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## Dark insights behind every glorious marriage: An unseen scarce or the masculinity urge of men?

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*Marriage is a knot of two profound bodies under the heavenly **seven vows** in the name of god which blesses the couple with a certificate of happily married life. It is a **sacred** and religious sentiment in our society that starts with the definition of new life and ends till the very end. But what happens when the marriage starts to be one-sided **consent** and desire of a person? The very roots of the Indian **patriarchy** inculcated a deep thought where the **desire** of men is to be set in stone without looking for the **choices** of women. It puts women as a material of want whose “**No**” is against the **orthodox** family policy and leads to different kinds of violence. One such violence is ‘Marital Rape’ where **sexual** consent has no value but the desire of men is the first priority. It is a kind of rape performed under a marriage that has no laws and regulations as a punishment. It is shame in the culture of the society where the violence is performed on the edge of the sacred ritual ties. So how do women survive? And what is the different violence under such headings? And why not the judiciary working on it? These are the different questions asked by each and every woman for their safety and dignity in the up-building society.*

**Keywords:** marriage, patriarchy, consent, orthodox, sexual assault, marital rape.

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### INTRODUCTION

*“A man is a man, An act is an act, Rape is a rape, May it be performed by a man the “Husband” On the woman “Wife”*

- *Karnataka High Court*

The unwelcomed and clamantly unrecognized footsteps of the Karnataka High Court on the unheard redressal of marital rape, where the court objectified exemption of a husband from the allegations of rape and unwillingly sex with his spouse, will stand against Article 14<sup>1</sup> of the Indian Constitution with the virtue of equality.

**Justice Nagaprasanna** quoted, *"If a man, a husband, a man he is, exempted from allegations of offences under Exception 2 of Section 375<sup>2</sup> of the IPC, the features of inequality would percolate in the society. It is this inequality that destroys the soul of Right to Equality in the Indian Constitution."*<sup>3</sup>

The Judge further stated that "It is a regressive, **preconceived notion of masculinity** that deviates these cases into the streets of dark lights floundering ignition throughout the nation". These **acts of husbands scar the very soul of the wives** with soaking tears inside the dying heart melting through the eyes to hear the "**voices of silence**".

The Bench described that "there was shameless lust, aggressive beast of passion, the harsh carnal desire of an admonishing perversion and the unsatisfied eyes of appetite which drove the complainant to file a complaint against the husband under Section 376 and 377<sup>4</sup> of the IPC. "**As you sow, so shall you reap**" is the best-fit quotation against the Husband, who raped her wife as a sex slave and sexually harassed her own daughter, driving his own hands in the court of law. His sexual '**lust**' during the pregnancy of her wife causing miscarriage and also forceful sex before his daughter is the victimized expression of a sexually harassed wife towards her husband pointed the different psychological trauma of all females around the world, with horrified emotions of married life.

### **BUT WHAT IS THE EXPRESSION 'MARITAL RAPE' STATE?**

*"Her Friends used to tell her, it wasn't rape if the man was her husband. Though she didn't say a word, but inside her heart; she wanted to take up a knife towards their faces."*

- F.H. Batacan

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<sup>1</sup> Constitution of India, 1950, art.14

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

<sup>3</sup> *Hrishikesh Sahoo v State of Karnataka* (2018) Criminal Petition No. 5515/2018

<sup>4</sup> Indian Penal Code, 1860, ss 376 and 377

Rape is unlawful, non-consensual sex because of the physical dangers or harm, or due to the deceitful demonstration of the perpetrator. According to Indian laws, Rape is an offence under **Sections 375 and 376<sup>5</sup> of the Indian Penal Code**. But the shocking factors lie with the avoidance of Marital Rape under the ambit of conviction. India is one of the **thirty-six<sup>6</sup> countries** in the whole world that still didn't criminalize the concept of marital rape. **Marital Rape** has been defined as sex by the spouse with his better half without her consent or by force or danger.

The patriarchal structure of the society created a perception where ladies were regarded as unimportant property **catering to the sexual satisfaction** of their husbands noiselessly with tolerance. In the case of **Nimeshbhai Bharatbhai Desai v State of Gujrat<sup>7</sup>**, the court held that **'the wife does not have right to initiate proceedings against her husband for the offence of rape under Section 376 because by marriage a woman gives irrevocable consent to her husband to have sex with her anytime he demands it'**. This created a deep on the legislatures who disregarded it as an offence by providing a shield of wedding rights where consent has no place to stay.

According to the data referred by the **National Family Health Survey**, no improvement has been shown and about **30% of Indian women aged 18 - 49 reported having experienced spousal violence and harassment**. Rape is not only heinous against ladies or women but a grave violation of a person's basic rights of life and freedom. This is not right to assert the fact that sex with a spouse is a husband's privilege entrusted to him after marriage. The dominant status of a man in the system of social marriage disregarded the essence of women's rights in a marital rape with the preferable condition for the husband to break her trust and individual freedom. The decriminalization of rape of Marital Rape in India failed to establish sex equality and freedom among genders.

