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Consequences of Non-Criminalization of Marital Rape and Stealthing in 21st Century India

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ABSTRACT

Time and again society has proved that the saying, “The change is only constant”, is actually not true because women are still treated exactly the way they were treated some 100 of years ago. The crime against women is ever increasing and there lies hesitance in taking bold actions to curb them. Women being subjected to sexual violence is nothing new, it was prevalent in the society which lacked definite laws and punishments and is still very much here in the society with strict rules and punishments. In ancient time rape of a woman was considered as a crime against the property of husband or father and not on the integrity of that woman. Today there are laws which punishes rape and other kinds of sexual offences as an offence against women but are we really free from the mindset of women being a property which can be used as according to the will of a man? The answer to this can be found in the rising no. of cases of sexual nature which has overburdened our courts. Section 375 of Indian Penal Code provides the definition of rape which states that a man is said to commit rape if he commits the act without consent and against will, even explanation 2 of the said section defines what is consent. So, at this juncture will it be wrong to say that the society somehow still does not understand the meaning of consent? The Hon’ble Supreme Court of India has in the case of Joseph Shine v. Union of India, categorically stated that ‘Husband is not the master of Wife’. But if look into the existence of marital rape and stealthing, which are still not recognized as an offence, is it not that husband is considered as a master in reality? Indian Penal Code very clearly state that the sexual act without consent and against will is rape, then why these provisions become dilute when the woman is married and perpetrator is her husband?

Keywords: Sexual offences, Marital rape, Stealthing, Consent.

I. INTRODUCTION

“Freedom is to live with dignity”

— Manal al-Sharif, *Daring to Drive: A Saudi Woman's Awakening*

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In the 21st century when the world is striving towards gender equality and women empowerment the fact that the crime against women is also increasing cannot be denied. On one hand the world is trying to create a safe environment for women and on the other hand people are still living with patriarchal mindset while treating woman as a property of man.

The enactment of Indian Penal Code, with definite punishments and definitions for the sexual offence committed against women, was with a hope that this might finally improve the condition of woman in the society and will give the much-needed safety to her but the fact that there exist some major amendments such as Criminal Law Amendment Act, 2013 and Criminal Law Amendment Act, 2018 proves that somehow the condition of a woman has barely improved.

The Indian Penal Code provides punishment for following sexual offences:

1. Section 354 deals with assault or use of criminal force on women with intent to outrage her modesty.
2. Section 354 A deals with sexual Harassment and punishment for sexual Harassment.
3. Section 354 B deals with assault or use of criminal force on women with intent to disrobe.
4. Section 354 C deals with the offence of Voyeurism.
5. Section 354 D deals with the offence of Stalking
6. Section 375 deals with the offence of Rape.
7. Section 376 provides punishment for rape.
8. Section 376 A provides punishment for causing death or resulting in the persistent vegetative state of the victim.
9. Section 376 AB provides punishment for rape on women under 12 years of age.
10. Section 376 B deals with sexual intercourse by husband upon his wife during separation.
11. Section 376 C deals with sexual intercourse by a person in authority.
12. Section 376 D deals with the offence of Gang rape.
13. Section 376 DA provides punishment for gang rape on woman under 16 years of age.
14. Section 376 DB provides punishment for gang rape on woman under 12 years of age.
15. Section 376 E provides Punishment for repeat offender.

The sections 354A – 354D and sections 376A, 376B, 376C, 376D and 376E have been added by the Criminal Law Amendment, Act, 2013 whereas sections 376AB, 376DA, 376DB have

been added by the Criminal Law Amendment, Act, 2018.

Even after having such an exhaustive legislation the no. of cases of sexual offences against women are ever increasing and these trends are only recognised by the cases which are reported, we have no idea about a lot of cases which never gets reported. The possibility of taking an action against a perpetrator who is a stranger or does not belong to the family of the victim is still possible but what about those who are close relatives of the victims?

In the case of **Unnikrishna v. State of Kerala**,² the Hon'ble Kerala High Court has while upholding the conviction of a man under section 376 for raping his own daughter, observed that:

"The protector then becomes the predator. The father is the fortress and refuge of his daughter. Charged of raping his own daughter under his refuge and fortress is worse than the gamekeeper becoming a poacher and treasury guard becoming a robber."

