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A Socio-Legal Study of Marital Rape on Constitutional Threshold

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ABSTRACT

Marital rape is indeed rape in matrimony. It is a physical relationship between the husband and his wife against the wife's consent or without her will. The Marital Rape's evil has come down heavily on women. The research paper endeavours to analyse the meaning of Marital Rape and discusses how it is different from Rape or Stranger Rape. The paper goes on to deal with the possible types of marital rape. As the researcher proceeds further in his research, he tries to elaborate the legal scenario regarding marital rape in India (Section 375 Exception 2) and some other nations like the United States of America and Great Britain. The paper also discusses the absence of a law on the point. Criminalisation of marital rape, which is lacking, is immensely needed. The researcher puts forward the arguments given against the criminalisation of marital rape in India and discusses each with their drawbacks. The latest case by the Honourable Apex Court in 2017 of "Independent Thought Versus Union of India & Ors." whereby the words "fifteen years of age" written in section 375 exception 2 of the IPC 1860 is directed to be understood as 18, is also addressed. Finally, the paper concludes with suggestions to criminalise marital rape so that this menace can be curbed and gender equality can be achieved.

I. INTRODUCTION

"I say nothing, not one word, from beginning to end, and neither does he. If it were lawful for a woman to hate her husband, I would hate him as a rapist."

PHILIPPA GREGORY

Area-wise, India ranks seventh in the world. It is also the second biggest country in terms of population. The crime rate in this densely populated country of ours is as high as is the population. Crime against women has also increased over the years. Rape is one such offence against women, which is made punishable in IPC 1860 under section 376. But forceful intercourse by a husband with his wife is excluded from the definition of rape under exception 2 of the section. And this is how it comes into the picture with the word marital rape. Marital

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rape has always been very controversial and, in one way or the other, been the topic of debate and discussion in most legal systems of the world. It is also observed that many countries have changed their approach to marital rape. Countries like the USA, England, Australia have made it an offence by withdrawing the marital rape exemption. However, India is still among those few countries where marital rape continues to be a part of marriage. "While many countries have responded to demands for gender equality and changing societal norms by repealing the marital rape immunity, commentators have expressed concern that India remains trapped in a 'time capsule', clinging to the immunity as an outdated legal inheritance from the British colonial era."² CJ Sir Matthew Hale laid the foundations for 'Marital protection' for rape prosecution in 'The History of the Pleas of the Crown'. He writes, "The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract." 'Sir Hale's Implied Consent Principle,' which follows the common law system, is part of all former British colonies' legal structure. Here in India, sexual offences against women like sexual harassment, stalking, voyeurism all are made punishable but so is not correct about marital rape. It is provided exemption under section 375 exception 2 of the IPC. The cause for not criminalising spousal rape in India is not that all husbands are so good that no or zero marital rape exists, but the reason for not criminalising spousal rape exception is that since its creation, as drafted in the lines of UK common law, it is under section 375, and lawmakers have never attempted to abolish the exemption from marital rape as they feel that doing so will be prejudicial to the institution of marriage. Legislature alone is not to be blamed for it. Marital rape has had social backing in India since ancient time, and it was considered a wife's duty to surrender herself to her husband. Sexual intercourse was considered a husband's right, and marriage implied perpetual consent to sex with the husband. So the patriarchal set up of society played a more significant role in the marital rape exemption.

Loosely marital rape means rape within the marriage. It means sexual intercourse by one spouse with the other spouse without their consent or against their will. So basically, it is non-consensual sexual intercourse where one partner forces himself or herself on the other partner. This way, the meaning of marital rape becomes too broad and includes rape by husband of wife and rape by the wife of the husband. It shall also include rape within heterosexual marriage as well as in homosexual marriages. However, because in India and many other countries, rape offences are not gender-neutral, but can only be committed by men and only against women,

²Deborah Kim, *Marital rape immunity in India: historical anomaly or cultural defence?*, 69 CRIME, LAW AND SOCIAL CHANGE 91–107 (2018)..

and the cases of forced sex by husbands with their wives are vast compared to forced sex by a wife with her husband, the term marital rape is taken to mean sex obtained by husband from his wife without her consent. It is an act of Violent perversion where the wife is sexually and physically abused. In olden times when a woman used to be considered merely her husband's personal property, and she didn't have the separate existence of her own, intercourse with her was a right of a husband which she could not deny, but in changing times engaging in non-consensual intercourse with the wife has been criminalised in many legal systems of the world.

