

# MARITAL RAPE: SORDID REALITY BEHIND CLOSED DOORS

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## ABSTRACT:

Marital rape is not criminalized as a rape in India and as well as other countries even though it violates and breaches the rights, trust and dignity of a married woman when it occurs within the four walls of the matrimonial home. It raises a question that, marriage has been treated as the sacrament between husband and wife so does marriage give license for forcing, beating and assaulting wife and also does a married woman can be treated as object or property. Moreover, it raises the question that does marriage gives license to rape a woman even though she refuses to do the sex. This article points out that married women who are raped by their husbands are often suffering severe long-term physical and emotional consequences. Marital rape may be even more traumatic than rape by a stranger. Today we talk about women empowerment in India but did we really mean it as we didn't criminalize marital rape. This shows the clear influence of patriarchal society in India. The two essential of Rape as defined under Section 375 of IPC, 1860, i.e. without the consent and against the will of a woman.

## INTRODUCTION:

Marriage is an institution which admits men and women to family life. It generates love and trust. It is a stable relationship in which a man and a woman are socially permitted to have children implying the right to sexual relations.<sup>1</sup> The Institution of marriage gives permission to a male and a female to live together under customary and statutory law. It is a special bond shared between

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<sup>1</sup> Blog, Vapsoft Technologies Pvt Ltd, <http://www.vapsoft.org/meaning-of-indian-marriage/> (last visited Sep 10, 2017).

two souls, who tie the wedding knot after promising to be companions for a lifetime. It is the physical, mental and spiritual unison of two souls.<sup>2</sup> Marriage means the spouses are ready to share, understand and respect each other feelings and respect their dignity. In marriage, women are assaulted within the four walls of matrimonial home amounting to marital rape. The marital rape varies within different countries, marital rape can be defined as unwanted intercourse with the wife within the four walls of the matrimonial home. Marital rape is a form of rape but the difference between them is that in marital rape the rape is done by the husband and in rape it is done by the stranger. The most painful thing in marital rape is that it is done by the husband without the consent of the wife. Researchers have examined the prevalence of different types of rape, they have found that marital rape accounts for approximately 25% of all rapes (Randall & Haskall, 1995; Resnick, Kilpatrick, Walsh, & Vernon, 1991<sup>3</sup>.) Women are at particularly high risk for being raped by their partners under following circumstances:

- a.) Women married to domineering men who view them as 'property'.
- b.) Women who are in physically violent relationships.
- c.) Women who are pregnant.
- d.) Women who are ill or recovery from surgery.
- e.) Women who are separated or divorced.

Rape in India is define under *Section 375 of the Indian Penal Code, 1860*, and give seven instances when it would consider as a rape. The circumstances being:<sup>4</sup>

First- Against her will.

Secondly- Without her consent.

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<sup>2</sup> What Is Marriage, What Is Marriage - Meaning Of Marriage, Significance Of Wedding, <http://weddings.iloveindia.com/features/what-is-marriage.html> (last visited Sep 15, 2017).

<sup>3</sup> Raquel Kennedy Bergen & Elizabeth Barnhill, Marital Rape: New Research and Directions VAWnet, <https://vawnet.org/material/marital-rape-new-research-and-directions> (last visited Sep 17, 2017).

<sup>4</sup> [advocatekhoj.com](http://www.advocatekhoj.com), For sections 375,376,376A, 376B, 376Cand 376D of the Penal Code, the following sections shall be substituted, namely | Criminal Law (Amendment) Act, 2013 | Bare Acts | Law Library | AdvocateKhoj, [http://www.advocatekhoj.com/library/bareacts/criminallawamendment/9.php?Title=Criminal Law %20Amendment%20Act%202013&STitle=For sections 375%20376%20376A%20376B%20376Cand 376D of the Penal Code%20 the following sections shall be substituted%20 namely](http://www.advocatekhoj.com/library/bareacts/criminallawamendment/9.php?Title=Criminal%20Law%20Amendment%20Act%202013&STitle=For%20sections%20375%20376%20376A%20376B%20376Cand%20376D%20of%20the%20Penal%20Code%20the%20following%20sections%20shall%20be%20substituted%20namely) (last visited Sep 18, 2017).

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.

The following exceptions given under the abovementioned section:

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

The scope of Rape has been elaborated and termed under Sexual Assault. The Criminal Law (Amendment) Act, 2013 which was originally an [Ordinance](#) promulgated by the [President of India, Pranab Mukherjee](#), on 3 April 2013, in light of the protests in the [2012 Delhi gang rape case](#) it has modified to constitute the other aspect as well.

