



Marriage – A Licence to Rape

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Abstract

Sir Matthew Hale, a renowned seventeenth century English Jurist came up with a theory that postulated legal impossibility of marital rape, as wedding vows imply wife's ongoing consent to sex. In his work, *Historia Placitorum Coronae – History of Pleas of the Crown*, he laid down that ¹

“The husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract wife hath given up herself in this kind unto her husband, which she cannot retract.”

This rule is infamously called Hale's Doctrine. He takes his source of authority from judgment laid down in *Rex V Jackson, R & RY. 487*, wherein it was held that *“a man having a connexion with a woman under a deceit practised on her, she supposing him to be her husband, is not guilty of the offence of rape.”* From this very unusual legal doctrine England had a rather long route to travel towards criminalising rape. Many world nations have criminalised rape, but India is yet to follow their footsteps. In this article, I seek to look into the position held by world nations with respect to marital rape with special emphasis on India's neighbours. I also seek to understand the stance taken by India and explore if it is valid in this day and age of liberty and liberalisation.

Keywords: Marital Rape, Indian law on Marital Rape, Rape within Marriage, Consent to sex within Marriage.

¹ Sir Matthew Hale, *Historia Placitorum Coronae – History of Pleas of the Crown*, Vol I, 1847, retrieved from https://upload.wikimedia.org/wikipedia/commons/1/15/Matthew_Hale%2C_Historia_Placitorum_Coron%C3%A6_%281st_American_ed%2C_1847%2C_vol_1%29.pdf, retrieved on 24/12/2021.

Introduction

A Survey conducted by Research Institute for Compassionate Economics, found that 98% of rapes of women worldwide were committed by their husbands.² In 2015, a terrible scandal hit headlines in United Kingdom. Charlie Tetley had drugged his wife Sarah Tetley and raped her while she was unconscious. There were 300 hundred such instances of rape tapes done by the husband while she was unconscious. These tapes were made during a time period of 2 years. She was unaware of being drug raped until the day she woke up from her unconscious state to witness her husband molesting her. The video recordings which were produced in the Court showed her husband not just raping her but also inserting various common household articles inside her. He is currently serving 12 years prison term after pleading guilty to five counts of rape, attempted rape and eight counts of assault by penetration amongst other charges.³ This became possible only because United Kingdom treats marital rape as a serious offence.

George Bernard Shaw famously observed ‘*Unless, the law of marriage was first made human, it could never become divine.*’ Marital laws must be framed in such a manner that it ensures both the parties to it, stand in equal footing. Across the world including India this is the norm in various aspects of personal laws especially aspects of marriage such as divorce, maintenance, custody of children, property rights as well as judicial separation. But India shies away from the concept of marital rape, hiding behind the universal excuse of Indian culture and customs. Marital rape is a crime that shamefully till today stands decriminalised in India. We are one of the mere 36 countries across world that has this dubious distinction.⁴ We stand hand in hand with countries such as Afghanistan, China, Kuwait, Malaysia, Syria and Sudan.⁵ Section 3 of the Protection of Women from Domestic Violence Act 2005, clearly points out that sexual abuse is also a form of domestic violence, but the Act fails to criminalise the same. Section 17 of the said Act merely provides for civil remedy, ensuring that the woman can continue to share matrimonial residence even after refusing to have sex with her husband.

India has been up to a certain, extent aware of the clamour to criminalise marital rape. When questioned in 2016, then Union Minister Maneka Gandhi responded that marital rape cannot be applied in Indian context due to factors such as illiteracy, poverty, customs, religious beliefs and mind set of the society to treat marriage as a sacrament. Responding to reporters’ questions about our Union Minister’s opinion, Mrs. Helene Clarke, Head of UN Development Programme, stated that each country must look at its law in light of *Sustainable Goals*. She scathingly observed ‘*It is pretty clear in the circles I move in at the UN that rape is rape. The issue is consent of women, and if it isn’t there, its rape. It is a crime; it has to be recognised*

² Benjamin Kentish, Independent (2017), Indian Government Files Legal Papers to Try to Stop Marital Rape Being Outlawed [2017 September, 1], retrieved from <https://www.independent.co.uk/news/world/asia/india-marital-rape-ban-fight-legal-papers-file-parliament-law-change-marriage-a7924106.html>, last accessed on 24/12/2021.