Almost every woman at one point or the other in her married life is subjected to marital rape by her husband. For persons like these, the wife is just an object to quench their sexual appetite whom they use when needed, irrespective of the wife's consent. "India is among 36 countries where it is still not an offence to commit marital rape. It's difficult to comprehend how a woman raped by her husband is less wrong than triple talaq or polygamy, which the govt seems to be concerned about. In other words, in a patriarchal society, a reasonable person is always a male who judges the place of a female in the social process. Women thus end up being perceived as baby-making machines where their right to bodily autonomy and reproductive rights is inconceivable and preposterous."³ Consent or no consent is immaterial if the person engaging in sexual intercourse with the victim is over 15 years of age, now 18 as directed by Hon'ble Apex Court in the matter of "Independent Thought Versus Union Of India & Anr."⁴ It has a traumatising effect on the person of women. She fails to understand how her husband, whom she confides in, happens to ignore her consent and do coitus with her against her wish.

The attitude must, however, be revised. This exemption from marital rape is in violation not only of female rights but also of fundamental rights enshrined in Art. 21 and 14 of the Constitution of India. Many countries have changed their approach to it, and it is a crime now in those countries as much as stranger rape is. It is high time for India to change its policy. In this research paper, the researcher highlights the magnitude of spousal rape in the Indian context and focuses on its constitutional dimensions. The legal framework regarding marital rape nationally and internationally is also discussed, along with suggestions.

II. MEANING AND TYPES OF MARITAL RAPE AND ITS LEGAL STATUS IN INDIA

The expression 'Rape,' which means "to snatch, take, or take away," comes from the Latin word 'Rapere'.⁵ Thus rape meant 'to forcibly snatch and carry away.' The transport of a lady

³ Legistify.com, *India is One of 36 Countries Where Marital Rape is a Crime*, THE BETTER HOME (Feb. 9, 2020, 03:37 PM), <https://www.thebetterindia.com/109672/marital-rape-an-unrecognized-evil/>.

⁴ Independent Thought Versus Union of India & ors. AIR 2017 SC 4904.

⁵ KEITH BURGESS-JACKSON, A MOST DETESTABLE CRIME: NEW PHILOSOPHICAL ESSAYS ON

by coercion, without or with intercourse, was “raptus” in the Roman legal system.⁶ There was no sexual significance associated with earlier rape. It was considered merely an act of abduction of a woman against the will of her father, husband, son or any other whose authority she lived under and nothing more. Sex was not at all essential to constitute rape. But this meaning of rape has undergone many changes over the years. Lately, most countries defined rape either as sex or some other sort of penetration with the victim without her consent or against her will. Since penetration was an essential element to constitute rape, the victim had to undergo the degrading two-finger test as a medical examination for rape. Then the presence or absence of semen on the victim’s private parts was another thing to embarrass her. This definition of rape was too obsolete and limited and covered only forceful male penetration of a female vagina.

Soon need was felt to re-look into rape definition. FBI in 2012 made a significant change in the rape definition in its Uniform Crime Report Summary Reporting System. This definition of rape was unchanged since 1927 in the USA. Earlier the definition was “the carnal knowledge of a female, forcibly and against her will.” The new definition is “The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.”⁷ This new definition made rape a gender-neutral offence and introduced that victim and perpetrator can be of any gender. It also included insertion into the female vagina of any body part other than male genitals or any other object.

