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# Marital Rape and its Criminalisation in India

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HARMANPREET KAUR<sup>1</sup> AND FARHAT KHANDAY<sup>2</sup>

## ABSTRACT

*Marriage is a sacrosanct bond that brings two individuals and their families together. Be that as it may, on the off chance that the marriage did not depend on common assent or, on the other hand, assuming one or both players are miserable, it can turn into a cause for issues. Since the beginning of time, our general public has leaned towards a man-centric framework, which has prompted men to show feelings of strength. All over the planet, the rule of law plays a critical role in managing human behavior and setting guidelines for leadership. Conjugal assault is perhaps the most incredibly abhorrent demonstration that exists in India. Conjugal assault is no less serious than the offence of assault; rather, it is the type of assault. It is one of the greatest dangers to orientation equity in India. Indian culture has never thought of conjugal assault as an issue. It is seldom gone against by anybody in Indian culture for different reasons. The disposition of the Indian governing body is the same in this manner. The Indian Assembly has been given the gravest undertaking of sanctioning regulations for the wellbeing, security, and improvement of the country by the Indian Constitution. However, the lawmaking body isn't intrigued by any means with regards to eliminating the evil of marital rape from the country. The Indian legal executive gives a beam of trust in such a manner, yet its hands are bound as the drafting of regulations is the privilege of the council and not the legal executive. There are no viable regulations in India, taking everything into account. Whatever regulations are there in India, they are not adequate to contain something as detestable as conjugal assault. There is need to carry areas of strength to stare death in the face of marital rape in India. This research paper centers around the development of ladies' privileges, especially the impacts of Marital Rape and how it abuses the Constitution of India.*

**Keywords:** *Marital Rape, Constitution of India, IPC, Conjugal assault, Criminalisation, Sexual assault.*

## I. INTRODUCTION

Totally, rape is a serious wrongdoing that disregards a person's most essential privileges, including the right to life and individual freedom. It is a heinous act that must be condemned

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<sup>1</sup> Author is an Assistant Professor at CT Group of Institute, Jalandhar, India.

<sup>2</sup> Author is an Assistant Professor at Rayat Bahra Group of Institutes, Hoshiarpur, India.

and a flagrant violation of fundamental human rights.<sup>1</sup> Conjugal assault is a type of assault that is like some other kind of assault, as it includes undesirable and constrained sexual contact. The only difference is that it takes place between married people.<sup>2</sup> A type of rape known as marital rape or spousal rape occurs when a partner is forced to have sex with another person against their will. The victim's rights have been violated, and this is a serious crime.<sup>3</sup>

A sexual assault committed by a spouse or partner without the consent of the victim is known as marital rape. Battering rape, sadistic/obsessive rape, or simply using force are all examples of it. It is a significant wrongdoing and an infringement of the casualty's privileges.<sup>4</sup> Even though some people may view marriage as socially acceptable sex, it is not acceptable for one partner to coerce the other into having sex. The expression "conjugal assault" is utilised to portray what is happening where one mate or accomplice is compelled to take part in sexual movement despite their desire to the contrary. The victim's rights have been violated, and this is a serious crime. Although the term may be contentious among some, it is essential to acknowledge that sexual assault can occur in any relationship, including marriage.<sup>5</sup> Finkelhor and Yllo have arranged rape into three significant structures: rape by beating, rape by force only, and rape by obsession. Battering assault includes brutality in the relationship, both physically as well as sexually, while force-just assault includes the utilisation of power to pressure an accomplice into sexual action. Harassment and/or wicked sexual activities are frequently used in obsessive rape, as is physical violence. It's critical to perceive these various types of rape and the damage they cause.<sup>6</sup> A spouse raping his wife is not against the law because the Indian Penal Code does not make it a crime. This has been cited as a reason in a number of Law Commission reports, debates in Parliament, and judicial decisions. These reasons range from protecting the sacredness of marriage to the existence of legal alternatives. The issue of marital rape has also been somewhat ignored by Indian society and the legislature. However, a number of landmark judgments show that the Indian judiciary has been in favor of eradicating marital rape from the country. Many countries have prohibited and made Marital rape a criminal offence, however this is not the situation in India yet.<sup>7</sup> The problem of marital rape is not adequately addressed by India's laws. There are no specific laws in place to deal with marital rape because the IPC does not consider it as a offence. Numerous activists and organisations have pressed for legal reforms to criminalise marital rape and provide victims with justice because of this.<sup>8</sup>