*Section 376B of the Indian Penal Code, 1860, says that-*<sup>5</sup>

Intercourse by a man with his wife during separation. Whoever has sexual intercourse with his own wife, who is living separately whether under a decree of separation or otherwise, without her consent shall be punished with imprisonment of either description for a term which shall not be less than two years but which may extend to seven years and shall also be liable to fine.

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<sup>5</sup> Ibid

Explanation- In this section, “sexual intercourse” shall mean any of the acts mentioned in clauses (a) to (d) of section 375.

Only two age groups are covered under the aforementioned section, i.e. 15 years and 12 years. The girl below the age of 12 years rape within marital bonds, he may be punished with rigorous imprisonment for a period of 10 years or more whereas the girl under the age of 15 years carries a lesser sentence if the rapist is married to the victim. Once the age crosses fifteen years, the rape legislation affords absolute immunity to the husband to impose himself on his wife and exercise complete sexual control over her body, in direct contravention to Human Rights Regulations.

### **BRIEF LEGAL HISTORY OF MARITAL RAPE:**

Ancient India presented a picture of gender equality and independence. Men and women were treated at par with each other and enjoyed their rights with equal fervor and zeal. It was, but natural, that in such an enlightened society the offence of rape was viewed as an invasion of a woman’s bodily integrity- and infringement of her self-esteem, dignity and honor.<sup>6</sup> Marital Rape has emerged from the legal community. It is improbable that in marriage which is sacrament between husband and wife that the rape can be done by the husband upon his wife. Throughout the history of most societies, it has been acceptable for men to force their wives to have sex against her will.<sup>7</sup> *Sir Mathew Hale, Chief Justice in England*, during the 1600s traced the statement of marital rape exemption that, “The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife hath given herself in kind unto the husband, whom she cannot retract.”<sup>8</sup> *Lord Keith* said that “marriage is in modern times regarded as a partnership of equals and no longer alone in which the wife must be subservient

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<sup>6</sup> Gifty Oommen, Marital Rape– Is IT or Not a Sexual offence–A Retrospection [https://www.worldwidejournals.com/international-journal-of-scientific-research-\(IJSR\),https://www.worldwidejournals.com/international-journal-of-scientific-research-\(IJSR\)/articles.php?val=MjAzOA&b1=313&k=79](https://www.worldwidejournals.com/international-journal-of-scientific-research-(IJSR),https://www.worldwidejournals.com/international-journal-of-scientific-research-(IJSR)/articles.php?val=MjAzOA&b1=313&k=79) (last visited Sep 20, 2017).

<sup>7</sup> Priyanka Rath, India Law Journal, [http://www.indialawjournal.org/archives/volume2/issue\\_2/article\\_by\\_priyanka.html](http://www.indialawjournal.org/archives/volume2/issue_2/article_by_priyanka.html) (last visited Sep 21, 2017).

<sup>8</sup> Ibid

chattel of the husband.”<sup>9</sup> Some countries like America (18 states), Australia (3 states), New Zealand, Canada, Israel, France, Sweden, Denmark, Norway, Soviet Union, Poland and Czechoslovakia where marital rape is illegal whereas countries like China, Afghanistan, Pakistan, and Saudi Arabia did not criminalize marital rape.<sup>10</sup> So here itself we can have a view that different countries have a different prospectus regarding marital rape. In India there is no laws regarding marital rape, and it is very difficult to prove by the wife that she was raped by her husband.

### **STARTLING MARITAL RAPE SURVEYS:**

Marital rape is both common and an un-reported crime. A study conducted by NFHS survey in the year 2005-2006 that 80,000 women in the age between 15 and 49 on sexual violence by the husband and the other men<sup>11</sup>. In the year 2003 and 2013 NCRB reported that, 50,703 cases reported for domestic violence and 1,18,000 domestic violence cases made against women far ahead the figures of molestation, rape.<sup>12</sup> The UN Population Fund states that more than 2/3rds of married women in India, aged 15 to 49 had been beaten, or forced to provide sex. In the year 2005, 6787 cases were recorded of women murdered by their husbands or their husbands’ families<sup>13</sup>. Statistical research reveals that 9 to 15% of married women are subjected to rape by their husbands, a staggering and sobering statistic<sup>14</sup>. NCRB found that in 2014 study by the United Nations Population Fund and the International Center for Research on Women that 98% of all rapes involve perpetrators familiar to survivors. For the average Indian man, masculinity is about “acting tough,

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<sup>9</sup> Shalini Nair, Meet Anam- One of the three petitioners seeking criminalisation of marital rape The Indian Express (2017), <http://indianexpress.com/article/india/meet-anam-marital-rape-survivor-criminal-offence-delhi-high-court-4847094/> (last visited Sep 22, 2017).