India has also revised the definition of rape in 2013 post gangrape in Delhi and incorporated all these elements except the gender neutrality of rape. Marital rape and stranger rape are different in the sense that in stranger rape victim can be any woman, married or unmarried, and the perpetrator is anyone, except the partner of woman, whereas in spousal rape, the victim is always a wife and the perpetrator is always her husband who forces himself on her. Legally there is no recognition of the term ‘Marital Rape’ in India. It has had a long history, and it was always understood that sex by husband with his legally wedded wife is a natural consequence of a marriage of which she cannot deprive her husband. It was implied that a woman’s assent to marry indicates her perpetual assent to indulge in intercourse with her husband, and he has all rights to force himself on her even if she’s unwilling. So technically, a wife cannot be raped by her husband and his intercourse with his wife, although forceful, is his right. Law also recognised this right of the husband, and almost all countries of the world had put marital rape

RAPE, 16, (1st ed., Oxford University Press 1999).

⁶ Ibid.

⁷ Revised FBI UCR definition of rape in 2013.

exemption clause in their rape laws, including India, which means husband raping his wife can't be punished at all.

There has been very little study focusing on the kinds of marital rape. Marital rape, however, has been divided into two categories by studies in this area: non-physical sexual abuse and physical or forceful sex. Non-physical sexual abuse by the abuser entails the exercise of social and personal pressure to make the victim agree to unwelcome sexual activities. Forced or physical sex requires the perpetrator's use or threat of coercion to gain sex. Though non-physical sexual harassment happens more often, much of the research on marital rape rates focus on sex that is physical or forced. The difference between physical and non-physical sex has to be kept in mind. It is vital to bear in mind as variations in the percentage of spousal rape could be because of researchers' understanding of spousal rape as non-physical and physical or forced sexual intercourse.

1) **Non-Physical Sexual Abuse-** Non-Physical Marital Rape is important to discuss because this type of marital rape occurs more than physical rape. Finkelhor and Yllo discussed two forms of this type of rape that perpetrators of spousal rape use: "social or normative coercion and interpersonal coercion."⁸ Social coercion is the commonest form. It indicates that a wife is duty-bound to be submissive to her husband. When a husband does sex with his wife showing her the fear of society, telling her that she must satisfy her husband physically so that he does not fall into extra-marital affairs with other women, it is social coercion. Telling her that sex is the base of marriage and she must submit herself to him like an obedient wife is a part of social coercion. Interpersonal coercion is the pressure that a husband puts on her wife to obtain sex by using his emotional bond with her. When a husband tells her wife that he takes care of her, spends on her, maintains her, so in turn, she should also not refuse sex to him; this is one instance of interpersonal coercion. Husband obtains sex from her wife in this way by using his authority and power over her, no matter how unwilling she is.

2) **Threatened or Forced Sex-** In marriage, there are three types of forced sex, according to Finkelhor and Yllo; "battering rape," "force-only rape," and "obsessive rape."⁹ These types will be discussed further-

a. **Battering Rape-** Battery is a tort meaning physical and harmful contact with the victim resulting in actual injury. This is also implicit in battering rape. In this type of marital rape, the

⁸ DAVID FINKELHOR & KERSTI YLLO, ABUSE AND VICTIMIZATION ACROSS THE LIFE SPAN, 140-152, (M.B. Straus ed., The Johns Hopkins University Press, Baltimore 1988).

⁹ DAVID FINKELHOR & KERSTI YLLO, LICENSE TO RAPE: SEXUAL ABUSE OF WIVES, (Free Press New York 1987).

husband abuses the wife physically and verbally to obtain sexual intercourse. It is an extended version of the general violence that such a husband does to her wife and is not provoked by any sexual disagreements between husband and wife. Beating wife, causing hurt to her is part of battering rape. Husband uses excessive violence in this and forcefully does sex with his wife. It is also called anger rape.

b. **Force only Rape-** If the husband just uses as much power to get sex as is required, and not more, it's force only rape. The husband uses his physical strength to dominate the woman, resisting sex in this form of Marital Rape. Generally, disagreements about sexual acts between partners lead to this form of marital rape. This is also called power rape.

c. **Obsessive Rape-** This happens when the husband is obsessed with perverse sexual activities and derives pleasure by doing them. It includes bondage sex, enactment of scenes of porn films, to which the wife does not consent. Husband gets sexually aroused by inflicting pain on her wife and uses force and violence to derive pleasure from it. It is also called sadistic rape because the husband causes violence to her wife and feels sexual arousal. It is different from battering rape in the sense that in the former, violence is used for sexual arousal, while in the latter, violence is used to humiliate her.

