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JUDICIAL RESPONSE TO MARITAL RAPE IN INDIA

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“ A murderer destroys the physical frame of the victim, a rapist degrades and defiles the soul of a helpless female.”- Justice Arjit Pasayat.

An eighteen-year-old girl, meets a stranger twice, and she is told by her parents that she is to get married to him. This innocent young girl has dreams of care and companionship and a rosy romantic married life. These are shattered on the very first night of the marriage when she is subjected to verbal and sexual assault from the man who had vowed to love and protect her in the rituals of marriage. Every night, she faces a new ordeal, from being forced to mimic pornographic videos to forcibly having a candle or flashlight inserted into her vagina. If she complains to her family, they advise her to “try and adjust.” If she complains to the police, they rebuke her and tell her to be grateful that her husband is coming home to her instead of visiting a brothel. And when she tries to take her woes to the Supreme Court, they tell her that she is bringing a personal claim, not a public concern and as such, they cannot change the law for one person. This is the unfortunate reality for countless Indian women living among the culture of arranged marriages and remaining legally unprotected from the realities of marital rape.² Marriage is viewed as a sacrament under the Hindu personal laws and the wife is still viewed as subservient to the husband. It is assumed by the society that, marriage refers to the wife giving consent to all the “matrimonial obligations” including sexual intercourse.

The concept that institution of marriage is “sacrosanct” is propagated in the Indian society and is further enforced by the mainstream Indian cinema in its portrayal of the Indian Bahu. This however is a myth and is contrary to the reality of women’s position today. Though marital rape is the most common and repugnant form of masochism in Indian society, it is hidden behind the iron curtain of marriage. Not only that it is hidden under strict tight-lipped secrecy within families, society and unfortunately protected by the Government and the Judicial reluctance to interfere. Dogmatic social practices and legal norms in India mutually enforce the denial of women’s sexual agency and bodily integrity, which lie at the heart of women’s human rights. Rape is rape. Be it stranger rape, date rape or marital rape. The law does not treat marital rape as a crime. Even if it does, the issue of penalty remains lost in a cloud of legal uncertainty. The legal system must be forced to accept

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² *Night After night, the torture grew’: A survivor of marital rape speaks up*, DAILY OPINION (May 12, 2016), <https://www.dailyo.in/voices/women-marital-rape-sexual-harassment-abuse-arranged-marriage-divorce/story/1/14390.html> [<https://perma.cc/RTM8-A9M8>]; see Chhavi Sachdev, *Rape Is A Crime In India – But There Are Exceptions*, NPR (Apr. 13, 2016), <https://www.npr.org/sections/goatsandsoda/2016/04/13/473966857/rape-is-a-crime-in-india-with-one-exception> [<https://perma.cc/6VSH-ANJR>]; see also Vimi, *Marital Rape – My Husband Rapes Me Everyday!*, PINKDOMBLOG (Aug. 1, 2017), <http://pinkdomblog.com/marital-rape/> [<https://perma.cc/CZP2-HP9W>]

rape within marriage as a crime. Further, women themselves must break free of societal shackles and fight for justice. They must refuse to comply with the standards applied to them as the weaker sex.³

marital rape has both Physical and psychological effects

There is a common myth that rape by one's partner is a relatively insignificant which causes little trauma and a woman eventually gets adjusted to it. However, research indicates that marital rape often has severe and long-lasting consequences for women. The physical effects of marital rape may include injuries to private organs, lacerations, soreness, bruising, torn muscles, fatigue and vomiting. Women who have been battered and raped by their husbands may suffer other physical consequences including broken bones, black eyes, bloody noses, and knife wounds that occur during the sexual violence. Specific gynaecological consequences of marital rape include miscarriages, stillbirths, bladder infections, infertility and the potential contraction of sexually transmitted diseases including HIV.⁴

It is well established through extensive scientific research that women who are raped by their partners are suffer severe psychological consequences and become emotional recluses. Short-term effects of marital rape like anxiety, shock, intense fear, depression, suicidal ideation, and post-traumatic stress are common while the long-term effects like disordered eating, sleep problems, depression, problems in establishing trusting relationships, and increased negative feelings about themselves resulting in blaming themselves for these acts have serious repercussions on the health of the woman concerned. Psychological effects are likely to be long-lasting and sometimes scar a woman for life disabling her from normal humanly functions not to speak of cornering her into a hole from which she is never able to pull herself out.

India as a nation is based on the theory of equity, but it is appalling to notice that even now in the 21st century it has still not recognised the right of a woman to include marital intercourse as a component of equality. There is a clear absence of legal provisions regarding marital rape and therefore, the victims have the only resort of going to court. Courts have time and again applied various methods to identify marital rape and have given strict punishments but the lack of legal provisions ties their hands and they are bound by the letter of law. They cannot hence describe "forceful intercourse by a man upon his wife" as marital rape. At this juncture it is necessary to examine the law of Rape in India.