The Hon'ble court further observed that even if it is shown that the victim is a girl of easy virtue or a girl habituated to sexual intercourse, it cannot be made a ground to absolve the accused from the charge of rape. The Court said that the question which is required to be adjudicated is whether the accused committed rape on the victim on the occasion complained of. It is the accused who is on trial and not the victim. There is a huge difference between consent and submission, which means it can be said that every consent involves submission, but the same cannot be held true in converse.

It won't be wrong to say that perpetrator at home is the condition in marital rape as well but unfortunately, it is still not recognized as an offence in India.

Some blame for these situations can also be accounted to our movies and television shows which often objectify a woman. The scenarios created in movies and soap opera where a bad man meets a woman, tortures her and then changes and woman accepts him unconditionally, not necessarily gives a positive message. It shows that a woman cannot say no to a man who wants her.

In the case of **Munna v. State of Tamil Nadu**³, the Hon'ble Madras High Court observed that:

"Treating women as an object of desire and portraying them so in movies and even in soap operas have a detrimental effect on the society. Education in the school is deprived for many and the family circumstances also cause such imbalances. Morality is the buzzword for this society to prosper and make such shameful acts a thing of past."

² CrI.A No. 242 of 2019

³ CrI.A.Nos.73 of 2017 & 106 of 2019

Another landmark judgment in regard to the protection of women from sexual harassment is that of **Visaka v. State of Rajasthan**⁴, which led to the enactment of The Sexual Harassment of women at workplace (prevention, prohibition and redressal) Act, 2013, having the mandate of creating a safe environment for women at their workplace. Recently The Hon'ble Supreme Court has in the case of **Union of India and others v. Mudrika Singh**,⁵ observed that:

“It is important that courts uphold the spirit of the right against sexual harassment, which is vested in all persons as a part of their right to life and right to dignity under Article 21 of the Constitution”.

The court further observed that it is important to keep in mind the power dynamics that are involved in sexual harassment at the workplace. For instance, there are several considerations that a subordinate who is aggrieved of sexual harassment has to face when they consider reporting sexual misconduct of their superior.

II. MARITAL RAPE AND STEALTHING

Marital rape: The section 375 of Indian Penal Code, 1860 defines rape, which states that a man is said to commit rape if he commits either of the act provided under clause (1)(a) to (d) of the said section,

- if it is done against the will of the woman or
- without her consent or
- when she is forced to consent by putting either her or any of her loved ones in the fear of death or hurt or
- when her consent is given under a false believe of the man being her husband or
- when consent is given under intoxication or unsoundness of mind, whereby she is unable to know the nature or consequences of the act or
- if the act is committed on a woman who is under 18 years of age and in such a condition whether consent was there or not will not matter or
- when the woman is not able to communicate her consent.

An analysis of this section clearly reveals that the sexual act to become punishable as the offence of rape *has to be committed against the consent of the women*. The act has to be against her will or without her consent or when her consent is forced or forged or when she is under age so

⁴ ((1997) 6 SCC 241)

⁵ Civil Appeal No. 6859 of 2021

as to be incapable in the eyes of law to form a valid consent. Basically, the entire section completely revolves around the consent of the women. However, it still has an Exception 2 which states that *sexual intercourse by a man with his wife is not rape*.

(A) What is consent?

The oxford dictionary defines the term consent as a *permission to do something*. The *section 90 of Indian penal code* provides what does not amount to consent. It states that, a consent if given by a person under *fear of injury, or under a misconception of fact, and if the person* Any provision of law affecting individual dignity and equality of women invites wrath of constitution. It's time to say that husband is not the master of wife. *doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception,* will not be regarded as consent.

Section 375 of the Indian penal code also defines consent under explanation 2 which states that by consent it is meant *an unequivocal voluntary agreement given by the woman through words, gestures or any form of verbal or non-verbal communication, to communicate her willingness to participate in the specific sexual act. Furthermore, non-resistance to the act of penetration shall not, by this mere fact be regarded as consent to the sexual activity.*

In the case of **Gopi v. State & Anr.**,⁶ Hon'ble Madras High Court has observed that:

“The very fact that the victim did not physically and violently resist the accused will not make the act as consensual...One has to step into the shoes of the victim and see the entire episode from her perspective”.