Section 375 of IPC discusses the law relating to rape. The scope of rape has been broadened by the criminal law amendment act 2013, and the definition is thoroughly revised. Rape is just not confined to penetration of the penis into the vagina, in the amended definition but includes the following-

“Rape- A man is said to commit rape if he

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to so with him or any other person; or

(c) manipulates any part of the body of a woman to cause penetration into the vagina, urethra, anus or any part of the body of such woman or makes her to do so with him or any other person;
or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person.”

All these acts amount to rape only when these are performed on a woman without her consent. So the latter part of the section deals with the consent part. All these acts can amount to rape

only when they are performed in the following circumstances-

“First- Against her will.

Secondly- Without her consent.

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 eighteen years of age.

Seventhly- When she is unable to communicate consent.”

This definition of rape under the Indian Penal Code has two exceptions-

“Exception 1: A medical procedure or intervention shall not constitute rape.

Exception 2: Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.”

Exception 2 of section 375 clearly mentions that if a man commits intercourse with his wife and the age of wife is not below 15; it shall not be considered rape, meaning thereby that the husband can be held guilty of raping her wife only when he has indulged in intercourse with his wife, and the age of wife is less than 15. On 11th Oct. 2017, the Supreme Court held in *Independent Thought versus Union of India*¹⁰ that sex, if done with a girl who is below the age of 18, is rape irrespective of her marital status. The apex court directed the age of 15, in exception number 2, to be read as 18. After the modification, according to the Supreme Court judgement, the husband can be charged with raping his wife if the age of the wife is below 18. A wife over 18 can still be lawfully raped by her husband. Rape laws clearly provide an exemption to the husband and are very unjust. Since marital rape finds no recognition in law, “Married women only have the option of using section 498A of the Indian Penal Code, which lays down provisions on cruelty, if they need to allege sexual violence against their husbands,”

¹⁰ *Independent Thought Versus Union of India & ors.* AIR 2017 SC 4904.

says Kavita Krishnan, secretary of the All India Progressive Women's Association.¹¹ Though the position in many countries of the world has changed, they have moved to criminalisation of marital rape from decriminalisation. However, the State of India is still the same.

III. CONSTITUTIONALITY OF MARITAL RAPE EXEMPTION IN INDIA

Any law is only applicable at the simple beginning if it holds up the checking stone of constitutionality. The exclusion clause for marital rape is in violation of part III of the Constitution. The preamble of the Constitution, which ensures justice, freedom of thought and speech, equal status for all people, is in fact, far behind in implementing it. The marital rape exemption is opposed to constitutionally recognised fundamental rights. Exception 2 of section 375 is examined in this part in light of the right to equality and the right to life under Art. 14 and 21, respectively. The researcher contends that each one of these commitments is violated by the Marital rape exemption provided under exception 2 of Section 375 of IPC.

- **Marital Rape and Article 14-** Article 14 of the Indian Constitution provides fundamental right to equality before the law. It reads, "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."¹² Article 14 guarantees two things to everyone; the first is 'equality before law' and second is 'equal protection of laws' where the state is bound to protect every human being from inequality.¹³ Under Article 14, class legislation is prohibited, but reasonable classification is permitted. A law has to pass the test of reasonableness to be constitutionally valid under article 14. Exception 2 of Section 375 of IPC is contrary to the guarantee of equality provided for in Article 14 with regard to the application of a reasonable classification test.

