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## Marital Rape: Still Legal in the Shadow of Patriarchy

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*Protection against 'Rape' as an offence has witnessed a considerable amount of progress in the last decade, however, the concept of 'marital rape' is still considered a personal affair that is to stay behind closed doors. While analysing the criminal law from the perspective of rape in general as well as marital rape, it is apparent that the lack of provisions to criminalize rape by a husband on her wife, promotes more violence in this alleged holy bond of marriage and they can't hide behind such arguments. The arguments against the criminalization of marital rape which were given have been receiving many attempts for a rebuttal. This article would further analyse this rebuttal argument in order to understand the basis behind them. The contention to criminalise marital rape has been refuted by many and there is an urgent need to understand the ideological status of society that puts forth such arguments.*

**Keywords:** *marital rape, criminal offence, section 375, sexual intercourse, society.*

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### INTRODUCTION

The Indian judiciary has faced a plethora of conundrums but has managed to triumph in almost all of them by giving a fair and just decision. A similar dilemma now stands before the Delhi High Court in form of a PIL filed against Marital Rape<sup>1</sup>. The issue has heard arguments

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<sup>1</sup> RTI Foundation v Union of India (2015) Writ Petition (Civil) No. 284/2015

from both sides and now awaits judgment. The arguments against the criminalization of marital rape which were given have been receiving many attempts for a rebuttal. This article instead of refuting the arguments would try to delve into their basis and would try to discern what forces such contentions to come forward while also focusing on what is needed to criminalize marital rape. To support the existence of Exception 2 of Section 375 of the Indian Penal Code, 1860 (“IPC”)<sup>2</sup> which essentially protects rapists if they are within the domain of marriage, a few feeble contentions have been relied upon. These contentions have been refuted by many, highlighting their pitfalls or obsolete application but mere denial would not be enough to make the legislatures and judiciary realize the depth of the matter. The ideological status of society that puts forth such arguments needs to be understood and changed.

#### **‘SEXUAL INTERCOURSE’: A NECESSITY OF MARRIAGE**

The primary contention put forward relates to the institution of marriage and its apparent inherent essential component which is sexual intercourse between a man and a wife. It is argued that criminalizing marital rape would somehow impact the institution of marriage negatively. The reason behind this argument, in the view of the authors, is that the legislature itself undermines the sanctity of marriage and still believes it to be just a step for the legalization of the relationship between a man and a woman only. This ideology narrowly interprets the definition of marriage and consequently believes that sexual intercourse and procreation are the major purposes that marriage seeks to achieve. This makes them believe that sexual intercourse is an integral part of marriage and that criminalizing forced sexual intercourse would be a step in the wrong direction. This interpretation of marriage itself can also be seen through the non-validation of the marriage of homosexuals, discrimination done against children not born out of a marriage, and attempts made to prevent divorce. The ideology itself requires a change which shall interpret marriage as per original personal laws where marriage is considered a sacrament<sup>3</sup> and in any sacred institution, there must not be space for any action done with force or against anyone’s free will. Further, the ideologies applied in family law are also conflicting with the plea of criminalizing marital rape. One of

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<sup>2</sup> Indian Penal Code, 1860, s 375

<sup>3</sup> *Tekait Mon Mohini Jemadai v Basanta Kumar Singh* (1901) ILR 28 Cal. 758

the major concerns regarding the application of family law is the amount of importance that is associated with the sexual relations of a married couple. Also, there is no specific provision that mentions 'sexual violence in a marriage as a specific ground for divorce, eventually making sexual intercourse a 'necessity' of marriage. On occasion, the family law appears complex, and its constant glorification of the sexual relationship between husband and wife dilutes the right of women in a marriage to say 'No'.

### **RAPE DISGUISED UNDER MARRIAGE**

The government through its arguments and the statutory provision has tried to exclude marital rape from the ambit of section 375<sup>4</sup> itself. However, it's just an attempt to disguise rape under the veil of marriage. The proponents of the provision don't consider marital rape to be within the ambit of rape. This is most probably based on the notion that a husband and wife have certain rights over each other which includes the right to engage in sexual intercourse and when the husband claims his rights, it should not be considered a crime. This belief undermines the entire offence of rape and shows the failure to understand the gravitas of the crime. Rape is derived from the Latin term "rapere" which means to seize<sup>5</sup>. The offence of rape is beyond mere sexual intercourse and focuses more on unwillingness and absence of consent. When there is an unwillingness or lack of consent, one person seizes others by way of actions, words, or signs and imposes themselves on the other. Here the person supersedes the autonomy and freedom of a person which further violates their fundamental and human rights. This nature and impact of rape are still not fathomed by the legislature and as a result, different laws are formulated for different alleged categories of people which is argued to be based on the differential intelligentsia. For example, the punishment for rape is different when the victim is a female compared to when they are transgender while in cases when the victim is a male, there are no penal consequences. Insensitivity to any kind of sexual offence can be witnessed from the judicial aspect as well.