Section 375 of the Indian Penal Code defines "Rape",

Operative part of the said section is reproduced herein below: 375. Rape.—A man is said to commit "rape" if he—

- a. Penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
- b. inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
- c. manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any of body of such woman or makes her to do so with him or any other person; or
- d. applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

under the circumstances falling under any of the following seven descriptions:

Firstly,— Against her will.

Secondly, — Without her consent.

Thirdly, — With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly, — With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly, — With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly, — with or without her consent, when she is under eighteen years of age

Seventhly, — When she is unable to communicate consent.

³ Marital Rape — Myth, Reality and Need for Criminalization

by Saurabh Mishra & Sarvesh Singh²(2003) PL WebJour 12 <https://www.ebc-india.com/lawyer/articles/645.htm>

⁴ Thornhill, R. & Palmer, C.T., *A Natural History of Rape — Biological Bases of Sexual Coercion* (1st Edn., MIT Press Cambridge Mass., 2000.

Explanation I—For the purposes of this section, "vagina" shall also include labia majora.

Explanation 2—Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

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

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

Nationwide protests erupted as a result of the horrendous crime in the NIRBHAYA case and consequently, the former Chief Justice of India, Late J.S. Verma established a committee to amend and enhance laws against rape and sexual assault. Among other recommendations, the committee suggested that the marital rape exception should be repealed as it originates from the notions of women being the property of their husbands. Several changes came about from the Criminal Law Amendment Act, 2013. Many changes made under The Criminal Law Amendment Act, 2013 were necessary and substantive, but the Act failed to criminalize marital rape with the exception of Section 376A where sexual intercourse by a man with his wife who is living separately shall be punishable with imprisonment and liable for a fine and where the girl is under the age of fifteen.⁵

That Article 21 of the Indian Constitution, incorporates the right to live with human dignity and is a standout amongst the most fundamental components of the right to life which perceives the independence of a person. The Supreme Court has held in a catena of cases that the offense of rape abuses the right to life and the right to live with human dignity of the victim of the crime of rape

In *Bodhisattwa Gautam v. Subhra Chakraborty*⁶ the court held that rape is a crime against the basic human right and violation of the right to life enshrined in Article 21 of the Constitution and provided certain guidelines for awarding compensation to the rape victim. In the landmark case of *The Chairman, Railway Board v. Chandrima Das*⁷, the Hon'ble Court held that rape is not a mere matter of violation of an ordinary right of a person but the violation of Fundamental Rights which is involved. Rape is a crime not only against the person of a woman, it is a crime against the entire society. It is a crime against basic human rights and is violative of the victims most cherished right, namely, right to life which includes right to live with human dignity contained in Article 21.⁸

The turning point of the judicial stance against marital rape can be seen in the case of *Independent Thought vs Union Of India*,⁹ The Division bench opined that "The issue before us is limited but one of considerable public importance – whether sexual intercourse between a man and his wife being a girl between 15 and 18 years of age is rape? Exception 2 to Section 375 of the Indian Penal Code, 1860 (the IPC) answers this in the negative, but in our opinion sexual intercourse with a girl below 18 years of age is rape regardless of whether she is married or not. The exception carved out in the IPC creates an unnecessary and artificial distinction between a

⁵ Criminal Law (Amendment) Act, No. 13 of 2013, PEN. CODE § 375, Exception 2; *India: Reject New Sexual Violence Ordinance*, HUM. RTS. WATCH (Feb. 11, 2009, 9:30 PM), <https://www.hrw.org/news/2013/02/11/india-reject-new-sexual-violence-ordinance> .See also *The Gap in Marital Rape Law in India: Advocating for Criminalization and Social Change* by Krina Patel* *Fordham International Law Journal* ; *Volume 42, Issue 5 2019 Article 7* .

⁶ AIR 1996 SC 922

⁷ JT 2001 SC 426.

⁸ India: Law On Marital Rape – A Much Needed Reform In Our Legal System

<http://www.mondaq.com/india/x/691482/Crime/Law+On+Marital+Rape+A+Much+Needed+Reform+In+Our+Legal+System>

⁹ 2017 SCC Online SC 1222; (2017) 382 SCC (India).

married girl child and an unmarried girl child and has no rational nexus with any objective sought to be achieved. The artificial distinction is arbitrary and discriminatory and is definitely not in the best interest of the girl child. The artificial distinction is contrary to the philosophy and ethos of Article 15(3) of the Constitution as well as contrary to Article 21 of the Constitution and our commitments in international conventions. It is also contrary to the philosophy behind some statutes, the bodily integrity of the girl child and her reproductive choice. What is equally dreadful, the artificial distinction turns a blind eye to trafficking of the girl child and surely each one of us must discourage trafficking which is such a horrible social evil.” However it cannot be overlooked that the court was clear “we have not at all dealt with the larger issue of marital rape of adult women since that issue was not raised before us by the petitioner or the intervener.”