Law in question has to meet the requirements of intelligible differentia and rational nexus to clear the reasonable classification test. It must not be an arbitrary, defunctive and artificial nature classification. The classification should be based on an intelligible difference that can be understood. The differentia used in the classification should have some relevant and important relationship with the purpose sought by the legislation to be achieved. For example, if the legislature makes a classification of individuals on the grounds of income, one of the purposes might be to provide low-income individuals with advantages, such as tax exemptions. Justice SR Das wrote in a judgement, "the law must clearly distinguish between the groups

¹¹ Anoo Bhuyan, *Government Denies Marital Rape Occurs, National Survey Shows 5.4% of Married Women Are Victims*, THE WIRE (Dec. 13, 2020, 01:09 PM), <https://www.google.com/amp/s/m.thewire.in/article/gender/indian-law-denies-marital-rape-exists-5-4-married-indians-claim-victims/amp>.

¹² Constitution of India 1950 Art. 14.

¹³ National Human Rights Commission vs. State of Arunachal Pradesh, AIR (1996) S.C 1234.

classified on an intelligible basis, and such a classification must have a rational correlation or nexus with the object sought to be achieved by the law”¹⁴

Exception 2 violates article 14 in the sense that it denies equality to a married woman as far as sexual abuse and rape are concerned. Depending on their marital status, the exemption clause establishes two types of women and immunises acts committed by men against their spouses. By so doing, the exception makes it possible, only because of their marital status, to victimise married women while shielding single women from the same acts. Exception 2 infringes the right to equality also in the sense that the classification of the woman on their marital status created under it does not have a reasonable connection with the intent underlying the law. In *Budhan Chaudhary Versus State of Bihar*¹⁵, the apex Court decided that classification made under Article 14 is subject to a test of reasonableness that can not be passed unless the classification has some rational connection to the object which the legislation wishes to achieve. Exception 2 destroys the objective of Section 375: to protect women and prosecute those involved in cruel and brutal rape activities. Exempting husbands from punishment is completely at odds with this objective. Strictly speaking, the effects of the rape are the same whether a woman is married or unmarried. “when the state, on the one hand, has, by legislation, laid down that abetting child marriage is a criminal offence, it cannot, on the other hand, defend this classification of girls below 18 years on the ground of sanctity of marriage because such classification has no nexus with the object sought to be achieved. Therefore, Exception 2 in so far as it relates to girls below 18 years is discriminatory and violative of Article 14 of the Constitution.”¹⁶ Justice M.B. Lokur said.

- **Violation of Article 21-** Exception 2 also violates the right to life under article 21 of the Constitution. Article 21 reads that “no person shall be denied of his life and personal liberty except according to the procedure established by law”.¹⁷ This article is interpreted in a number of cases by the Hon’ble Apex court, and its scope widened beyond the literal meaning of the article. The Supreme court has held that the right to life and liberty under article 21 includes the right to privacy, a safe and pollution-free environment, health, etc. Recently judiciary has started to recognise that right to stay away from intercourse and not indulging in unwelcome sexual acts is included in Art. 21. In *The State of Karnataka v. Krishnappa*, the Supreme Court held that “sexual violence apart from being a dehumanising act is an unlawful intrusion of the

¹⁴ State of West Bengal v Anwar Ali Sarkar AIR 1952 SC 75.

¹⁵ Budhan Chaudhary Versus State of Bihar AIR (1955) SC 191.

¹⁶ Independent Thought Versus Union of India & ors. AIR 2017 SC 4904.

¹⁷ Constitution of India 1950 Article 21

right to privacy and sanctity of a female.”¹⁸ Supreme Court also decided in this case that sex without consent amounts to sexual and physical violence. In *Suchita Srivastava v. Chandigarh Administration*¹⁹, Apex Court decided that the right to life and personal liberty under article 21 also includes the right to make choices regarding sexual activities.