³ Caroline Mcguire, Daily Mail[2015], My husband raped me 300 times while I Slept: Horrified Mother, 26, discovers Pervert Partner Filmed Sickening Assault for Two Years [2015 June, 15], retrieved from <https://www.dailymail.co.uk/femail/article-2910936/My-husband-raped-hundreds-times-slept.html>, last accessed on 24/12/2021.

⁴ India Today (2016) Marital Rape in India: 36 Countries where Marital Rape is Not a Crime [2016, March 12], retrieved from <https://www.indiatoday.in/education-today/gk-current-affairs/story/marital-rape-312955-2016-03-12>, last accessed on 24/12/2021.

⁵ Ibid.

and dealt with.⁶ This age old excuse that when a woman gets married she becomes her husband's chattel, making her a slave to her husband's needs; she exists only to perform her wifely duties have long gone stale.

In India, rape as defined in Section 375 of Indian Penal Code has a specific exclusion clause that, sexual intercourse by a man with his own wife, wife not being below 15 years of age, is not a rape. The age mentioned in this exception clause is in itself eyebrow rising, as Indian law holds child marriage a criminal offence. The Child Marriage Restraint Act lays down the minimum age for marriage as 18 years for a woman; this law again stands reiterated by The Prohibition of Child Marriage Act 2006. Reality is of course different, as child marriage is permitted and permissible amongst Indian Muslims and many tribal communities. Thus any law and any court rulings against criminalising marital rape also had a bearing upon these child brides. This pitiable position of child brides was finally acknowledged by the Indian Supreme Court in *Independent Thought V Union of India*⁷, wherein the Supreme Court laid down that the exception to S.375 of Indian Penal Code, must be read as '*sexual intercourse by a man with his wife, wife not being 18 years, is not rape.*' But, the Supreme Court issued a further note of caution in the judgment itself observing that '*this judgment is not to be taken as an observation in one way or another with regard to issue of marital rape.*' It is bone chilling to note that even child brides had to face marital rape as a part and parcel of their wifely duties until the Supreme Court deemed it fit enough to intervene on their behalf in 2017. In other news, as a further step to ensure equality amongst genders, the government has a proposal to amend the Prohibition of Child Marriage Act (PCMA), 2006 to raise the minimum age for marriage as 21 years for women also, even as the silence towards recognition of marital rape is deafening.⁸

Why to Treat Marital Rape as a Criminal Offence?

In 1983, the Andhra Pradesh High Court had struck down S.9 of Hindu Marriage Act, which deals with restitution of conjugal rights.⁹ Andhara Pradesh High Court observed that this particular section was violate of right to liberty, privacy and dignity guaranteed under Art 21. The Court went on to observe that forced marital relations might result in a woman carrying a child without her own will and wish. The Court pointed out that "*In a matter which is so intimately concerns her body and which is so vital for her life, a decree of restitution of conjugal rights totally excludes her.*" The same argument holds valid in case of marital rape also, a woman must always have right over her own body, a right to say YES or NO.

Perhaps, as the principles elaborated upon while striking down restitution of conjugal rights was far ahead of our times, our society refused to catch up; barely an year ahead Delhi High Court upheld the validity of

⁶ Kayleigh Lewis, Independent [2016], UN urges India to Outlaw Marital Rape After Women's Minister Says it is not Applicable [2016, March 15], retrieved from <https://independent.co.uk/news/world/asia/rape-india-married-women-un-undp-sdg-sustainable-development-goals-a6931821.html>, last accessed on 24/12/2021.

⁷ (2017) 10 SCC 800.

⁸ Tarushi Aswani, The Diplomat [2021], India Proposes to Raise Legal Marriage Age for Women [2021, December 28], retrieved from <https://thediplomat.com/2021/12/india-proposes-to-raise-legal-marriage-age-for-women/#:~:text=On%20December%2016%2C%20the%20Narendra,2006%2C%20was%20introduced%20in%20Parliament.> , last accessed on 29/12/2021.