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<sup>4</sup> Indian Penal Code, 1860, s 375

<sup>5</sup> Rebecca M. Ryan, 'The Sex Right: A Legal History of Marital Rape Exemption' (1995) 20 Law and Social Enquiry, 944

In the case of *Satish v State of Maharashtra*<sup>6</sup>, even the courts first failed to determine the gravity of the offence and gave orders inconsistent with what was desirable and then, later on, reversed their stand. Moreover, the legislature has increased coverage of marriage by including 'sexual assault' as the exception<sup>7</sup>. This substantiates their belief that after marriage, issues between the couple must not be interfered with, irrespective of whether such issue is based on the human right of any partner. The importance of individuality of women in a relationship is crucial which is blatantly ignored. A change in the status of women in any relationship could to a large extent help them to raise voices against marital rape and help them fight for the justice they deserve. It is necessary for us to stop relying on the argument of the private sphere, as there is an immediate need to stand in support of individual autonomy. It is thus necessary to conceptualize and understand the 'private sphere' more progressively in the light of the *K.S. Puttaswamy* judgment<sup>8</sup>. We as advocates of individual rights would like to highlight the approach of autonomy both sexual and individual rather than using the shield of the private sphere. In the case of *Saroj Rani v Sudarshan Kumar Chadha*<sup>9</sup>, marriage has been considered a reasonable classification to escape any form of penal consequences for marital rape, making it all the more difficult for married women to approach the courts of law<sup>10</sup>. Even though the concept of marriage has evolved over the past few decades, when earlier the wife was considered as property belonging to her husband, however under the Hindu, Parsi, Christian, or Special Marriage Act both husband and wife are put on an equal footing. Thus, it is essential to understand that there is no 'legal argumentation that supports treating the wife as possession or property, rather every woman irrespective of her marital status must be treated as an independent individual.

## PERPETUITY OF CONSENT

Another pillar on which the proponents rest their stand is that in any marriage, consent for sexual intercourse is implied. Major opposition to this argument is considered to be the fact

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<sup>6</sup> *Satish v State of Maharashtra* (2021) Criminal Appeal No. 161/2020

<sup>7</sup> *Ibid*

<sup>8</sup> *K.S. Puttaswamy v Union of India* (2017) 10 SCC 1

<sup>9</sup> *Saroj Rani v Sudarshan Kumar Chadha* (1984) 4 SCC 90

<sup>10</sup> *Ibid*

that it is based on the British idea that a wife is the property of the husband and such an idea has no place in our nation. However, the basis for contention of implied consent goes beyond it. The government still believes that non-assertion of a stand amounts to consent and consent shall be applicable perpetually and at all times. If a woman has agreed to marry a man, she must have known that she would be required to have sexual intercourse and would have assented to the marriage nevertheless. This presumption of assent to marriage and consequently to sexual intercourse requires upheaval. Even if the woman assented to marriage, it doesn't allow us to conclude that she assented to have sexual intercourse any time as per her husband's demands. In that case, she would be no less than a sex slave rather than a wife, and that in the authors' opinion damages the sanctity and the institution of marriage. Consent on every occasion comes with certain limitations. This aspect has been mentioned in IPC as well, as a part of Explanation 2 of Section 375<sup>11</sup> where consent must be given for a specific sexual act. Moreover, if any person agrees to have sexual intercourse, you can't refer to such consent after the person has revoked it. When consent to marriage itself can be reversed through a divorce, it must be understood that even consent to sexual intercourse must also allow such reversal.

### **PRESUMPTUOUS MISUSE OF CRIMINALIZATION OF MARITAL RAPE**

The possible misuse of the provision is another strong argument put forward. It has been time and again emphasized that the criminalization of marital rape would allow wives to file frivolous cases against their husbands claiming rape and innocent men might end up behind the bars. This argument is further supported by citing multiple fraudulent cases of 498A<sup>12</sup>, POSCO<sup>13</sup>, Section 375<sup>14</sup>, etc. The basis of this argument however goes beyond the mere possibility of misuse. It relies upon the belief that wives may want to take action against their husbands and the removal of the exception may provide them with a great weapon. This reflects the existing patriarchal mindset of the society which considers assertive women to be malicious. It bifurcates women into mere two categories: either she is submissive or she acts

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<sup>11</sup> Indian Penal Code, 1860, s 375

<sup>12</sup> Indian Penal Code, 1860, s 498A

<sup>13</sup> Protection of Children from Sexual Offences Act, 2021

<sup>14</sup> Indian Penal Code, 1860, s 375

with malice. Any woman who stands for what she believes in is still considered to be an abomination. An inherent mistrust over women in this society forces the thought that criminalizing rape would amount to its misuse. However, here the possibility of misuse of such action by husbands needs to be addressed as well. Therefore, it must believe in the slogans of feminism that it has been raising and trust women that they shall act responsibly. Those who intend to harm, do it in any manner whatsoever, in this light, the government must realize that keeping marital rape outside IPC shall be beneficial to none.