(B) What is marital rape?

The Merriam-Webster dictionary defines rape as unlawful sexual activity and usually sexual intercourse carried out forcibly or under threat of injury against a person's will or with a person who is beneath a certain age or incapable of valid consent because of mental illness, mental deficiency, intoxication, unconsciousness, or deception,⁷ and is an outrageous violation.⁷ And when this heinous act is committed by the husband on his wife it is regarded as marital rape.

All around the world including India rape is considered as heinous crime and is punishable with rigorous punishment. But marital rape is not punishable in India as section 375 has provided an exception that sexual intercourse by a man with a woman who is his wife, will not be considered as rape. If we simply analyse the entire section, it provides that any sexual act committed by a

⁶ Criminal Revision Case No. 708 of 2014

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

man on a woman without her consent is rape but if the same act is committed with his wife, then it is no offence altogether. The mere fact of marriage nullifies the entire offence which is otherwise so rigorously punished.

The Hon'ble High Court of Judicature at Gujarat has observed in the case **Nimeshbhai Bharatbhai Desai v. State of Gujarat**⁸ that:

“A law that does not give married and unmarried women equal protection creates conditions that lead to the marital rape. It allows the men and women to believe that wife rape is acceptable. Making wife rape illegal or an offence will remove the destructive attitudes that promote the marital rape. Such an action raises a moral boundary that informs the society that a punishment results if the boundary is transgressed.”

The Hon'ble Court said that there is a need for total abolition of the exception of marital rape so as to punish dehumanized treatment of women and to teach the society that marital rape is not a privilege given to husband rather it is a violent act against women which needs to be criminalized. The court further observed that:

“If a person takes indecent liberties with his wife in public he will be as much punishable as if he had outraged the modesty of another woman. But in case the wife is below 18 years of age, then irrespective of the fact that the husband and wife are alone or in public, any assault or use of force against her may amount to an outrage. If they are alone, the husband may be held guilty of outraging the modesty of his wife, if he does unkind, cruel or perverted sexual acts to her.”

The Hon'ble court said that any question, if raised, whether a man has outraged the modesty of his own wife, such questions should be answered in affirmative and section 354 of the Indian Penal Code should also be made applicable to a person who assaults or uses criminal force against his wife.

The amicus curiae Senior Advocate Rajshekhar Rao⁹ in the case of **RIT Foundation v. Union of India**, (pending before Hon'ble High Court of Judicature at Delhi) has said that,

“From a reasonableness standpoint which is foundation of Art. 14, is it reasonable in a constitutional democracy to suggest that merely because you are married to the man and five minutes ago you would have the ability to prosecute him for rape....is it conceivable that if he would have done it 5 minute before marriage, she would have prosecuted and said I will not

⁸ Guj 732, [128] 65

⁹ <https://www.livelaw.in/top-stories/marital-rape-classification-on-basis-of-marriage-unreasonable-amicus-curiae-concludes-submissions-before-delhi-hc-189523>

marry you. The fact that merely because she has decided to marry a man who has now decided to ignore her consent, does that entitle the legislature to say that it is intelligible for me to differentiate between the two relationships and deny her the ability to prosecute him for that one act."

Senior Advocate Rebecca John, also appearing as an amicus curiae in this case, said that:

"This is not about expectation. This is about the man exercising his dominant right over his wife despite the wife saying I cannot and will not do it with you."

She further said that:

"Expectation is not wrong. Both sides can have expectation. However, the expectation cannot result in the husband having forcible sex with wife."

She highlighted the fact that various provisions in different statutes have been enacted and also amended time and again, focusing women as a victim. For instance, section 498A, 304B of Indian Penal Code and section 113B of Indian Evidence Act have been enacted with an intent of safeguarding a woman from domestic violence and dowry death. However, senior advocate also pointed out that the remedy available under these provisions as well as under Domestic violence act are insufficient to deal with offence of rape as provided under section 375 of Indian Penal Code when alleged by a wife against her husband. She said that:

"Therefore, to argue that wives have remedies under sec. 498A, under Domestic Violence Act domestic and such like Acts, is not a tenable argument. Of course, they exist but for separate offences, which may be added in a given case to an aggravated offence"

".....That depends on the facts of individual case. The ingredients of sec. 375 are separate and there is no reason why sec. 498A can be used as a substitute for Section 375. It can be used in addition but it's not a substitute."