It is essential to examine the rape provisions in the IPC in order to comprehend the problem of marital rape in India. Rape is described in IPC under section 375 as a man having physical relations with any woman in six different situations. These include having sex against her will,

without her assent, with her assent gained out of dread, with her consent when the man has reason to believe that he isn't her spouse, with her assent while intoxicated or intellectually disabled, and without her consent when she is under the age of sixteen. The segment additionally makes sense of that entrance is adequate to comprise the sex important to comprise the offence of assault. Be that as it may, the special case for the part leaves out conjugal assault by and large in the event that the spouse isn't under fifteen years old.<sup>9</sup>

Marriage does not constitute an excuse for rape, as stated in Indian Penal Code Section 375. This means that if a husband tries to smother his wife without her consent, he could be accused of rape. Furthermore, assault is definitely not a compoundable offence under Segment 320 of the Criminal System Code. This implies that the survivor of assault can't pull out the argument against the culprit, and the case should be heard and chosen by the court.<sup>10</sup>

## **II. THE HISTORY OF MARITAL RAPE**

Conjugal assault is definitely not another peculiarity in India, as its set of experiences traces all the way back to antiquated times when ladies were treated as property and had no freedoms. Marital rape flourished as a result of women's dependence on their husbands and their lack of independence. The absence of powerful regulations for the assurance of ladies likewise permitted the training to proceed. As a result, marital rape is a social problem that has been prevalent from many years in India.<sup>11</sup>

Rape is the most abhorrent of all sexual offences.<sup>12</sup> Traditionally, Western law exempted spouses from the prospect of rape. However, in 1877 a Kansas newspaper published, "The Markland Letter" which have prompted the first significant discussion in the United States regarding the classification of coerced sex in marriage as rape and the necessity of legal action. The letter depicted a lady who had as of late conceived an offspring and was seriously harmed during the conveyance. She was left worse off than ever after her husband forced himself on her, ripped the stitches from her healing flesh, and forced himself on her. This incident sparked a discussion about the need for a legal remedy for spouses who were raped by their better half, which eventually resulted in the United States making marital rape a crime.<sup>13</sup>

The graphic description of violence in "The Markland Letter" made it clear that the male partner was a rapist in spite of law, leaving no room for doubt. Before 1976, a marital rape exemption was included in all state rape laws, and American law did not consider forced sex during marriage to be rape. Notwithstanding, in 1976, Nebraska turned into the main state to nullify that exclusion, and different states before long stuck to this same pattern. It was only after the 1990s that every one of the 50 states condemned conjugal assault.<sup>14</sup>

The expression "conjugal assault" is generally new. Because sexual activity was considered a private matter, victims of marital rape, typically wives, preferred to remain silent for a considerable amount of time. All through a lot of history, in numerous nations and societies all over the planet, conjugal assault was viewed as a difficulty. This attitude was based on the idea that a male partner has the authority to have sex with his wife, no matter what she wants. It was only after the late twentieth century that the possibility of conjugal assault being a wrongdoing earned respect.<sup>15</sup>

Many cultures and nations have believed that marriage includes conjugal rights throughout history. This view was frequently based on St. Paul's teachings, which stated that husbands should show affection to their wives and vice versa. Additionally, St. Paul wrote that male partners have rights over their female partners' bodies, but female partners do not have rights over their husbands' bodies. In order to devote themselves to fasting and prayer, St. Paul advised couples not to dominate each other in sex without mutual consent and for a brief period of time.<sup>16</sup>

