To keep it unbiased the dignity of the married women should be protected by making certain amendments and protecting them from instances of unwilling or non-consensual sex.

- **No Fool-Proof Mechanism To Deal With The Culprits-**

In India there are many laws related to rape which actually aims at prohibiting such incidents. But the implementation of those laws is very poor. The culprits don't fear such laws and they feel very confident that they will be saved no matter how heinous the

crime they commit. And this is what actually happens. Firstly, the judicial system is too slow that it takes years to seek justice and in many cases the culprits move freely out of the courts due to the lack of evidences or other several reasons. Secondly, the Indian society looks at the victim as the actual culprit. The society fails to accept the rape survivors.

IV. MARITAL RAPE

Marital rape is a very serious offence and the women who have gone through such type of situation need better help. Victims go through a variety of severe emotional reactions.

Males have accepted this belief that women are their assets or commodities and the value of women as a commodity is measured to a great extent by their “sexual virginity”. Whenever a woman gets married, in many cases the bride groom spend their nuptial night on white bed sheet just to check whether she is a virgin or not. In the ancient times, a raped woman was considered relatively less valuable as property¹² and the penalties for such offence involved some compensation, that too to her father or brother. The exemption of marital rape is evidently a legacy of this mindset. Since an act against one’s own property is generally not considered to be a crime, therefore it is always considered that no crime has been committed when a husband forces intercourse upon his wife, since she is under his ownership.

V. TYPES OF MARITAL RAPE

Marital rape is sub divided into three categories –

1. Violent Rapes
2. Force only Rape
3. Sadistic Rapes

- **VIOLENT RAPE** - Apart from the injuries due to rape itself, abuser uses enough physical violence to cause injury to the victim i.e. injuries to the breasts or the genital area. The abuser here forces his wife to submit to sexual acts after a physical assault.

12 Sumedha Chaudhary, *Why Criminalization Of Marital Rape Is Still A Distant Dream In India*, The Wire, (Oct 29th, 2018), https://www.business-standard.com/article/current-affairs/why-criminalisation-of-marital-rape-is-still-a-distant-dream-in-india-118102900084_1.html (Last visited on 16th May, 2020)

- **FORCE ONLY RAPE** - It is a form of rape where enough force is exercised by the husband to control or hold his wife. For eg. Holding down the victim by her arms or wrist to prevent her from escaping or defending herself. This form of rape takes place where there is a larger contrast between the strength and physical size of the victim and the abuser. There is a huge probability that the victim starts feeling numbed by constant emotional abuse.
- **SADISTIC RAPES** - Here the abuser tries to fulfill his fantasies of torturing or using other object during rape, rapist urinating on the victim, etc. it is also known as obsessive rape. Pornography frequently showcases this kind of rape.

VI. ANALYSIS OF LEGAL PROVISIONS

The institution of marriage looks like a contract and the section 9 of the Indian Contract Act, 1872 fits really well, where the consent of the wives to have sex is implied once the marriage is performed.

But, according to the tenets of Hinduism, marriage is termed as a sacred relationship and not a contract.¹³

Hence the provision of the contract act doesn't apply here.

However, under Muslim law, marriage is a contractual relationship¹⁴. But here also, a contract made with a woman to rape her after the performance of marriage makes no sense and will be void under Section 24 of the act itself. Then from where does this entire act of committing forceful sex within a marriage come?

The females has been given the right to fight for her protection when the violators are outside entities, but when the criminal of her bodily integrity is her own husband with whom she is married, such protection is withdrawn by the legislators.

Also, once again the protection is again granted to the wife against the husband, once the court passes the decree of judicial separation under Section 10 of the Hindu

¹³Laksheyender Kumar, *Salient Features of Hindu Marriage Act, 1955*, <http://www.legalservicesindia.com/article/558/Salient-features-of-the-Hindu-Marriage-Act,-1955.html> (Last visited on 16th May, 2020)

¹⁴*Marriage Under Muslim Law*, Academike (7th December, 2014) <https://www.lawctopus.com/academike/marriage-under-muslim-law/> (Last visited on 16th May, 2020)

Marriage Act.¹⁵ And any subsequent act of forceful sex with the wife amounts to rape under section 376B Of the Indian Penal code, 1860.¹⁶

Does it not amount to complete hypocrisy and ignorance towards the situation of women by the legislatures and the judiciary?