⁹ T. Sareetha vs T. Venkata Subbaiah, AIR 1983 AP 356

S. 9 of Hindu Marriage Act.¹⁰ Later Supreme Court¹¹ tried to reconcile the difference between these two judgments by holding that S. 9 of Hindu Marriage Act served a social purpose as an aid to prevent breakup of marriage. S.C. pointed out that S.9 of Hindu Marriage Act only acts as an inducement for spouses to live together and that it did not force an unwilling wife to submit to sexual intercourse with her husband. How valid this particular observation of Supreme Court is, is a point to ponder upon, as Marital Rape is not an offence in India.

S. 375 of IPC excludes forceful sexual intercourse within a marriage from the definition of rape. This classification of married woman as a different group doesn't make much sense, as it fails the condition that the differentia must have a rational relation to the object sought to be achieved by the legislation under Art 14 of our Constitution.¹² The aim behind the particular section is to protect a woman from unwanted sexual advances, then how will marriage act as a defence in such cases? The argument that a wife is giving irrevocable perpetual consent is absurd and irrational, thereby defeating intelligible differentia requirement of Art. 14. Our Supreme Court has negated doctrine of waiver as far as fundamental rights are concerned. In *Muthiah v.CIT*¹³, Supreme Court held that, it is not open to a citizen to waive any of the fundamental rights conferred by Part III of the Constitution. Thus it stands to reason that a married woman also retains her fundamental right to life and personal liberty and cannot be forced to silently submit to marital rape citing irrevocable perpetual consent.

Yet again as was observed on in *T. Sareetha vs T. Venkata Subbaiah*¹⁴ it also violates a women's right to life and personal liberty, privacy and much vaunted right to dignity. For, right to life includes a life that is beyond mere animal existence.¹⁵ This turning blind eye to marital rape is violate of Art 21 of our constitution, as it runs into ground a married woman's right to bodily self-determination and right to good health, all of which have been recognized as an integral part of the right to life and personal liberty at various points of time. Marriage is no excuse to take away these fundamental human and constitutional rights from a woman.

In *State of Maharashtra And Anr vs Madhukar Narayan Mardikar*¹⁶, Supreme Court had very scathingly observed 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."* Does the same rule not hold good for a married woman? Does a woman give away her fundamental rights simply because she got married?

¹⁰ *Harvinder Kaur vs Harmander Singh Choudhry*, AIR 1984 Delhi 66.

¹¹ *Smt. Saroj Rani vs Sudarshan Kumar Chadha*, 1984 AIR 1562.

¹² *Ibid.*

¹³ 1956 AIR 269.

¹⁴ AIR 1983 AP 356

¹⁵ *Bandhua Mukti Morcha v. Union of India*, AIR 1984 SC 802, 811.

¹⁶ AIR 1991 SC 207.

United Nations' Fight against Marital Rape

In 1993, United Nations General Assembly proclaimed *Declaration on the Elimination of Violence Against Women*, in which it stated that violence against women includes marital rape.¹⁷ United Nations observed that only 4 in 10 countries criminalised marital rape. United Nations in its press release stated that 'three billion women and children live in countries where rape within marriage is not explicitly criminalised'¹⁸ during the press meet that followed Executive Director of United Nations Women, Phumzile Mlambo-Ngcuka observed that 'Home is one of the most dangerous places for women.'¹⁹ In UN Report Progress of World's Women 2019-20 the following statistics were laid down:

- Only 42% of the world's nations have explicitly criminalised marital rape [77/185].²⁰
- Of the remaining 108 countries, 74 countries have provisions in place for women to file criminal complaint against husbands for rape.²¹
- Out of the remaining 108 countries, 34 countries have not criminalised marital rape, so they cannot file any criminal cases.²²
- There are 12 countries still retain clauses exempting perpetrators of rape from persecution if they subsequently marry the victim.²³

Some of the statistics United Nations has put forth over a period of time are rather alarming²⁴

- National studies show that up to 70% of women have experienced physical and or sexual violence from an intimate partner in their life time.
- In majority of countries, adolescent girls are most at risk of forced sex by a current or former husband or boyfriend. Based on data from 28 countries, only 1% of such victims sought professional help.²⁵
- Evidence show that women experiencing this type of violence from husbands have higher rate of depression, abortion and even acquire HIV.