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<sup>5</sup> Indian Penal Code, 1860, ss 375 and 376

<sup>6</sup> 'Marital Rape in India: 36 countries where marital rape is not a crime' (*India Today*, 12 March 2016) <<https://www.indiatoday.in/education-today/gk-current-affairs/story/marital-rape-312955-2016-03-12>> accessed 25 June 2022

<sup>7</sup> *Nimeshbhai Bharatbhai Desai v State of Gujarat* (2018) R/CR.MA No. 26957/2017

## TYPES OF MARITAL RAPE

Legal scholars identified that there are basically three types kinds of marital rape that are prevalent in society:

1. **Battering Rape**- It is the most common form of marital rape where 48% of cases are registered under it. In these rapes, women experience both physical and sexual violence in the relationship in various ways. Some are battered during the sexual violence where the husband wants to make up and coerces his wife to have sex against her will.
2. **Force - only Rape** - Here the husbands use only the amount of force necessary to coerce their wives. Battering may not be part of these relationships. The assault may be performed only when the woman refuses to have sexual intercourse.
3. **Obsessive Rape** - These rapes are also known as sadistic rape. Here the assaults are associated with torture, perverse sexual acts, and other physical violence.

## CONDITIONS UNDER WHICH THE WOMEN ARE HIGHLY RAPED

There are the following circumstances where women are at high risk to be raped by their husbands -

- Women Married to dominant men who take them as '**property**'
- Women who are suffering from physically violent relationships
- Women who are **pregnant**
- Women who **suffering from illness** or undergoing surgery
- Women who are divorced or **separated**

## THE DIFFERENT CONSEQUENCES OF MARITAL RAPE

- **Physical Effects** include injuries to vaginal or anal areas, soreness, bruising, fatigue, broken muscles, and vomiting.
- All those women who are battered and raped simultaneously suffer from bloody noses, broken bones, blackening eyes, and wounds from a knife.

- **The short-term, psychological effects** such as anxiety, intense fear, shock, PTSD, depression, and suicidal impressions.
- **Long-term psychological effects** include disordered eating and sleeping, intimacy problems, depression, negative self-recognition, and sexual dysfunction.
- **Gynecological Effects** include pelvic inflammation, vaginal stretching, unwanted pregnancy, HIV, infertility, and sexually transmitted diseases.

## LEGAL POSITION OF MARITAL RAPE IN INDIA

### *Criminal Law Aspect*

The Indian Penal Code defines Rape under Section 375<sup>8</sup> as;

A man is defined to commit the offence of rape, who, except in the case hereinafter excepted, has sexual intercourse with the woman under the following six conditions:

- Against the will
- No consent is involved
- With her consent, the consent has been obtained by putting her or any other person in whom she is interested in the fear of death or hurt.
- With her consent, where the man knows that he is not her husband, but she had given her consent because she believes that he is another, man to whom she is or believes herself to be lawfully married.
- With her consent, but at the time of giving her consent, by reason of intoxication or unsoundness of mind which was administered by him personally or through another or unwholesome substance, was she unable to understand the consequences of her consent?
- With or without her consent, when she is **under the age of eighteen years**<sup>9</sup>.

Then it is sufficient to constitute that the sexual intercourse resulted in the offence of rape.

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<sup>8</sup> Indian Penal Code, 1860, s 375

<sup>9</sup> *Independent Thought v Union of India* (2017) Writ Petition (Civil) No. 382/2013

**Exception - 1.** When a man has sexual intercourse with his wife, who is not under the age of fifteen years, it is not rape. In one of the cases, the **High Court held** that **“it’s the husband’s right over the body of the wife, and this concept that a woman can refuse sex within marriage is not widely accepted”**.

**According to the Indian Penal Code, 1860**, it is rape, if there is non -consensual intercourse done with a wife between the ages of 12 - 15 years, the punishment may be either **imprisonment of 2 years at maximum or a fine or both.**

2. There is the criminalization of the rape of a **judicially separated wife.**

If a man performs sexual intercourse with his wife forcefully when they are living separately under the decree of separation despite the fact that the wife may be subjected to sexual assault, it is referred to as rape. Therefore, Rape is a grievous crime in India, but it is not an offence under the boundaries of marriage.

#### **CIVIL LAW ASPECT**

Marital Rape is not a criminal offence in India but it covers some parts under the civil law aspect. The **Protection of Women from Domestic Violence Act, 2005<sup>10</sup>** states that **“any act, omission or conduct of the respondent shall constitute a domestic violence if it harms, or injuries or risk the health, safety, life or wellbeing, whether mental or physical, of the aggrieved person or to do so that includes causing physical abuse, sexual abuse, verbal, emotional and economic abuse”**. The abuse refers to the nature of any sexual conduct which involves humiliation, degradation, or violation of the dignity of the woman.