She further argued that:

".....by not recognising that inequality actually exists within a marriage, for a large majority of Indian women, and making exception gender neutral or keeping it would dilute protections given to a wife under Constitution and other statutes."

A married woman being deprived of the right to take action against her husband if she is subjected to sexual acts without her consent is violative of article 14 as well as article 21 of The Constitution of India, as it is against her right to equality and right to live with dignity and privacy.

The article 14 provides that everyone is equal before law, though it recognises reasonable

classification or intelligible differentia. This doctrine basically provides that a set of different rules or law can be applied to a class of persons on some grounds which is important for protecting the rights of the class so separated from the group, for example Indian Contract Act has recognised contracts made with minor as void ab initio. Here intelligible differentia of treating minor and major as two different class is age. Hence similarly when we analyse exception 2 of section 375 of the Indian Penal Code, it separates married woman from an unmarried woman in relation to consenting to sexual acts but the base for such separation is not comprehensible.

Article 21 of The Indian Constitution provides for one of the most significant fundamental rights i.e. the Right to life and personal liberty which has been interpreted by The Hon'ble Supreme Court of India in the case of **K.S.Puttaswamy v. Union of India**¹⁰ to include right to privacy within its ambit. A woman being subjected to sexual act against her will even though by her husband is clearly a violation of her privacy and liberty.

The section 375 also provides for the quality of consent as it states that even if the consent is given out of fear or under misconception it is no consent. Non-resistance as well does not constitute consent. Then why a mere fact of marriage gives a consent for lifetime to the husband? Then how is it lawful that just because a woman said yes to marriage her husband received a license to rape her? Is marriage a license to rape?

Section 497 of the Indian Penal Code, which is now struck down by The Hon'ble Supreme Court of India as manifestly arbitrary, in the landmark Judgment of **Joseph Shine v. Union of India**¹¹, punishes adultery. It is defined as an act of sexual intercourse by a man with a married woman, who is not his wife, without the permission of the husband of that woman. Even in this offence if woman, so involved, does not consent to the act it would amount to rape. Adultery punishes consensual sexual intercourse between a married woman and man who is not her husband. It is considered as a crime against the husband of such married women. But consent of the woman is impliedly considered in the act. Hence it won't be wrong to say that every woman has a right to say No except when she is married and perpetrator is her husband. In ancient society women were considered as a property of man. Offence of rape was actually considered as an offence against husband or father of the woman and not against woman herself. After the codification of the criminal law, offence against women are recognised and rigorously punished but is the mind set of women being property of man really left the society?

¹⁰ 2017 10 S.C.C

¹¹ (2019) 3 SCC 39

The Hon'ble Supreme Court of India has categorically stated in this case (mentioned above) that:

“The Husband is not master of wife”.

The Hon'ble court further observed that, any provision which affects the dignity and equality of women is not in conformity with the Constitution.

" Legal sovereignty of one sex over other sex is wrong".

amendments to the Criminal Law in order to provide enhanced punishment for criminals accused of committing sexual assault against women. *“.....Autonomy is intrinsic in dignified human existence. Section 497 denuded the woman from making choices. The law in adultery is a codified rule of patriarchy. Society attributes impossible attributes to a woman, raising woman to a pedestal is one part of such attribution”*,

"Respect for sexual autonomy must be emphasized. Marriage does not preserve ceiling of autonomy 497 perpetrates subordinate nature of woman in a marriage"

It is a strange situation of our society that even a sex worker has a right to take action against a man who forced her to sexual act without her consent but not a wife. In the case of **State of Maharashtra vs. Madhukar Narayan Mandikar**¹², The Hon'ble Supreme Court of India, has referred to right to privacy over one's body and held that a prostitute has a right to refuse sexual intercourse. Time and again it has been reiterated that even if a woman consents 10 times but if she says no the 11th time, then it means no, and if she is forced thereafter it would amount to rape. But unfortunately, such option is not available to a wife.

The **Section 376B** of the Indian penal code provides punishment for sexual intercourse by the husband upon his wife during separation. This can be interpreted as every woman can refuse to forced sexual intercourse except a woman who is in a happy marriage.