<sup>10</sup> Anubhav Pandey, Can a wife file a rape case against husband iPleaders (2017), <https://blog.ipleaders.in/rape-wife-against-husband/> (last visited Sep 22, 2017).

<sup>11</sup> Kanika Sharma & Aashish Gupta, When even rape is legal The Hindu (2015), <http://www.thehindu.com/opinion/op-ed/when-even-rape-is-legal/article7298898.ece> (last visited Sep 23, 2017).

<sup>12</sup> Namita Bhandare, Behind closed doors: Marital rape in India [http://www.livemint.com/\(2015\),http://www.livemint.com/Politics/b6HcnmMqYadNzWAP05FbEO/Behind-closed-doors-Marital-rape-in-India.html](http://www.livemint.com/(2015),http://www.livemint.com/Politics/b6HcnmMqYadNzWAP05FbEO/Behind-closed-doors-Marital-rape-in-India.html) (last visited Sep 24, 2017).

<sup>13</sup> Ibid

<sup>14</sup> Gifty Oommen, Marital Rape– Is IT or Not a Sexual offence–A Retrospection [https://www.worldwidejournals.com/international-journal-of-scientific-research-\(IJSR\),https://www.worldwidejournals.com/international-journal-of-scientific-research-\(IJSR\)/articles.php?val=MjAzOA&b1=313&k=79](https://www.worldwidejournals.com/international-journal-of-scientific-research-(IJSR),https://www.worldwidejournals.com/international-journal-of-scientific-research-(IJSR)/articles.php?val=MjAzOA&b1=313&k=79) (last visited Sep 24, 2017).



freely exercising his privilege to lay down the rules controlling women”<sup>15</sup> Estimate stated that 75% of Pakistan’s female prisoners are victims of rape. Bertrand Russell in his book *Marriage and Morals* saw marriage as one of the most conventional forms of livelihood for a woman where the frequency of undesired intercourse she has to give in to is in all probabilities higher than that endured by a prostitute. Still the problem of marital rape has received very little attention from the activists, criminal justice system and the society at large. The concept of rape in marriage got recognition only after 1970s. The right of a husband to have sexual intercourse with his wife was considered to be one of the most natural implications of the contract of marriage<sup>16</sup>. Despite an increase in reporting among survivors following the passage of the Criminal Law (Amendment) Act, 2013, rape continues to remain under-reported. Only about six of every 100 acts of sexual violence committed by men other than husbands actually get reported, says a report by Aashish Gupta of Rice Institute, a non-profit research organization. “Most incidence of sexual violence, however, were committed by husbands of the survivors: the number of women who experienced sexual violence by husbands was 40 times the number of women who experienced sexual violence by non-intimate perpetrators.”<sup>17</sup> The survey doesn’t end the figures goes on but one thing what we can see from the above statistics that though there is women empowerment in India but the dignity what women need is still not given by their family and they are treated as equivalent to slaves.

### **JUSTICE VERMA COMMITTEE REPORTS AND 172<sup>nd</sup> LAW COMMISSION REPORT:**

Justice Verma Committee, 2013 recommendation on the view of marital rape:

1. The exception for marital rape be removed.
2. The law ought to specify that:

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<sup>15</sup> Namita Bhandare, Behind closed doors: Marital rape in India [http://www.livemint.com/\(2015\),  
http://www.livemint.com/Politics/b6HcnmMqYadNzWAP05FbEO/Behind-closed-doors-Marital-rape-in-India.html](http://www.livemint.com/(2015),http://www.livemint.com/Politics/b6HcnmMqYadNzWAP05FbEO/Behind-closed-doors-Marital-rape-in-India.html) (last visited Sep 24, 2017).

<sup>16</sup> A Rape Covered Under The Veil Of Marriage, LawFarm, <https://www.lawfarm.in/blogs/a-rape-covered-under-the-veil-of-marriage> (last visited Sep 26, 2017).