In *Justice K.S. Puttuswamy (Retd.) v. Union of India*²⁰ the right to privacy was recognised as a fundamental right of all citizens, and it was also held that the right to privacy includes “decisional privacy reflected by an ability to make intimate decisions primarily consisting of one’s sexual or procreative nature and decisions in respect of intimate relations”. All above judgments see no difference in unmarried and married women’s rights, and there is no ruling that a woman loses her right to privacy on entering a marriage. Therefore Supreme Court has recognised that a woman is free to indulge or abstain from intercourse, and this right of hers is a fundamental right that finds place under article 21 and is available to all women whether married or not.

In addition, Exception 2 infringes the right of Article 21 to lead a safe and respectful life. As already discussed, article 21 does not mean a bare right to live. It also includes the right to obtain healthcare which the state is obligated to provide for its citizens. The courts have consistently maintained, in this respect, that the “right to life” requires the right to live with human dignity. But the very nature of Exception 2, which does not prevent husbands from engaging in acts of forced sexual intercourse with their spouses, has a detrimental effect on women’s physical and mental health and threatens their right to live with dignity.

IV. MARITAL RAPE IN VARIOUS LEGAL SYSTEMS OF THE WORLD

Marital rape has always been prevalent, but the approach of law to deal with it has changed over times globally. Earlier it was not punishable, as most legal systems in the world provided for marital rape exemption clause in their rape laws, and the husband was immune from prosecution for the non-consensual intercourse with his wife. In the course of time, countries started shifting to criminalise marital rape and removing marital rape exemption from their laws. The exception or preservation of marital rape has become more generally seen as conflicting with the emerging principles of human rights and equality. Feminists have been actively seeking to overturn the marital rape exemption and criminalise marital rape since the 1960s. The Declaration on Elimination of Violence Against Women was issued by the UN High Commissioner for Human Rights in December 1993. It defines marital rape as a human

¹⁸ *The State of Karnataka v. Krishnappa*, (2000) 4 SCC 75.

¹⁹ *Suchita Srivastava v. Chandigarh Administration*, (2008) 14 SCR 989.

²⁰ *Justice K.S. Puttuswamy (Retd.) v. Union of India*, (2017) AIR 2017 SC 4161.

rights violation. Despite these phenomena and foreign demonstrations, it has yet not been criminalised by all the UN Member States. “By April 2011, at least 52 States had explicitly outlawed marital rape in their criminal code.”²¹ “Australia, under the impact of the second wave of feminism in the seventies, was the first common law country to pass reforms in 1976 that made rape in marriage a criminal offence. In the two decades before that, several Scandinavian countries and countries in the Communist bloc passed laws criminalising spousal rape, including Sweden, Norway, Denmark, and the former Soviet Union and Czechoslovakia. Poland in 1932 was the first to have a law explicitly making it a criminal offence. Since the 1980s, many common law countries have legislatively abolished marital rape immunity. These include South Africa, Ireland, Canada, the United States, New Zealand, Malaysia, Ghana, and Israel.”²²

In the US, marital rape was made an offence between the 1970s and 1993. The marital exemption contained in their law was struck down in 1984 by the Court of Appeals of New York. The 1986 Resolution on Violence against Women of the European Parliament called for the criminalisation of spousal rape in 1986, which was carried out shortly after by many countries, including Germany, France, the Netherlands, Luxembourg, Belgium. In 1991, the House of Lords in the United Kingdom struck down its common law principle that a marriage arrangement implied the consent of a woman to any sexual activity. Nepal got rid of the marital rape exception in 2002 after its Supreme Court ruled that it went against the universal right to fair justice and the right to privacy. It claimed that it is not a fair classification to classify the law that an act committed against an unmarried woman to become an offence against an unmarried girl and the same act performed against a married woman not to become an offence.

- **Legal Status of Marital Rape in the USA-** Marital rape was not rape in the United States before 1970. Then existing laws provided exemption to the husband from prosecution for raping his wife as it was not considered an offence. For the first time in 1975, the state of Nebraska removed the marital rape exemption from its law and also made rape a gender-neutral offence using the term sexual assault in place of rape. Legislations in many states of the USA also had a cohabitation clause which meant that a wife living together with her husband could not bring a rape charge against him. Oregon versus Rideout was the first-ever case in the USA that challenged this cohabitation clause. Although the matter did not result in a conviction, it

²¹ Report on Progress of the World's Women 2015-2016.