Major World Nations on Tackling Marital Rape

Many countries across the world have criminalised rape, during the second wave of feminism around late 1970s. The ground work for voices against marital rape was first laid by second wave feminists like *Brown Miller*. Her book *Against Our Will: Men Women and Rape* took the world by a storm and brought spot light on Marital Rape. She was amongst the feminist leaders who spearheaded the beginning of marital

¹⁷ Article 2, Declaration on the Elimination of Violence Against Women 1993.

¹⁸ Press Release [2019, June 25], New UN Women Report Puts Forth Policy Agenda to End Gender Inequalities Within Families, retrieved from <https://www.unwomen.org/en/news/stories/2019/6/press-release-progress-of-the-worlds-women-2019>, last accessed on 2/1/2022.

¹⁹ Ellen Wulffhorst, Reuters [2019], UN Urges Legal Reform To Protect Women From Rape at Home [2019 June 25], retrieved from <https://www.reuters.com/article/amp/idUSKCN1tQ1YY>, last accessed on 2/1/2021.

²⁰ UN Report [2019], Progress of World's Women 2019-20, Pg.26

²¹ Ibid, Pg.27

²² Ibid.

²³ Ibid.

²⁴ United Nations, Facts and Figures: Ending Violence Against Women, retrieved from www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures, last accessed on 2/1/2022.

²⁵ UNICEF (2017), A Familiar Face: Violence in Lives of Children and Adolescents Pg.73,84, retrieved from <https://www.unwomen.org/what-we-do/ending-violence-against-women/facts-and-figures>, last accessed on 2/1/2022.

rape laws in USA.²⁶ Some of the major world nations that have criminalised marital rape are Australia, Canada, UK and USA.

United Kingdom

Pressure began to build in UK around 1970 to change the marital rape laws. Many feminist writers such as Elizabeth Elmy began to raise their voice against this grave offence against woman. In fact Elizabeth Elmy argued that Hale's Doctrine degraded every English wife to the legal position of the purchased slave of the harem.²⁷

The real change came in 1991 when a case innocuously named case R v. R²⁸ came up for discussion. In this case the couple got married in 1984, but the wife left her husband due to matrimonial disharmony and settled in with her parents in 1989. She had also left a letter making it pretty clear that she plans to obtain divorce. Husband didn't not take this the right way and forced his way into his wife's home. He attempted to have sexual intercourse with her and when she refused he assaulted her by wringing her neck. Wife filed a complaint based on which police arrested the husband and rather interestingly charged him with rape in contravention of the Sexual Offences (Amendment) Act 1976. Even more interesting is the fact that Lanicester Crown Court sentenced the husband to three-year term imprisonment for attempted rape along with 18 months for assault. Husband obviously displeased with the results went for higher appeal. By the time this case popped up in House of Lords, two other similar cases came along. In Reg v. C²⁹ Simon Brown J. observed that Hale's proposition was no longer the law. Whereas in Reg v. J³⁰ judgment was in line with 1976 Act and it was held that the rape charge against husband was bad as per the statute. It was observed that the term used in the act was 'unlawful' which is akin to 'illicit' or 'outside of marriage' which makes it pretty clear that Hale's Doctrine was incorporated within the 1976 Act. House of Lords, in the R v. R³¹ finally observed that marital rape was a criminal offence. In this case it was observed that the House of Lords had no obstacles in '*declaring that in modern times the supposed marital exemption in rape forms no part of law England.*' In 2003 statutory law also caught up with judiciary and S.1 of Sexual Offences Act 2003 rape included marital rape within its ambit.