### **DIFFICULT TO PROVE - AN EXCUSE FOR EXCEPTION**

It is further believed that the act of marital rape would be difficult to prove as the question of existence and validation of consent will be then based majorly upon the contentions of both the parties standing against each other. In criminal acts, guilt beyond reasonable doubt must be proven which requires substantial evidence<sup>15</sup>. However, in the case of marital rape, evidence and witnesses are restricted to the house of the married couple, thus there is a high probability that when the offence occurred the couple was staying at the husband's place and his relatives who are crucial witnesses act with bias. On this basis, the government rightly claims that establishing guilt would be difficult, especially in cases where physical force has not been applied. Moreover, evidence/witnesses might not even reach courts owing to spousal privilege which drastically reduces the evidence which could be placed on record. Here the basis of the argument may be well-founded but it is quite far-fetched from the dilemma. The presumption of non-proof in all cases deprives women of the opportunity of justice when they can gather enough evidence to support their claim. The general presumption must not be forced upon the government over everyone, they should keep a holistic approach and consider the conditions of all women.

### **DRAWING PARALLELS: JUDICIAL PRECEDENTS**

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<sup>15</sup> Rebecca M. Ryan (n 5)

Marital Rape is a direct violation of articles 14<sup>16</sup> and 21<sup>17</sup>, the fundamental rights that are granted to each one of us. Even though marital rape is a violation of human rights that transpires in the private sphere of one's marriage, it is the duty and responsibility of not only the state but also the judiciary of India to prohibit such a violation. The engagement of the judiciary in the private sphere with regard to "restitution of conjugal rights" can be traced back to the judgment passed by the Andhra Pradesh High Court in the case of *T. Sareetha v T. Venkata Subbaiah*<sup>18</sup>. It was for the first time observed in this case that "*the remedy of restitution of conjugal rights is unconstitutional as the right to choose under this was transferred to the state taking it away from women*"<sup>19</sup>. However, the court continued to observe that the concept of forced sexual intercourse can exist within the purview of marriage. Further, in the case of *Harvinder Kaur v Harmander Singh Choudhry*<sup>20</sup>, the Delhi High Court conveniently turned a blind eye to the abuse of human rights that a woman faces in marriage while shielding itself with the theory of "marital privacy". It observed that "*The introduction of constitutional law within the purview of marriage will strike at the very root of the said relationship. It will result in opening the doors to unlimited litigations and dissension in marriage.*"<sup>21</sup> Thus the courts have refused to question the sanctity of marriage and created a private sphere around it that shall not be penetrated. The relevant view that is indicated from these judicial precedents is first, restricting the constitutional law from penetrating the alleged pure institution of marriage. However, according to various 'Feminist Critiques', this notion of private spheres/spaces restricts the application of law making it difficult for the victims of 'marital rape' to take legal action. In an attempt to stabilize the contrasting views of various courts in this regard, the Supreme Court of India in the case of *Saroj Rani v Sudarshan Kumar Chadha*<sup>22</sup> upheld the constitutional validity of "restitution of conjugal rights"<sup>23</sup>. Therefore, the court managed to put forth that despite the violation of article 21 of the Indian Constitution, marital rape is allegedly 'justified' as the

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<sup>16</sup> Constitution of India, 1950, art.14

<sup>17</sup> Constitution of India, 1950, art.21

<sup>18</sup> *T. Sareetha v T. Venkata Subbaiah* AIR 1983, AP 356

<sup>19</sup> *Ibid*

<sup>20</sup> *Harvinder Kaur v Harmander Singh Choudhry* AIR 1984, Delhi 66

<sup>21</sup> *Ibid*

<sup>22</sup> *Saroj Rani* (n 9)

<sup>23</sup> *Ibid*

woman is married. The 'restitution of conjugal rights has already been abolished in the United Kingdom<sup>24</sup> however India, despite having the basis of its laws from the said country fails to do the same. Therefore giving the husbands a window to primarily claim 'restitution of conjugal rights if the wife refutes sexual intercourse.

## CONCLUSION

While analyzing the criminal law from the perspective of rape in general as well as marital rape, it is apparent that the lack of provisions to criminalize rape by a husband on her wife, promotes more violence in this alleged holy bond of marriage and they can't hide behind such arguments. The feminist literature understood a while back the lack of recognition of marital rape as a separate criminal offence. However, under the Indian Penal Code, the offence of rape has been given much-needed recognition after the amendment of 2013<sup>25</sup> because of the late realization of the brutality of the criminal act. This reform in the criminal law brings to the spotlight the evolving frame of mind of society. But, ever since the debate on marital rape has surfaced, this evolution has also attracted various doubts. The lack of efforts on the part of the legislature as well as the judiciary to engage fundamental rights of even married women against the brutality of marital rape is questionable and the presumption of the consent of the wife while having sexual intercourse is itself negated.

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<sup>24</sup> Raveena Rao Kallakuru & Pradyumna Soni, 'Criminalisation of Marital Rape in India: Understanding its Constitutional, Cultural and Legal Impact' (2018) 11 (1) NUJS L. Rev., 121-150

<sup>25</sup> Criminal Law (Amendment) Act, 2013