²² Shalini Nair, *Marital rape a crime in many countries, an exception in many more*, THE INDIAN EXPRESS (Dec. 17, 2020, 11:06 AM), <https://www.google.com/amp/s/indianexpress.com/article/explained/marital-rape-a-crime-in-many-countries-an-exception-in-many-more-4821403/lite/>.

ultimately led to rape law reforms in many USA states.

Almost every state in the USA had criminalised spousal rape by 1993, yet the way they treated rape and marital rape was different. In only 17 US states, treatment of marital rape was no different than non-marital rape. Everywhere else in the United States, punishment for marital rape was not as severe or harsh as for stranger rape or required a shorter period to report or excluded situations where the husband refrained from using violence.

Marital rape was made an offence in 1979 in California's Penal Code. But non-spousal and spousal rape stood on separate footings and were dealt with under section 261 and 262, respectively. And spousal rape was a less serious crime under it.

Connecticut, under its penal laws, makes a specific offence of forced sex with a spouse and this offence not only applies to married couples but also to individuals living in a relationship with each other without undergoing formal marriage. Section 53a-70b of its penal law reads- "No spouse or cohabitor shall compel the other spouse or cohabitor to engage in sexual intercourse by the use of force against such other spouse or cohabitor, or by the threat of the use of force against such other spouse or cohabitor which reasonably causes such other spouse or cohabitor to fear physical injury."

In Maryland, the prosecution for rape by one spouse against the other depends on the fact whether they are living together or living separately. In case they are living together, prosecution for rape against the spouse can be launched only if force or threat of force is used and intercourse is done without the consent of the other spouse. In case they are living separately, they are treated as strangers to each other, and there is no requirement to prove force or threat of it.

In Nevada, in a situation where there was no danger or force, marriage can only be a shield. In a case in which the victim has been exposed to some form of force or some form of threat, the marriage defence is in vain.

In Oklahoma, however, a person cannot prosecute his or her spouse for rape if he or she consented to intercourse because of the effect of drugs administered by the accused.

- **Legal Status of Marital Rape in England-** The Sexual Offences Act of 2003 governs all types of sexual offences in Great Britain. Marital rape is classified as a crime in the United Kingdom. Similarly, rape is discussed in Section 1. If the perpetrator enters into the victim's mouth, anus or vagina, his penis without the victim's permission and on purpose, he is said to have raped. Whether the victim knows the accused or he is a complete stranger. It is immaterial. The fact of whether the accused stays with the victim or is married to her is also not material.

It is the consent that matters. Rape is the term used when the victim does not acknowledge the intrusion.

In this respect, *R v R*²³ is a significant case. House of Lords decided that raping his own wife was not permissible under English criminal law. The defendant husband claimed that he was allowed to rape his wife because she had consented irrevocably to indulge in sexual intercourse by entering a marriage. However, the House of Lords found that marital rape in English law was no exception.

V. ARGUMENTS AGAINST AND FOR THE CRIMINALISING MARITAL RAPE

Marital rape is a social menace. The world has shifted towards its criminalisation but so is not true about India. Here in India, time and again, there has been debate on whether or not it should be criminalised. We find two distinct approaches to it. Some believe that criminalisation is no answer to forced intercourse in marriage, and it will destroy the very basic fabric of marriage, while some feel that marriage does not license to rape and marital rape has to be criminalised. Both sides shall be discussed in detail further.