United States of America

In 1905 the Hale's Doctrine that no man can rape his own wife was upheld.³² Almost four decades later, law saw no change, no injection of humanity, and once again Hale's Doctrine was seen upheld by the Duckett V State case.³³ The situation began to change finally around late 1970s when voices against Marital rape began to raise. In February 1981, Supreme Court of New Jersey, held that when a husband and wife were in separation, Hale's Doctrine will cease to apply as there no longer exists implied consent. But even

²⁶ Sasha Cohen, Time [2015], How a Book Changed the Way We Talk about Rape [2015 October 7], retrieved from <https://time.com/4062637/against-our-will-40/>, last accessed on 2/1/2022.

²⁷ Mary Shanley (1989) *Feminism, Marriage and Law in Victorian England 1850–1985* (London: Tauris), pp. 184–185.

²⁸ [1992] 1 AC 599.

²⁹ [1991] 1 All. E.R. 755.

³⁰ [1991] 1 All E.R. 759.

³¹ [1992] 1 AC 599.

³² *Frazier V State* 48 Tex. Crim 142.

³³ 149 Tex. Crim. 100.

this decision made it clear that marital rape can be claimed only when husband and wife are separated.³⁴ Finally, in *Commonwealth V James Knowledge Chretien*³⁵, Massachusetts Supreme Judicial Court, in March 1988, brought a historic judgment that '*there was no unfairness in subjecting a defendant to criminal prosecution for rape of wife.*' In this landmark judgment, it was laid down that even in cases where there is no judicial separation and the spouses are within a subsisting matrimony and living together, there was no spousal rape defence or exemption.

A survey during 2005-2010 showing the relationship between the rape victim and the offender shows that nearly 34% of such rapes are by intimate partners.³⁶ Marital Rape stands criminalised in all 50 US States since 1986, but the legislation varies from State to State. But some states in USA show more leniency than others in terms of the definition of marital rape, punishment as well as the law of limitation applicable. Some states permit for dismissal of rape charges, if wife consents and husband is ready to undergo counselling.³⁷

In many States such as Connecticut, Ohio, Minnesota and Rhode Island there are many loopholes in the law. Most of the above mentioned States do not treat drug rape of one's wife as marital rape, as an offence. Former Lawmaker Greta Johnson first sought to change this deplorable position in 2015 but the Bill got derailed. Now, there is again an opposition attempt to reintroduce the Bill.³⁸

In 2017, Jenny Teeson fought and lost a bitter battle against her rapist husband in Minnesota. She was drugged and raped by her husband who also had the habit of taping those rapes. Even though those tapes were brought into evidence, Teeson's husband was able to escape with 45 day jail sentencing for invasion of privacy, a mere slap on his wrists.³⁹ Minnesota was amongst the States that did not treat drug rape of one's own wife a criminal offence. Jenny Teeson undeterred launched a singlehanded campaign to ensure that the laws are rewritten, so that no one in future faced the same helplessness she felt. In February 2019, she saw her first taste of success, when a Bill to repeal the voluntary relationship defence was unanimously passed in the State House.⁴⁰ In 4th May 2019, Governor Tim Walz, signed the new law, which

³⁴ State of New Jersey V Smith ,426 A.2d 38.

³⁵ 383 Mass 123.

³⁶ Special Report US. Department of Justice, Office of Justice Bureau of Justice, Statistics Programs [March 2013], Female Victims of Sexual Violence 1994-2010, retrieved from <https://www.bjs.gov/content/pub/pdf/fvsv9410.pdf>, last accessed on 5/1/2022.

³⁷ Deborah C. England, The History of Marital Rape Laws, retrieved from <https://www.criminaldefenselawyer.com/resources/criminal-defense/crime-penalties/marital-rape.htm>, last retrieved on 5/1/2022.

³⁸ Julie Carr Smyth and Steve Karnowski, Associated Press [2019], Some States Seek to Close Loopholes in Marital Rape Laws [2019 May 4], retrieved from <https://www.usnews.com/news/politics/articles/2019-05-04/lawmakers-target-spouses-who-drug-rape-their-partners>, last accessed on 5/1/2022.

³⁹ Stephen Mortemayor, Star Tribune [2019], Her Husband was not Convicted of Drugging and Raping her – Because it is Still Legal in Minnesota [2019 February 22], retrieved from <http://m.startribune.com/her-husband-was-not-convicted-of-drugging-and-raping-her-because-it-is-still-legal-in-minnesota/506246802/>, last accessed on 5/1/2022.