Basically, the Indian law and the society doesn't recognize the offence of marital rape and it constantly denies the existence of the same.

Marital rape is defined as rape where the wife is forced to have sexual intercourse against her will, with her own husband. In India, the marital rape exists de facto but not de jure. However in the other countries either the legislature has criminalized the marital rape, or the judiciary has played a lively role in recognizing marital law as an offence. In India however, the judiciary seems to be operating at the cross-purposes.

VII. STATUS OF MARITAL RAPE LAWS IN OTHER COUNTRIES

Australia, under the impact of the second wave of feminism within the seventies, was the very first common law country to pass changes in 1976 that made rape in marriage a criminal offence.¹⁷ 20 years before that, several countries within the communist bloc and Scandinavian countries passed laws criminalizing marital rape including Denmark, Norway, Sweden and the former Soviet Union and Czechoslovakia. Poland in 1932 was the very first state to possess a law explicitly making marital rape a criminal offence. Since the 1980s, many of the common law countries have legislatively abolished the marital rape immunity. These include South Africa , Ireland, Canada, the us , New Zealand, Malaysia, Ghana, and Israel.

In the US, between 1970s and 1993, all 50 states made marital rape a criminal offense. In 1991, the House of Lords within the UK struck down its common law principle that a wedding contract implied a woman's consent to all or any sexual intercourse.¹⁸

In 2002, Nepal repealed the marital rape exception after its Supreme Court held that it went against the constitutional right of equal protection and therefore the right to

¹⁵ Section 10, The Hindu Marriage Act, 1955

¹⁶ Section 376B - "Whoever Has Sexual Intercourse With His Own Wife, Who Is Living Separately From Him Under A Decree Of Separation Or Under Any Custom Or Usage Without Her Consent Shall Be Punished With Imprisonment Of Either Description For A Term Which May Extend To Two Years And Shall Also Be Liable To Fine."

¹⁷ Lisa Featherstone & Alexander George Winn, *Marital Rape and the Marital Rapist: The 1976 South Australian Rape Law Reforms*, (28th Aug, 2018), *Feminist Legal Studies* volume 27, pages 57–78(2019)

¹⁸ KAREN ZRAIC, *INSIDE ONE WOMAN'S FIGHT TO REWRITE THE LAW ON MARITAL RAPE*, [HTTPS://WWW.NYTIMES.COM/2019/04/13/US/MARITAL-RAPE-LAW-MINNESOTA.HTML](https://www.nytimes.com/2019/04/13/us/marital-rape-law-minnesota.html) (LAST VISITED ON 16TH MAY, 2020)

privacy of women. It said, “The classification of the law that an act committed against an unmarried girl to become an offence and therefore the same act committed against a wife to not become an offence isn't a very reasonable classification.”¹⁹

According to the UN Women’s 2011 report, out of all the 179 countries from which data was available, 52 countries had amended their legislation to explicitly make marital rape a criminal offence.²⁰ But in India it still is a far fetched dream because the legal provision for the same is not in existence yet. There have been constant debates and the question of law arises on what actually and exactly the marital rape is, and whether if it actually exists or not, and if it does, then how and why it should be taken as a criminal offence?

There are two opinions when it comes to criminalizing the marital rape. The first one says that the marital rape should be criminalized because when it comes to the rights of a woman it is the same irrespective of the fact whether she is married or not. Also, the constitution of India recognizes the right to equality under Article 14.

On the other hand, the other group states that recognition of marital rape would ‘destabilize the institution of marriage’. This gives rise to a question that in India, is the institution of marriage has a greater priority than the rights of women. It’s not a secret fact that both women and men are equal. So why do women always have to suffer?