Therefore, marital rape is a non - consensual sexual act that humiliates the person mentally and physically, causing the violation of women’s rights within the ambit of domestic violence. A wife can **seek civil remedy by filing the case under domestic violence** for marital rape. The reliefs include protection orders, judicial separation, and monetary value but it does not do anything to deter the violent behavior itself.

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<sup>10</sup> Protection of Women from Domestic Violence Act, 2005; See also, Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013

## CONSTITUTIONAL LAW ASPECT

Marital Rape is a non – criminalized offence violating Article 14 and Article 21<sup>11</sup> of the Indian Constitution.

### *Violation of Article 14*

**Article 14<sup>12</sup> of the Indian Constitution** states, *“The State shall not deny to any person equality before the existing law or equal protection of the laws within the territory of India.”*<sup>13</sup> Though the Constitution guarantees equality to all the members yet it discriminates against female victims who are being victimized by their own husbands through marital rape.

The exception provided under the Indian Penal Code violates Article 14 of the Indian Constitution, which discriminates between married women under the age of 15 years and above the age of 15 years.

In *Budhan Choudhary v State of Bihar*<sup>14</sup> and *State of West Bengal v Anwar Ali Sarkar*<sup>15</sup>, the court held that Article 14 is subject to the **reasonableness test** which can be passed only when a rational objective seeks to be achieved. But as the exception violates the purpose of Section 375, there is no rational nexus created to achieve the objective of the Act, causing the violation of Article 14 of the Indian Constitution.

## VIOLATION OF ARTICLE 21

According to **Article 21<sup>16</sup> of the Indian Constitution**, *“No person shall be denied of his life and liberty except accordingly procedures established by the law.”* Exception 2 also violates Article 21 of the Constitution which guarantees the rights to health, privacy, dignity, safe living condition, and environment among all.

In the case of *State of Karnataka v Krishnappa*<sup>17</sup>, the Supreme Court held that sexual violence apart from being a dehumanizing act is an unlawful intrusion of the right to privacy and

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<sup>11</sup> Constitution of India, 1950, art.14 and art.21

<sup>12</sup> Constitution of India, 1950, art.14

<sup>13</sup> Constitution of India, 1950, art.21

<sup>14</sup>*Budhan v State of Bihar* (1955), AIR 191

<sup>15</sup>*State of West Bengal v Anwar Ali Sarkar* (1952), AIR 75

<sup>16</sup> Constitution of India, 1950, art.21

<sup>17</sup>*The State of Karnataka v Krishnappa* (2000) 4 SCC 75 (India)

sanctity to a female. It also said that non – consensual sexual intercourse amounts to mental and physical violence.

In the *Suchita Srivastava v Chandigarh Administration*<sup>18</sup>, the Supreme Court held that the right to make equal choices during sexual activity guarantees the right to liberty, privacy, dignity, and bodily respect under the Constitution of Article 21.

In the other case of *Justice K.S. Puttuswamy v Union of India*<sup>19</sup>, the Supreme Court ordered that the right to privacy is the fundamental right of all citizens and there is no distinction between the rights of married women and unmarried ones. Thus, the court concluded that rape is a violation of Article 21 guaranteed under Fundamental Rights of the Indian Constitution, irrespective of the fact that the woman was married to whom such crime was committed.

Therefore, the above conclusions clearly reflect the idea of Marital Rape under Article 14 and Article 21 of the Indian Constitution.

#### THE WAYS TOWARDS THE CURBING OF THE CRIME: CONCLUDING REMARKS

- The **JS Verma Committee** set up on the occasion of the protest over the December 16, 2012 gang rape case, recommended the criminalization of marital rape. They believe that the law made would make the women safer from abusive spouses and can also receive help when needed during marital rape and save their life from harassment and abusive relationships.
- The UN took the initiative toward women's protection by forming the **United Nations Declaration on the Elimination of Violence against Women** which defines harassment or assault against women as “*any act of gender-based violence which results in or likely to result in, physical, sexual or mental suffering to the women, including violation of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.*” In 2013, the United Nations Committee recommended on Elimination of Discrimination Against

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<sup>18</sup>*Suchita Srivastava v Chandigarh Administration* (2008) 14 SCR 989

<sup>19</sup> *Justice K.S. Puttuswamy (Retd.) v Union of India* (2017), AIR 4161



Women (CEDAW) and it is high time for the Indian government to criminalize marital rape.

Therefore, we can say that all people irrespective of their gender have their **own liberty and freedom** and nobody is empowered to violate it. Marriage is a beautiful combination of two thoughts and identities but it never surrounds one to be a dictator on the other. The Indian laws afford husbands and wives separate legal identities and independence and with the changes in the modern era, it is more towards the protection of women.

Thus, the decision taken by the Karnataka High Court is the new rose voice in the ears of the legislature to take cognizance of the legal absurdity and inferiority, as a rising sun in the darkening clouds of marital rape with the recognition of the elimination of exception 2 in Section 375 of the rape laws. It is here when the women will feel the fresh air from the windows without being caged in the patriarchal lust of men.