⁴⁰ Karen Zraick, The New York Times[2019], Inside one Woman's Fight to Rewrite the Law on Marital Rape[2019 April 13], retrieved from <https://www.nytimes.com/2019/04/13/us/marital-rape-law-minnesota.html>, last accessed on 5/1/2022.

went into force from 1st July 2019, finally removing one of the major loopholes in marital rape laws.⁴¹ Many States across USA are taking steps to replicate the same.

Indian Neighbours

The countries with which India shared its origin and culture have taken different turns while tackling marital rape. It will help us understand the present day scenario much better, if we study the positions our neighbour countries such as Afghanistan Bangladesh Bhutan China and Pakistan are in.

Afghanistan

Afghanistan has not criminalised marital rape. Furthermore, Article 134(2) of Shia Personal Law Status Law, grants husband right to withdraw material support to his wife by even denial of food if she refuses to submit to his sexual advances.⁴² The 2009 Law drew huge international condemnation causing many clauses to be changed or removed, such as the one, which required the wife to submit to her husband's sexual advances at least once in every four days.⁴³

Bangladesh

In Bangladesh there are laws that prohibit spousal physical abuse, but these laws make no provision for spousal rape. A 2015 survey done by Bangladesh Government showed that, physical and or sexual intimate partner violence for past 12 months was 26.9%, while during the entire life time around 54.2%.⁴⁴ While child rape is defined in S.375 of The Penal Code, 1860 explanation to that section provides that sexual intercourse by a man with his own wife, wife not being 13 years of age, is not rape. Thus, there is no protection for even a child above 13 years of age if she is raped by her own husband.

China

A Chinese Survey conducted in 1994 by Institute of Population, China Academy of Social Science [CASS] showed that 19.84% urban husbands and 27.39 rural husbands believed that wife cannot refuse to have sex with husband. Correspondingly, 18.66% of urban women and 33.59% of rural women held similar beliefs. China has no provisions to punish marital rape. Most people in China don't consider it appropriate in Chinese context to define marital rape as a crime, as they believe that couples are bound by marital

⁴¹ Amir Vera CNN[2019], Marital Rape is no longer legal in Minnesota under new law [2019 May 04], retrieved from <https://edition.cnn.com/2019/05/03/us/minnesota-marital-rape-repeal/index.html#:~:text=Tim%20Walz%20signs%20a%20bill,accused%20of%20raping%20their%20spouse>, last accessed on 5/1/2022.

⁴² Jurist.org [2009], Afghanistan's Shia Personal Status Law Treats Woman as Second Class Citizens [2009 August 17], retrieved from <https://www.jurist.org/commentary/2009/08/afghanistans-shia-personal-status-law/>, last accessed on 5/1/2022.

⁴³ Ben Farmer, Telegraph [2019], Afghanistan Revises Marriage Law But Woman Still Required to Submit to Sexual Intercourse [2009 July 9], retrieved from <https://www.telegraph.co.uk/news/worldnews/asia/afghanistan/5790702/Afghanistan-revises-marriage-law-but-women-still-required-to-submit-to-sexual-intercourse.html>, last accessed on 5/1/2022.

⁴⁴ Bangladesh Bureau of Statistics 2016, Report on Violence Against Women Survey 2015, retrieved from <https://evaw-global-database.unwomen.org/-/media/files/un%20women/vaw/vaw%20survey/bangladesh%20vaw%20survey%202015.pdf?vs=2125>, last accessed on 10/1/2022.

contract.⁴⁵ Li Yuan observed that most view marital rape through cultural lens, that rape exists only outside marital relationships as Chinese culture called for ‘...*the principle of collective interests. Wives being wives should respond to husband’s desire for sex because of women’s obligations, thus woman’s right to say no disappear in such cultural endorsement.*⁴⁶

Pakistan

S.375 of Pakistan’s Penal Code was amended in 2006 to read that a man commits rape if the sexual intercourse is without the approval of a woman. A simple reading of this section shows that marital rape can also be included within its ambit, as the defence of matrimony is not available as an exception to the definition of rape. Thus, it can be argued that this amendment in 2006 has created a scope for the courts to recognise marital rape as an offence.⁴⁷