In the case of *State of Maharashtra v. Madhkar Narayan*¹⁰ the Supreme Court has held that every woman is entitled to her sexual privacy and it is not open to for any and every person to violate her privacy as and whenever he wished. The court explicitly laid down that Even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when he likes. So also it is not open to any and every person to violate her person as and when he wishes. She is entitled to protect her person if there is an attempt to violate it against her wish. She is equally entitled to the protection of law.

Clause (2) of S.357 is violative of Article 14 and Article 21 of the Indian Constitution -

Article 14 of the Indian Constitution ensures that “[t]he State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.” Although the Constitution guarantees equality to all, Indian criminal law discriminates against female victims who have been raped by their own husbands.

At the time the IPC was drafted in the 1860s, a married woman was not considered an independent legal entity. Rather, she was considered to be the chattel of her husband. As a result, she did not possess many of the rights now guaranteed to her as an independent legal entity, including the right to file a complaint against another under her own identity. Exception 2, which essentially exempts actions perpetrated by husbands against their wives from being considered acts of “rape,” is largely influenced by and derived from this already existing doctrine of merging the woman’s identity with that of her husband.

The roots of this doctrine can be traced to British colonial rule in the Victorian era. merged the identities of husband and wife under the “Doctrine of Coverture.”

But times have changed. Indian law now affords husbands and wives separate and independent legal identities, and much jurisprudence in the modern era is explicitly concerned with the protection of women. This concern is evident in the plethora of statutes intended to protect women from violence and harassment that have been passed since the turn of the century, including “The Protection of Women from Domestic Violence Act” and the “Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act.”¹¹

Article 21 states that “no person shall be denied of his life and personal liberty except according to the procedure established by law.” In recent years, courts have begun to acknowledge a right to abstain from sexual intercourse and to be free of unwanted sexual activity enshrined in these broader rights to life and personal liberty. In *The State of Karnataka v. Krishnappa*,¹² the Supreme Court held that “sexual violence apart from being a dehumanizing act is an unlawful intrusion of the right to privacy and sanctity of a female.” In the same judgment, it held that non-consensual sexual intercourse amounts to physical and sexual violence. Later, in *Suchita Srivastava v. Chandigarh Administration*,¹³ the Supreme Court equated the right to make choices related to sexual activity with rights to personal liberty, privacy, dignity, and bodily integrity under Article 21 of the Constitution.

Most recently, the Supreme Court has explicitly recognized in Article 21 a right to make choices regarding intimate relations. In *Justice K.S. Puttuswamy (Retd.) v. Union of India*,¹⁴ the Supreme Court recognized the right to privacy as a fundamental right of all citizens and held that the right to privacy includes “decisional privacy reflected by an ability to make intimate decisions primarily consisting of one’s sexual or procreative nature and decisions in respect of intimate relations.” Forced sexual cohabitation is a violation of that fundamental right. The above rulings do not distinguish between the rights of married women and unmarried

¹⁰ AIR1991SC207

¹¹ Marital Rape: A Non-criminalized Crime in India

<https://harvardhrj.com › 2019/01 › marital-rape-a-non-criminalized-crime->

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¹² 2000) 4 SCC 75 (India).

¹³ 2008) 14 SCR 989 (India)

¹⁴ 2017) AIR 2017 SC 4161 (India).

women and there is no contrary ruling stating that the individual's right to a privacy is lost by marital association. Thus, the Supreme Court has recognized the right to abstain from sexual activity for all women, irrespective of their marital status, as a fundamental right conferred by Article 21 of the Constitution.¹⁵

A bench of Acting Chief Justice Gita Mittal and C Hari Shankar said RIT Foundation versus Union of India that in a relationship like marriage, both man and woman have a right to say 'no' to physical relations. The Delhi High Court, while hearing petitions on making marital rape an offence, has observed that physical force is not necessary for rape as a man could bring her wife under financial pressure to force her for sex. It also held that marriage doesn't mean that wife is always consenting for physical relation with her husband. "Force is not a pre-condition of rape. If a man puts his wife under financial constraint and says he will not give her money for household and kids expenses, unless she indulges in sex with him and she has to do it under this threat. Later, she filed a rape case against the husband, what will happen," the court said. The court rejected the arguments put forward by the NGO Men Welfare Trust which said that in a spousal relationship, use of force or threat of force are important elements to constitute as rape. The bench also observed that marriage gives the right to both man and woman to say no to physical relations. "Marriage does not mean that the woman is all time ready, willing and consenting (for establishing physical relations). The man will have to prove that she was a consenting party," the bench observed.¹⁶

The Government has taken a reactionary stand that condemning marital assault would destabilize the establishment of marriage" and could turn into a simple device to "hassle spouses" is disheartening, disillusioning and regressive to say the least. This patriarchal approach and misogynistic attitude of the government puts the position of women of our country in peril in the very so called safe havens of her own home.