<sup>17</sup> Namita Bhandare, Behind closed doors: Marital rape in India [http://www.livemint.com/\(2015\),  
http://www.livemint.com/Politics/b6HcnmMqYadNzWAP05FbEO/Behind-closed-doors-Marital-rape-in-India.html](http://www.livemint.com/(2015),http://www.livemint.com/Politics/b6HcnmMqYadNzWAP05FbEO/Behind-closed-doors-Marital-rape-in-India.html) (last visited Sep 26, 2017).

- A marital or other relationship between the perpetrator or victim is not a valid defence against the crimes of rape or sexual violation;
- The relationship between the accused and the complainant is not relevant to the inquiry into whether the complainant consented to the sexual activity;
- 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.

Though the committee had recommended the removal of the exception for marital rape but no steps has been taken by the legislation regarding it.<sup>18</sup>

The 172<sup>nd</sup> Law Commission report had made the following recommendations for substantial change in the law with regard to rape: <sup>19</sup>

1. 'Rape' should be replaced by the term 'sexual assault'.
2. 'Sexual intercourse as contained in section 375 of IPC should include all forms of penetration such as penile/vaginal, penile/oral, finger/vaginal, finger/anal and object/vaginal.
3. In the light of *Sakshi v. Union of India and Others [2004 (5) SCC 518]*, 'sexual assault on any part of the body should be construed as rape.
4. Marital rape: explanation (2) of section 375 of IPC should be deleted. Forced sexual intercourse by a husband with his wife should be treated equally as an offence just as any physical violence by a husband against the wife is treated as an offence. On the same reasoning, section 376 A was to be deleted.

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<sup>18</sup> Gifty Oommen, Marital Rape– Is IT or Not a Sexual offence–A Retrospection [https://www.worldwidejournals.com/international-journal-of-scientific-research-\(IJSR\),https://www.worldwidejournals.com/international-journal-of-scientific-research-\(IJSR\)/articles.php?val=MjAzOA&b1=313&k=79](https://www.worldwidejournals.com/international-journal-of-scientific-research-(IJSR),https://www.worldwidejournals.com/international-journal-of-scientific-research-(IJSR)/articles.php?val=MjAzOA&b1=313&k=79) (last visited Sep 26, 2017).

<sup>19</sup> Priyanka Rath, India Law Journal, [http://www.indialawjournal.org/archives/volume2/issue\\_2/article\\_by\\_priyanka.html](http://www.indialawjournal.org/archives/volume2/issue_2/article_by_priyanka.html) (last visited Sep 26, 2017).

5. Under the Indian Evidence Act (IEA), when alleged that a victim consented to the sexual act and it is denied, the court shall presume it to be so.

### **EFFECTS ON MARITAL RAPE SURVIVORS:**

The term ‘marital rape’ refers to unwanted intercourse by a man on his wife obtained by force, threat of force or physical violence or when she is unable to give consent. In marital rape the women faces many psychological as well as physical problems in the form of 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. Dr Suneeta Mittal, director and head, (department of obstetrics and gynaecology) at Fortis Memorial Research Institute, Gurgaon said that for many, the idea of sexual consent in marriage is an anomaly. “If she’s given her consent to marriage, then by definition, she is consenting to a sexual relationship. It’s possible that at times she may not be well or feel like having sex and the husband might insist, but by that definition every husband will become a rapist and there is no way prove such marital rape unless it is associated with domestic violence.”<sup>20</sup> Some of the short-term effect of martial rape includes, include anxiety, shock, intense fear, depression, suicidal ideation, and post-traumatic stress. Long-term effects often include disordered eating, sleep problems, depression, problems in establishing trusting relationships, and increased negative feelings about themselves.

There is a large body of research that addresses the inadequate response of the police to the problem of wife abuse. The limited research on the question of police response to marital rape reveals an equally dismal picture. The majority of women reporting their assaults to the police in studies found the police to be unresponsive. Marital rape survivors reveal that when police officers learn that the assailant is the woman’s husband, they may fail to respond to a call from a victim of

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<sup>20</sup> Namita Bhandare, Behind closed doors: Marital rape in India [http://www.livemint.com/\(2015\),  
http://www.livemint.com/Politics/b6HcnmMqYadNzWAP05FbEO/Behind-closed-doors-Marital-rape-in-India.html](http://www.livemint.com/(2015),http://www.livemint.com/Politics/b6HcnmMqYadNzWAP05FbEO/Behind-closed-doors-Marital-rape-in-India.html) (last visited Sep 26, 2017).