Bhutan

In Bhutan, marital rape law is recognised which classifies it as a petty misdemeanour. S. 199 of the Bhutanese Penal Code makes it clear that a spouse (both sexes) is guilty of marital rape if they engage in sexual intercourse without the consent /will of their counterpart. S. 200 of the Penal Code classifies marital rape as petty misdemeanour which carries a punishment of one month to one year at the maximum.⁴⁸

Nepal

Nepal is yet another Indian neighbour that has criminalised marital rape with up to 5 years of imprisonment. In May 2002, highest court of Nepal took a decision to outlaw marital rape based on a petition filed by Forum for Women Law and Development (FWLD) a women’s right group. In this case, the Supreme Court of Nepal had directed its parliament to amend their criminal laws to include marital rape as a criminal law. In 2017 a bill to amend was brought in⁴⁹ and S. 219 (4) of the Nepali Criminal Law laid down that if a man rapes his wife when he is still in marital relationship with her, he shall be sentenced to up to 5 years in jail.⁵⁰

⁴⁵ Qihua Ye [2016], Introduction to Issue of Rape in China as a Developing Country, International Approach to Rape, edited by Westmarland N and Gangoli G [Pp. 60,61], Policy Press[2012].

⁴⁶ Yuan L [2005], Reconciving Women’s Equality in China, P.94, Lanham: Lexington Books [2005].

⁴⁷ The Daily Star [2020], Marital rape and the law [2020, November 10], retrieved from <https://www.thedailystar.net/law-our-rights/news/marital-rape-and-the-law-1992473>, last accessed on 22/1/2022.

⁴⁸ S.3(c) of Penal Code of Bhutan, retrieved from oecd.org/site/adboecdanti-corruptioninitiative/46814108.pdf, accessed on 20/1/2022.

⁴⁹ The Himalayan Times [2017], New law sets five-year jail term for marital rape, Himalayan News Service [2017 October 30], retrieved from <https://thehimalayantimes.com/kathmandu/new-law-sets-five-year-jail-term-marital-rape>, last accessed on 20/1/2022.

⁵⁰ Harsh Mahaseth, South Asia Journal [2018], Nepal’s Parliament raises punishment for marital rape – but differentiates [2018 April 11], retrieved from <http://southasiajournal.net/nepals-parliament-raises-punishment-for-marital-rape-but-differentiates>, last accessed on 20/1/2022

Present Position in India

In 2000, Law Commission of India in response to a petition⁵¹ filed by Sakshi a woman's right organisation observed that it was not inclined to recommend criminalising marital rape.⁵² The Law Commission refused to recommend deletion of the exception to S.375 of IPC which explicitly decriminalises marital rape, stating that it will amount to excessive interference with matrimonial relationships.

In 2013 Justice JS Verma Committee recommended for criminalising marital rape.⁵³ The report observed that marital rape must not be treated as a lesser degree of offence than rape, merely because of the subsisting relationship between a man and his wife. The report forged ahead to point out the need to educate and orient the society especially prosecutors and police towards marital rape.

In 2015, Supreme Court refused to entertain a plea to declare marital rape a criminal offence. The plea was filed by a Delhi based MNC executive, who said she was treated to repeated sexual abuse and violence at the hands of her husband. She pleaded the court that she had no legal remedy as marital rape was not criminalised in India. But, Supreme Court responded that she was espousing a personal cause and not a public cause.⁵⁴ In other words, Supreme Court said that the criminal laws in India can be changed to accommodate individual needs.