The starting points of the marital assault exception can be traced back to Sir Mathew Robust, Boss Equity of Britain, who offered expressions in the seventeenth hundred years. He argued that because they had agreed to have sexual relations when they signed the marriage contract, it is legally impossible for a husband to be found guilty of raping his wife. Solidness' perspectives laid out the idea that once hitched, a lady couldn't deny sex with her significant other. This viewpoint allows husbands to rape their wives without being punished, which goes against human rights principles.<sup>17</sup>

Since married women were not subject to rape laws in the past, it should not come as a surprise. Due solely to the fact that they were married, the law granted husbands complete immunity from prosecution for raping their wives. However, when the idea of human rights has grown, so has the notion in a marital right to sexual behaviour.<sup>18</sup>

Ladies' privileges activists in the nineteenth century started to challenge the possibility that men reserved the option to compel their spouses to participate in sexual movement. In the US, the ladies' freedoms development battled against a spouse's assumed right to control conjugal intercourse. Suffragists like Lucy Stone and Elizabeth Cady Stanton believed that a woman's right to direct her marriage was an essential part of gender equality. In the 19th century, feminist want centered on women's right to control their bodies and fertility, including the right to give or withhold consent in marital sex. These requests likewise reflected eugenic worries about overpopulation. John Stuart Mill and Harriet Taylor, liberal feminists in Britain, criticized

marital assault as a major cause of women's oppression and a legal double standard.<sup>19</sup>

Feminists have worked from the 1960s to make marital assault/rape a criminal offence and end the exemption. This work has prompted throughout the world renaming of sexual violations, moving from offences against profound quality, family, and customs to offences against freedom, self-assurance, and actual uprightness.<sup>20</sup>

Sexual abuse, domestic violence, and partner rape all fall under the category of marital rape when the offender is the victim's spouse. Despite the fact that it was once excused or overlooked by regulation, it is currently broadly censured by worldwide shows and progressively condemned. In December 1993, the Unified Countries High Magistrate for Basic liberties delivered the Statement on the End of Brutality Against Ladies, which perceives conjugal assault as an infringement of common freedoms.<sup>21</sup>

In 1991, in the matter of *R v. R*<sup>22</sup>, eliminated the marital rape exemption in the country England and Wales. The aforementioned exemption was initially presented in the year 1736 within the pages of Matthew Hale's *History of the Pleas of the Crown*. This marks the initial endeavor to bring legal action against a spouse for the offence of sexual assault committed against their partner.<sup>23</sup>

Until the 1980s and 1990s, many countries in Western Europe and North America did not consider committing marital rape to be a crime. Only 17 nations had made marital rape a crime in 1997. However, the Declaration of the United Nations on the Elimination of Violence Against Women has increased the number of nations that outlaw marital rape to over 100 and raised public awareness of the problem.<sup>24</sup>

Spousal rape was prohibited in at least 104 nations in 2006, but only four of those nations allowed for its prosecution in cases where the spouses were legally separated. In any case, in numerous nations, it isn't evident whether conjugal assault can be arraigned under standard assault regulations. A countries like Scandinavia and Eastern Europe has made conjugal assault unlawful before 1970, and other Western English speaking nations in the world prohibited it a lot later, mainly during the 1980s and 1990s. It was banned in the majority of developing nations in the 1990s and 2000s.<sup>25</sup>

### **III. THE MARITAL RAPE IN VARIOUS NATIONS**

The Soviet Union, Poland, Czechoslovakia, Denmark, Sweden, Norway and other members of the Socialist Coalition are only a few countries that condemned domestic violence at the appropriate moment. The Talmudic rule was used by the Israeli Supreme Court in a 1980 ruling

to support the legality of marital rape. Australia's criminalization process began in the province of New South Wales in 1981 which was followed in 1985 to 1992 by any remaining states.<sup>26</sup>

Before, many assault rules in the US didn't permit the arraignment of life partners, regardless of whether they were alienated or legitimately isolated. South Dakota eliminated this special case in 1975, and North Carolina was the last state to eliminate the spousal exception in 1993. However, 33 of the 50 states in the United States still consider spousal rape to be a lesser offence as of 1999. Assault, battery, and spousal abuse are all related offences against which the perpetrator could face charges. Other criminal charges may not necessarily apply to legally wedded spouses. For example, in the United states, a marriage exclusion exists to the charge of legally defined sexual assault, regardless of whether one of the companions is under the period of assent in the purview the sexual demonstration happens.<sup>27</sup>