On December 23, 2012 a **three-member Committee headed by Justice J.S. Verma**, was constituted, in aftermath of Nirbhaya gang rape case, to recommend amendments to the Criminal Law so as to provide more stringent punishment for the criminals who are accused of committing sexual assault against women. One of the recommendations of this committee was the removal of exception of marital rape. It said that marriage should not be considered as irrevocable consent to sexual acts. However, this particular recommendation never saw light and was not included in the Criminal Law Amendment, Act, 2013.

Recently Hon'ble High Court of Judicature at Kerala has observed that marital rape is a valid

¹² AIR 1991 SC 207

ground for seeking divorce and thus recognising it as a form of cruelty. The court held that:

Merely for the reason that the law does not recognise marital rape under penal law, it does not inhibit the court from recognizing the same as a form of cruelty to grant divorce. We, therefore, are of the view that marital rape is a good ground to claim divorce”

“..... Treating a wife's body as something owing to husband and committing sexual acts against her will is nothing but marital rape”.¹³

The fact that Hon’ble High Court considered it as a form of cruelty for granting divorce should be taken into consideration.

Those who are against criminalizing marital rape often put up this argument that it would destroy the sanctity of marriage. So, does wife being subjected to a form violence will maintain sanctity of marriage?

There is another part in the exception 2 of section 375 of Indian Penal Code, which is sexual intercourse with a minor wife. The exception provides that sexual intercourse with a man with his own wife is not rape if wife is not below the age of 15 years. The provision is specifically for the protection of a married girl child. In another landmark Judgment of **Independent thought v. Union of India**¹⁴, The Hon’ble Supreme Court of India, has read down exception 2 of section 497 and observed that:

"We are left with absolutely no other option but to harmonize the system of laws relating to children and require Exception 2 to Section 375 of the IPC to now be meaningfully read as: “Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape. It is only through this reading that the intent of social justice to the married girl child and the constitutional vision of the framers of our Constitution can be preserved and protected and perhaps given impetus”.

In this case a PIL was filed by an NGO, Independent thought challenging the validity of exception 2 of section 375 of Indian Penal Code as violative of article 14, 15 and 21 of The Constitution of India. Hon’ble Mr. Justice Madan B. Lokur, **has held that exceptions in rape laws led to trafficking.**

However, in this matter the court categorically stated that they are refraining from commenting on adult marital rape as the issue is not before them.

¹³ <https://www.livelaw.in/top-stories/kerala-high-court-upholds-marital-rape-as-a-ground-for-divorce-under-cruelty-179010?infinitescroll=1>

¹⁴(2017) 10 SCC 800

If we analyse the entire law relating to marital rape in India it can be summarised as

1. a sexual act, as provided in the section 375 of Indian Penal Code, when committed by a man on a woman against her will or without her consent or when consent is forced or forged or misrepresented or when woman is not a major, so to be incapable in the eyes of law to form consent, is said to commit rape.
2. Any such act, as stated above, if committed by a husband on his wife, when she is below 15 years (now 18 years) of age, it would also amount to rape.
3. Any such act, as stated above, if committed with a man with his wife, when she is not below 15 year (now 18 years) of age, it would not amount to rape.

(C) What is stealthing?

It refers to the act of secretly removing protection while having sexual intercourse without the permission of the partner when partner has consented to the protected sexual intercourse.

In Indian context this can be interpreted under section 375 of the Indian Penal code which completely revolves around consent and the act of stealthing can be regarded as a clear violation of it because when a partner is consenting to protected sexual intercourse, the act of removal of protection without consent should definitely be regarded as rape.

The act of stealthing is clearly violative of article 21 of The Constitution of India. In the case of **Suchita Srivastava and another v. Chandigarh Administration**¹⁵, The Hon'ble Supreme Court of India, observed that:

"There is no doubt that a woman's right to make reproductive choices is also a dimension of personal liberty as understood under Article 21 of the Constitution of India. It is important to recognize that reproductive choices can be exercised to procreate as well as to 'abstain' from procreating."

The England and Wales High Court of Justice, in the case of *Assange v. Swedish Prosecution Authority*, held that:

"If the victim had made it clear that she would only consent to sexual intercourse if the accused used a condom, then there would be no consent if, without her consent, he did not use a condom, or removed or tore the condom."