marital rape, refuse to allow a woman to file a complaint, and/or refuse to accompany her to the hospital to collect medical evidence.<sup>21</sup>

### LEGAL PROVISION IN INDIA:

The concept of right to life under Article 21 of the Indian Constitution includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and mingling with fellow human beings. The right to live with human dignity is one of the most inherent qualities of the right to life which recognizes the autonomy of an individual. The Supreme Court has held in a catena of cases that the offence of rape violates the right to life and the right to live with human dignity of the victim of the crime of rape. The Supreme Court has held that rape is not merely an offence under the Indian Penal Code, but is a crime against the entire society. Rape is less of a sexual offence than an act of aggression aimed at degrading and humiliating the women. Thus the marital exemption doctrine is also vocative of a woman's right to live with human dignity. Any law which legitimizes the right of a husband to compel the wife into having sexual intercourse against her will and without her consent goes the against the very essence of right to life under Article 21 and is hence unconstitutional.<sup>22</sup> The 42<sup>nd</sup> Law Commission Report (1972) suggested that marital rape should be criminalized. However, actions were not taken to that effect and the 84<sup>th</sup> Report (1980) was not in favour of the criminalization.

In the year 1996 the Supreme Court of India in *Bodhisattwa Gautam v. Subhra Chakraborty* classified rape as a crime against the basic human rights and a violation of the victim's most

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<sup>21</sup> Marital Rape: New Research and Directions, VAWnet, [http://www.vawnet.org/summary.php?doc\\_id=248&find\\_type=web\\_desc\\_AR](http://www.vawnet.org/summary.php?doc_id=248&find_type=web_desc_AR) (last visited Sep 28, 2017).

<sup>22</sup> Hariharan Kumar, Marital Rape Academike (ISSN: 2349-9796) (2014), <https://www.lawctopus.com/academike/marital-rape/> (last visited Sep 29, 2017).

cherished of fundamental rights, namely, the right to life enshrined in Article 21 of the Constitution. However, the Apex Court negated this very pronouncement by not recognizing marital rape. This shows that the Indian courts as well as the law makers have made recommendations and pointed out the need for penalizing marital rape several times. Still there has not been any substantial change in this field. There are a lot of loopholes in the Indian legal system when it comes to marital rape. It not only provides immunity to the rapist husband but is also silent with regard to a lot of questions. For example, there are no provisions to deal with the cases of rape which are committed by the husband in collusion with a third person or if rape is committed by both the husband and a third person. Whether the third person will only be punished for rape, or whether the husband, would escape punishment for marital rape owing to his relationship with the victim are some of the many questions which the law has failed to adequately answer.

The Hon'ble High Court of Delhi has rightly pointed out in the case of *Meena & Anr. v. State & Anr. on 17 October, 2012* where the Court observed that if a girl who is not the wife of the man but is below 16 years of age (15 as per the Criminal Law Amendment 2013) then even the consensual intercourse between the two amounts to rape. But if the girl is above 16 years and is wife of the man, then even the forced intercourse is not rape. This provision in the Indian Penal Code, 1860 is a specific illustration which shows that the legislature has legitimized the concept of child marriage by keeping a lower age of consent for marital intercourse.<sup>23</sup>

## CONCLUSION:

Marriage is an institution which admits men and women to family life. It generates love and trust. The concept of marital rape is an oxymoron. It is a rape under the veil of marriage. Marriage is not a license for sex. Just because a woman says "I do" to marriage it does not mean that she has said "I do" to sex whenever, wherever, and however her husband wants it. Many men took advantage of this crime as it would be impossible to prove rape within marriage. The study proved that

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<sup>23</sup> A Rape Covered Under The Veil Of Marriage, LawFarm, <https://www.lawfarm.in/blogs/a-rape-covered-under-the-veil-of-marriage> (last visited Sep 29, 2017).

married women who are raped by their husbands are often suffering severe long-term physical, emotional consequences and more traumatic than rape by a stranger. We have to come together under one roof in order to protect the dignity of women and stand as their voice so that masses can hear whatever the consequences they have faced so that another won't face such consequences. Married women can be considered as a property or the ancillary chattel of the husband. In today's scenario we require generation of awareness along with judicial awakenings. What really needs to be done is to educate both boys and men to not rape women and view them as a valuable partners in every aspect of life.