VIII. STATUS OF MARITAL RAPE IN INDIA

According to a survey conducted by the international centre for research on women (2011) stated that nearly 20% of Indian men reported at least once having carried out sexual violence against their female partners. In another study conducted by national health and family survey (NFHS-4) for the year 2015-2016, 5.6% women have been reported as victims under the category of “physically forced her to have sexual intercourse with him even when she did not want to”..²¹

In 2005, the Protection of women from domestic violence Act, 2005 was passed which although did not consider marital rape as a criminal offence but it did consider it as a

19 Shalini Nair, *Marital Rape A Crime In Many Countries, An Exception In Many More*, <https://Indianexpress.Com/Article/Explained/Marital-Rape-A-Crime-In-Many-Countries-An-Exception-In-Many-More-4821403/> (Last visited on 16th May, 2020)

²⁰ *FACTS AND FIGURES: ENDING VIOLENCE AGAINST WOMEN*, [HTTPS://WWW.UNWOMEN.ORG/EN/WHAT-WE-DO/ENDING-VIOLENCE-AGAINST-WOMEN/FACTS-AND-FIGURES](https://WWW.UNWOMEN.ORG/EN/WHAT-WE-DO/ENDING-VIOLENCE-AGAINST-WOMEN/FACTS-AND-FIGURES) (LAST VISITED ON 16TH MAY, 2020)

²¹Supra Note 11

sort of domestic violence.²² As per this Act, if a woman has undergone marital rape, she can go to the court and obtain judicial separation from her husband. It provides civil remedies including protection orders, judicial separation and monetary compensation. Section 498 A of the Indian penal code provides for criminal penalties for a husband or his relatives if found treating the lady with cruelty. Furthermore, section 23 of the Hindu marriage act allows “cruelty” to be used as a ground for divorce.

However, the same doesn't entirely protect the women from the crime she has undergone. One of the main reasons of marital rape is the dominance of husbands in the relationship and the constant use of sexual violence by them as a way to maintain power over their wives.

Also, abusive men with the history of drug problems or alcohol are more likely to abuse their spouses sexually when drunk or sober. Marital rape is a very serious offence and the women who have gone through such type of situation need better help. Victims go through a variety of severe emotional reactions.

Males have accepted this belief that women are their assets or commodities and the value of women as a commodity is measured to a great extent by their “sexual virginity”. Whenever a woman gets married, in many cases the bride groom spend their nuptial night on white bed sheet just to check whether she is a virgin or not. In ancient times, a raped woman was considered relatively less valuable as property²³ and the penalties for such offence involved some compensation, that too to her father or brother. The exemption of marital rape is evidently a legacy of this mindset. Since an act against one's own property is generally not considered to be a crime, therefore it is always considered that no crime has been committed when a husband forces intercourse upon his wife, since she is under his ownership.

The condition of women in India is very miserable. There is no gender equality. Girls are taught to suffer, tolerate, shut their mouths and never utter a single word no matter what. This is a very sick mindset. This is where women lose their self confidence and suffer for their entire life. A woman should never compromise no matter what. A woman too is a human being and she has the full right to live with dignity as mention under

²²*The Protection Of Women From Domestic Violence Act, 2005*

²³ *Supra Note 11*

article 1 of The Universal Declaration of Human Rights (UDHR).²⁴

Suggestions for criminalizing the cases of marital rape and to completely eliminate this atrocious crime from our society:

- Proper penal sanctions should be made regarding marital rape starting from 7 years to 10 years or death sentence within the rarest cases (such as an act resulting in a vegetative state of the victim or the death of the victim).
- An awareness campaign should be launched by the both central and the state legislature that marital rape is a crime and shall be reported and treated accordingly. (The culprits will have to face the setbacks).
- Strong yet efficient method should be introduced while handling the cases of marital rape.
- Cases should be tried in a fast track court in order that justice should be served as soon as possible.
- The woman should be given adequate amount of compensation when the husband has been proved guilty until and unless she remarries.
- The wife shall be provided justice at no additional cost and her dignity shall be maintained.

IX. CONCLUSION

Marriage, in India is a very mandatory thing which implies that majority of women face such sort of abuse because the patriarchal system is so deeply rooted in our Indian society that males tend to dominate their wives. Such sensitive issue like marital rapes shouldn't be ignored at any cost and Proper legislations should be made and passed to protect the dignity of the women. Also, the entire concept that a wife has to have sex with her husband irrespective of her consent, will, etc is absolutely unacceptable in today's society. There is no justification for the exemption of marital rape in the current times. It stands true that the criminalization of the marital rape in India won't end the problem but it surely is an important step towards changing the conditions of women in an abusive marital relationship. The culprit of the violator of a women's dignity

²⁴ UNIVERSAL DECLARATION OF HUMAN RIGHT, 1948

shall be punished with harshest punishment irrespective of his relationship with the women.