The first contention against making marital rape an offence is that its criminalisation is against Indian culture, and it will destroy the sacrosanct relation of marriage if made criminal. Former CJI said, “it will create absolute anarchy in families, and our country is sustaining itself because of the family platform which upholds family values.” In parliament, the then Union Minister for Women and Child Development spoke, “It is considered that the concept of marital rape, as understood internationally, cannot be suitably applied in the Indian context due to various factors like level of education or illiteracy, poverty, myriad social customs and values, religious beliefs, the mind-set of the society to treat the marriage as a sacrament etc.” Govt. Says that it cannot intervene in the bedroom matters of husband-wife. They also say that marital rape, if criminalised, will destroy the wedding tie. Because of the refusal of the wife, the husband will turn to extra-marital affairs for his physical needs, which in turn will promote adultery, and marriage will result in divorce or multiple cases. So basically, Govt. admits that marital rape is prevalent but is not in favour of making it an offence. In their opinion criminalising it will destroy the marriage, presumably because the victim wife will stand up against her perpetrator husband. The researcher differs from the above opinion and believes that there is no point in saving a marriage in which the wife is supposed to be merely a sex machine for the husband. Secondly, preserving marriage is not just the responsibility of a wife but of the husband too.

²³ *R Versus R* 1991 UKHL 12.

Secondly, recognition of marital rape will strengthen the position of women and create a balance in conjugal relationships. As far as the argument of intervention in bedroom matters is concerned, this seems to be a lame excuse as the state does not mind interfering in intimate matters of homosexuals. Adding to it, when there can be a law for divorce and marriage, why can't there be a law to regulate intercourse between the couple. The state must understand that consent is the key, no matter the victim is married or not. If she is not consenting to it, then it is rape.

People against the criminalisation of marital rape also argue that by entering marriage, the wife consents to indulge in sexual intercourse perpetually, and she doesn't have a right to revoke from it. They believe that intercourse is a part of marriage and the duty of an obedient wife towards her husband that she has to perform unconditionally. That is why they believe that there was never, and there can not ever be rape in marriage. This ideology is centuries old. Time has changed, and most of the countries in the world have recognised that women are not chattels who have to surrender their self on the fancy of their husband. A Woman is the first owner of her body, and she has the right to refuse cohabitation to her husband and husband should also understand that she is also a person and respect her wish in place of forcing himself on her.

Thirdly people supporting the non-criminalisation of marital rape contend that if it is criminalised, there are high chances of its misuse. The researcher contends that just because a law may be misused in future is no ground for not enacting it at all. Every law has the possibility of misuse, and the responsibility of identifying true and false cases lies with the judicial system.

VI. SUGGESTIONS

The researcher has the following things to suggest-

- Spousal rape exemption under section 375 of IPC ought to be omitted by the legislature in the first place, and marital rape be included within the definition of rape, as it infringes Article 21 and 14 of the Indian Constitution.
- A committee should be constituted to thoroughly look into the issue, and it should hold discussions and debates throughout the country to spread awareness about the issue.
- The punishment for marital rape can be different from the punishment for stranger rape.
- Spousal rape can also be made the basis for taking a divorce.
- Sensitisation programs for the police personals and for judicial officers have to be conducted to sensitise them about the issue.

- Since penalising marital rape is only intended to serve as a deterrent, so provisions for the counselling of both husband and wife can also be provided for.
- The topic of marital rape can also be introduced in textbooks of school and college-going students so that they can be made aware of the issue and develop hatred towards it.
- NGOs and women commissions should be trained to assist the women and empower them in case any such incident happens.

VII. CONCLUSION

Marriage is believed to be an everlasting relationship between a husband and a wife. It is founded on trust, mutual respect, love and utmost care. Undoubtedly sex is an obvious thing to happen between the two, but the husband must understand that it's not always possible when he wants, and there are times when she's not in the mood and doesn't want to do it. So in place of forcing himself on her, he should refrain from doing it. That will only increase respect to him in her eyes and strengthen the bond of marital tie. He should understand that her body is hers, and she has the first right on it. He should respect her identity and her choice. Criminalisation of marital rape shall work as a deterrent to those who treat her as chattel. A great many countries in the world have changed their approach to it and shifted to penalise it. India is still stuck where it was centuries ago. The JS Verma committee report said that it should be criminalised. It's high time for India to take action against marital rape, to frame a law on it. That's the primary step to curb this menace.