In the case of **R v Hutchinson**, The Canadian Supreme Court held that:

"Consent to sexual activity must be clear and ongoing. A participant can consent to sexual

¹⁵ (2009) 14 SCR 989

activity and revoke that consent".

Recently **The Ontario Superior Court of Justice**, has held that:

"The non-use of a condom against a participant's wishes not only usurps that individual's sexual autonomy and right to make decisions about how she/he/they engage in sexual activity"

The court further observed that:

"In my view, sex without a condom is a qualitatively different act than sex with a condom and the complainant's consent was withdrawn when Mr. Rivera penetrated her without a condom without her overt agreement. When a condom is used as a form of birth control or to prevent sexually transmitted infections, its use provides participants with a sense of security. The non-use of a condom against a participant's wishes not only usurps that individual's sexual autonomy and right to make decisions about how she/he/they engage in sexual activity, it is an activity against that person's will, fraught with the gamit of emotions resulting from an assault".

III. MARITAL RAPE RECOGNISED AS AN OFFENCE AROUND THE WORLD

A lot of countries around the world have actually explicitly criminalized marital rape or have deleted any difference between rape and marital rape and provides rigorous punishment for the offence. Some of these Countries are as follows:

Albania- Criminalized Marital rape through criminal code amendment back in the year 2012 and 2013.

Australia- Criminalized Marital rape through Section 73 of the Criminal Law Consolidation Amendment Act 1976, which states that: *"No person shall, by reason only of the fact that he is married to some other person, be presumed to have consented to sexual intercourse with that other person".*

Turkey- Criminalized Marital rape in 2005 through article 102 of Criminal Code. The law prohibits and punishes sexual assault which includes rape as well as spousal rape, with punishment of two years which may extend to ten years imprisonment for conviction of attempted sexual violation and at least 12 years imprisonment for conviction of rape or sexual violation.¹⁶

Taiwan- Explicitly criminalizes marital rape through article 221 and 229-1 of the Criminal

¹⁶ https://en.wikipedia.org/wiki/Marital_rape_laws_by_country

Code of the Republic of China.

Even the Neighbouring Countries of India such as **Nepal and Bhutan have also explicitly criminalized Marital rape**. In Bhutan Marital rape is Criminalized through section 199 and 200 of the Penal Code whereas in Nepal it is criminalized through Section 219 (4) of the 2017 Criminal Code Bill which states that, if a man rapes his wife when he is still in marital relationship with her, he shall be sentenced to up to five years in jail.¹⁷

At this juncture it won't be wrong to state that at present there are very few countries which are yet to criminalize marital rape and it is high time that India gets off this list.

IV. CONCLUSION

In 21st century the world is focusing on the human rights and trying to give it priority. There are various international conventions as well as domestic laws targeting protection of human rights. These rights are recognised as basic to human being as they are implicit with the existence of humans. The right to life and personal liberty is one of such right and it includes within its ambit right to bodily integrity and privacy. Rape is direct attack on this basic right. And to separate this offence into two classes based only on the fact of marriage is clear and cruel violation of a right which is of utmost importance for human survival.

Sexual offences against women have been one of the biggest hurdles in the development of a country. There are various legislation and amendments which have been enacted putting women as a victim. These laws basically have just one intention and that is to protect women and provide them with a safe environment to live, grow and prosper.

Safety of a women is of paramount importance and when we talk about such safety, we always consider her home as the best place, the safest place. But is it really so? No. The existence of cases where perpetrator is someone close to the woman, rather inside her home, is a proof that women is not safe anywhere, including her home. Not recognising Marital rape as an offence has also contributed to this fact of home not being safe. Imagine a wife living in a constant fear of her husband abusing her sexually anytime anyway he pleases. It affects her not only physically but also emotionally. It shakes her confidence. When a protector becomes perpetrator, the hurt is even more. Marital rape is like an offence in existence but not yet recognised so, neither made punishable.

The fact that there are so many countries around the world which have not only explicitly recognised marital rape as an offence but also punishes it rigorously, proofs how real this

¹⁷ https://en.wikipedia.org/wiki/Marital_rape_laws_by_country#cite_note-10

problem is and the time is now for India to take action and criminalise it.