France's Cour de Cassation approved arraignment of mates for assault or rape in 1990, yet in 1992, it decided that there is an assumption of assent from the hour of marriage until it is renounced by one or the other party. Law 94-89 of 1994 made marital rape a crime. On April 4, 2006, a second law made rape by a husband in civil unions, legally wedded partners, and unmarried couples an aggravating circumstance in the prosecution of rape. Germany prohibited spousal assault just in 1997, which is later than other created nations. Over the course of more than 25 years, women's rights activists and ministers lobbied for this law.<sup>28</sup>

The following countries have recently made marital rape a crime: Ghana (1998–2007), Mauritius (2007), Malaysia (2007), Thailand (2007), Tunisia (2008), Rwanda (2009), South Korea (2009), and Jamaica (2009). However, despite the fact that marital rape has been made a crime, human rights observers have criticized Japan, Poland, and Kazakhstan for not effectively prosecuting the offence.<sup>29</sup>

The laws of the country determine whether or not marital rape is a crime. Most developed and many developing nations consider marital rape to be a criminal offence. The degree to which these countries consider marital rape to be a more severe crime than "stranger" rape, however, differs from nation to nation and even from one state to other. Some nations and governments believe that marital rape is a crime that is at least as severe as other kinds of rape, despite the fact that the prevalence of marital rape is a significant signal that other types of domestic violence are also occurring.<sup>30</sup> Additionally, the list of nations divided into categories depending on their participation in the marital rape problem is shown below:

COUNTRIES THAT HAVE NOT MADE SPOUSAL RAPE A CRIMINAL OFFENCE. <sup>31</sup>
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• Algeria	• India	• Syria
• Afghanistan	• Jordan	• Sudan
• Brunel Darussalam	• Kenya	• Saudi Arabia
• Botsawana	• Lebanon	• Tonga
• Bolivia	• Laos	• Uganda
• Bahrain	• Mynamar	• Yemen
• Bahamas	• Morocco	• Zambia
• China	• Mongolia	
• Ethiopia	• Malawi	
• Egypt	• Nigeria	
• Georgia	• Oman	
• Honduras	• Pakistan	

Countries who criminalised Marital Rape only when couple is legally separated.<sup>32</sup>

Singapore, Sri Lanka, Tanzania, India

COUNTRIES THAT HAVE MADE SPOUSAL RAPE A CRIMINAL OFFENCE . <sup>33</sup>		
• Czech Republic	• Hong Kong	• Poland
• Cyprus	• Israel	• Philippines
• Cuba	• Ireland	• Russia
• Croatia	• Iceland	• Romania
• Costa Rica	• Mauritania	Republic of the Congo
• Dominican Republic	• Macedonia	• Spain
• Dominicia	• Japan	• South Africa
• Denmark	• Lithuania	• Sweden



• Estonia	• Latvia	• Serbia
• El Salvador	• Mexico	• Taiwan
• Ecuador	• Malta	
• Finland	• Malaysia	
• Fiji	• Norway	
• Hungary	• Peru	

#### IV. INDIAN SOCIETY

Humans are social creatures who are unable to live alone. Because it provides many of our needs, including safety, security, companionship, a means of subsistence, recreation, and so on, society is necessary for survival. Nonetheless, every general public likewise needs to defy a few social wrongs. As a result, every society has advantages and disadvantages.<sup>34</sup> since its inception, Indian society has been dominated by men or patriarchal. Conjugal assault is by and large not considered a wrong in Indian culture on the grounds that the casualties are for the most part ladies as opposed to men. There are not very many voices in India that help the denial and criminalization of conjugal assault in the country. Society assumes a significant part in wiping out any friendly wickedness. No friendly evil can be killed from a general public except if the general public itself rejects it. In the case of India, marital rape is still practiced because Indian society has not rejected it.<sup>35</sup>