"Marital rape is not a husband's privilege, but rather a violent act and an injustice that must be criminalized," said a Gujarat High Court judge presiding over a case involving a woman who'd accused her husband of sexually assaulting her. He repeatedly forced sex on her, she said. He also subjected her to "mental and physical torture," the woman claimed. Pardiwala.J. ruled that the husband could not be charged with rape in this case since the Indian Penal Code explicitly states that "sexual acts by a man with his own wife ... is not rape." The judge said the man could be charged with sexual harassment and spousal cruelty (which carry lesser punishments than rape). As he delivered his decision, however, Paridwala.J. expressed dismay at the limitations of the law. He advocated for the criminalization of marital rape, saying that outlawing non-consensual sex in a marriage is the "first necessary step in teaching societies that dehumanized treatment of women will not be tolerated." "Marital rape is not a husband's privilege, but rather a violent act and an injustice that must be criminalized," he added.¹⁷

Allowing spousal rape and not criminalizing it, effectively means that human dignity can be accorded lesser value in the case of a woman when she is married. It is inherently wrong and problematic to assure dignity and sexual autonomy to the husband and not the wife. The argument that the act cannot be criminalized to protect the stability of the institution of marriage is base and illogical. Only when two partners are given equal rights over their bodies can the "sacred" institution of marriage thrive.¹⁸

In the aftermath of the Delhi gang rape of 2012, the Justice Verma Committee was set up which recommends the need to remove the exception of marital rape and these were its recommendations

¹⁵ Ibid <https://harvardhrj.com › 2019/01 › marital-rape-a-non-criminalized-crime->
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¹⁶ Read more at:

[//economictimes.indiatimes.com/articleshow/65034722.cms?from=mdr&utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst](http://economictimes.indiatimes.com/articleshow/65034722.cms?from=mdr&utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst)

¹⁷ WORLD NEWS 05/04/2018 8:29 AM IST

<https://www.huffingtonpost.in/entry/india-marital-rape-gujarat-high-court>

¹⁸ India's Marital Rape Problem; *Aahna Rajan*; 14 FEB 2019

<https://intpolicydigest.org/2019/02/14/india-s-marital-rape-problem/>

1. The exception for marital rape is to be removed.
2. The law ought to specify that:
 - (a). A marital or other relationship between the perpetrator and victim is not a valid defence against the crimes of rape or sexual violation;
 - (b). The relationship between the accused and the complainant is not relevant to the inquiry into whether the complainant consented to the sexual activity;
 - (c). The fact that the accused and victim are married or in another intimate relationship may not be regarded as a mitigating factor justifying lower sentences for rape.

It is pertinent to note that in India, one in every ten women was reported facing sexual violence by their husbands during their lifetime. “35.1% of the sample women reported to surveyors in 2005-06 (on which the UN Women 2011 figures for India are based) that they have experienced physical violence by their intimate partners in their lifetime.”

CONCLUSION :

The issue of violence against women is a sensitive issue as it brings the worms out of the cupboards of homes that have tightly closed door. It is therefore important to address the safety of women and prevention of violence against women from their very homes. It is a basic need to make the home a safe place in its true sense for women. This in turn entails an open and clear understanding and discussion about the issue of respect to women and their dignity within home which has to stand in stark contrast to the patriarchal notion of considering her as a chattel. Till the time society, government, legislature and judiciary all do not come together to take this initiative treating women as individuals within or without marriage, the situation of women is not going to improve. There has to be an equal partnership. In a marriage it is of utmost necessity to include and imbibe the concept of consent within marital relation. Acknowledging the fact that women have a right over their bodies is essential to promote the concept of consensual sex. Challenging the deeply ingrained stereotypes, widespread entrenched mentality and questioning the biased values may provide the solutions to the issue of discrimination and violence within marriage.¹⁹

If the true essence of Equality of women at all levels is to be achieved in our country, the patriarchal and dogmatic attitude of oppressing system, women needs to be replaced by an inclusive structure that promotes women's equality to the level where women have sexual autonomy, right to self-determination in the home and outside, protection of their self-dignity and physical integrity. An amendment of the criminal laws should be so structured as to give a significant and symbolic recognition of women's equality and right to their bodily integrity. Once this step is effectively taken it will bring about a proper realisation of women's right of equality. All this can be achieved only when it is accompanied by a paradigm shift in the social mind set followed by a political transformations that brings about economic and social independence for women.

¹⁹ The Social And Legal Paradox Relating to Marital Rape in India: Addressing Structural Inequalities
Shalu Nigam