In 2018, Gujrat High Court looked into various aspects of marital rape including application of S.377 of Indian Penal Code, pertaining to unnatural offence.⁵⁵ In this case it was observed that as far as unnatural offences are concerned they do not look into the aspect of consent. So the myth of perpetual consent from a wife will have no role to play here, making S.377 of IPC applicable as against husband also. The only point to be noted is that the section is not inclusive in nature and limits itself to sodomy, buggery and bestiality. The High Court also stated that as far as present day legal position in India is concerned wife cannot successfully bring a rape case against her husband, as marital rape is not criminalised in India. High Court went ahead to lament against this deplorable state of affairs and pointed out that "*the exemption given to marital rape stems from long out dated notion of marriage which regarded wives as no more than property of their husbands.*"

In March 2019, a Public Interest Litigation was filed in the Supreme Court requesting the court to direct the government to legislate laws and byelaw criminalising marital rape as well as making it a ground for divorce. The PIL also sought for directions to the government to frame guidelines for registration of FIR in marital

⁵¹ Sakshi vs Union Of India, 2004 Supp(2) SCR 723.

⁵² Review Of Rape Laws, Law Commission Of India Report No. 172, 2000, retrieved from <http://www.bareactslive.com/LCR/LC172.htm>, last accessed on 20/01/2022.

⁵³ Justice JS Verma Committee Report on Amendments to Criminal Law 2013, retrieved from https://www.thehindu.com/multimedia/archive/01340/Justice_Verma_Comm_1340438a.pdf, last accessed on 20/01/2022.

⁵⁴ Bhadra Sinha, Hindustan Times [2015], S C rejects plea to make marital rape a criminal offence [2015 February 18], retrieved from <https://www.hindustantimes.com/india/sc-rejects-plea-to-make-marital-rape-a-criminal-offence/story-URH9IRXhJPK58Qy6AySjPM.html>, last accessed on 21/1/2022.

⁵⁵ Nimeshbhai Bharatbhai Desai vs State Of Gujarat, 2018 SCC Online Guj 732.

rape cases.⁵⁶ But, Supreme Court refused to entertain this PIL as Delhi High Court was entertaining a similar issue.⁵⁷

This 2015 case is now in the final stages of hearing in Delhi High Court even as I put forth my views in this article. Senior Advocate Rebecca John appearing as amicus curiae pointed out before the court that she was well in favour of recognising marital rape as an offence. In fact she argued that it was not recognition or creation of a new offence rather only removal of immunity that was accorded to the husbands in cases of marital rape.⁵⁸ The debate is still raging on with no end at sight, as the government is still dragging its feet holding on to age old barbaric thoughts. Thus, even though the society at present is repeatedly requesting the Courts to intervene on behalf of hapless women who are raped within their marriages, the Courts as well as the Legislatures are not willing to take the step ahead.

Conclusion

It is high time that India leaves behind such historical hang ups and marches ahead with need of the time and society. A woman does not waive of her fundamental rights guaranteed to all and sundry, simply because she went ahead and got married. Citing illiteracy, poverty, customs, religious beliefs and mind set of the society to treat marriage as a sacrament is nothing but a bundle of excuses as both the legislature and judiciary wants to play safe. When adultery was decriminalised, the nation did not look into religious factors, rather it moved ahead with the dictates of time. Thus, I believe that our society is evolved enough to understand that a woman always retains a right over her own body, and let a married woman regain back her right to sexual privacy as well as right to dignity. Only can only hope, justice is finally rendered to the women in India.

⁵⁶ Satya Prakash , The Tribune [2019], PIL in SC seeks guidelines to penalise marital rape [2019 March 31], retrieved from <https://www.tribuneindia.com/news/archive/nation/pil-in-sc-seeks-guidelines-to-penalise-marital-rape-750895>, last accessed on 21/1/2022.

⁵⁷ The Tribune [2019], SC refuses to entertain PIL on marital rape [2019 July 1], retrieved from <https://www.tribuneindia.com/news/archive/nation/sc-refuses-to-entertain-pil-on-marital-rape-795567>, last accessed on 21/1/2022.

⁵⁸ Nupur Thapliyal, Live Law [2022], Marital Rape - Removal Of Exception From Sec 375 IPC Will Uphold Woman's Bodily Integrity: Rebecca John To Delhi High Court[20/1/2022], retrieved from <https://www.livelaw.in/top-stories/marital-rape-removal-of-exception-from-sec-375-ipc-will-uphold-womans-bodily-integrity-rebecca-john-to-delhi-high-court-189985>, last accessed on 22/1/2022.