##### (A) Indian Legislature

The Indian legislature may be able to significantly reduce marital rape in the country. Nonetheless, there is a great deal of hesitance with respect to Indian lawmaking body to condemn conjugal assault in India. In India, numerous attempts to criminalise marital rape have repeatedly failed. A few Bills have been acquainted in Indian Parliament with condemn conjugal assault, however not a single one of them could emerge into any kind of regulation. The Indian legislature is of the opinion that making marital rape a criminal offence would have a negative impact on the revered concept of marriage and increase the number of divorces in the country.<sup>36</sup>

##### (B) Indian Executive

Numerous attempts have been made to make marital rape a criminal offence in India by various governments, but none of them have shown the courage or will to do so. The country's decision not to make marital rape a criminal offence is justified by the fear that such laws would weaken

marriage and increase divorce rates. Thus, the demeanor of Indian leader is likewise disheartening in such manner.<sup>37</sup>

### **(C) Indian Judiciary**

The Indian judiciary is less reluctant and reserved than the Indian legislature when it comes to the sin of marital rape. Indian legal executive is substantially more proactive in managing the danger of conjugal assault. In a number of significant decisions, the Apex Court of India strongly condemned the practice of marital rape in India and repeatedly called for its criminalization. In a similar vein, a number of Indian High Court judgments have called for making marital rape a crime. It is imperative to note that the onus of criminalising marital rape in India rests solely with the Indian legislature, and not with the Indian judiciary.

### **(D) Regulations in India**

In India, there are regulations set up to rebuff the culprits of assault. Segment 376 of Indian Reformatory Code gives discipline to assault. However, there are no specific laws that specifically address the act of marital rape.<sup>38</sup> According to the Exception 2 of Section 375, IPC is the only law in India that gives victims of marital rape some protection. Under this law, a husband can be convicted for rape if he has done sex with his spouse who is younger than 15 years old. However, as a result of its decision in *Independent Thought v. Union of India*, the Supreme Court of India has changed this age to 18 years.<sup>39</sup> At present, the law in India is that assuming a spouse commits sex with his minor wife, he can be rebuffed for assault, however a significant wife has no such cure.<sup>40</sup> Victims of marital rape are only partially protected by Indian law. There is no comprehensive protection against the offence of marital rape in India.<sup>41</sup>

## **V. CONCLUSION**

Even though the spouse has the freedom to have intercourse with other partners, both partners should enjoy themselves. Wife also have sexual fascinations which must be fulfilled, it is not only the wife's responsibility but also the husband's duty to fulfill the wife's sexual desires. A perceptive couple will consider the erotic needs and desires of their partner. In the event that a sexual act is planned by the husband but tragically unintentional by the wife, the husband must either abstain from having sex since it isn't wanted by his wife, or the wife must serve her husband despite the fact that she would prefer not to. In the end, it can be concluded that marital rape, like rape, is a serious threat to the achievement of gender equality in India. Women in India will never be considered free and independent as long as such evils persist. Conjugal assault is one of the greatest blotches to one side to balance and right to life of ladies in India.<sup>42</sup> To turn into a created country, it should dispose of conjugal assault as it is one of the greatest

impediments to improvement. In India, marital rape will only be criminalised if all three organizations take an active role in this regard.<sup>43</sup> Through its judgments, the Indian judiciary must also exert pressure on the legislature and executive to criminalise marital rape. In order for this to occur, the evil of marital rape must be eradicated from India by bringing together members of Indian society, the legislature, the executive, and the judiciary.<sup>44</sup> Bringing issues to light about marital rape is pivotal to accomplish equity. Even though a number of groups have vowed to raise awareness, no substantial steps will be made until people realize how severe the issue is. Studies show that 70% of women have at some time in their life seen physical or sexual abuse by an intimate partner.<sup>45</sup> The Indian Constitution's Articles 14 and 21 concern equality and the right to life and freedom. India has to make a decision about the criminalization of marital rape. In a country where goddesses are respected and worshipped, India can no longer afford to overlook this problem. To do so would be manifestly unfair.

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