

## CONTINUITY WITHOUT CONSENT?

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Change is the only constant. Change in ideas, change in behaviour, change in outlook - this is what evolves humankind. What was perhaps admissible a few decades ago, may or may not be in the present time and situation. The practices in execution in the past happen to have materialised and emerged on account of the available information and the encompassing customs or traditions prevalent in that phase. But today, in the 21 century, there is hope and expectation of justice being granted with the same extent of progress, as time. While observance and convention as a manifestation of custom or tradition hold due esteem in various domains of life, the wrong, if any, must be undone. The author proceeds using the instance of marital rape in India - its occurrence, responsibility and outcomes, to examine and establish the need for the metamorphosis of such a laws and provisions.

Section 375 of the Indian Penal Code defines and explains sexual assault, with a second exception clause stating that sexual activity or sexual intercourse by a man with his own wife (recently amended to wife not being under 18 years of age) does not amount to the crime of rape.

Section 375, that earlier defined and explained 'rape,' was sought inefficient in defining and reflecting the various forms of sexual assault that women are subjected to in reality. The Indian Penal Code, in light of the inadequacies of law relating to rape, suggested that the legislature must bring about the necessary changes. Such recommendations were recognised by the Supreme Court via the case of *Sakhi vs Union of India*<sup>1</sup> and the new bill was drafted, based on the 172nd Law Commission report. The provision sought to exclude married girls of under 15 years of age previously, but with the recent landmark judgement of *Independent thoughts vs Union of India*<sup>2</sup>, the exclusion extends upto married girls of 18 years of age. While such a revision, in all certainty, is a step towards a veritable scenario, the honourable courts must not uptake any more time in criminalising marital rape altogether.

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<sup>1</sup> AIR 2004 SC 3566

<sup>2</sup> *Independent Thought vs Union of India*, WP (Civil) No. 382 of 2013, decided on October 11, 2017

The very presence of such an exception lies in the historical view and acceptance of women in our country. The marital rape exemption can be traced back to scholarly views, like that of Sir Mathew Hale, former Chief Justice in the court of law in England, during the 1600s, wherein he states in course of judgement, "*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.*" In India, the women, whether queens or otherwise, were considered mere property or possessions of the husbands. In the royal front, women were 'won' in battles or were a part of transactions for the purpose of peace. The public life saw no-consent marriages and miserable working allowances and living conditions. Hence, the notion that women imply consent through marriage of the sexual interests of their husbands was during the period when the men made all the decisions<sup>3</sup>. The acceptance of a woman as an equal individual is something that unfortunately occurred only very late in history. So, when the Indian Penal Code was drafted in the year 1860, it was in such reckoning that the officials provided for such a provision. Engrained in custom, marriage was upheld to be the epitome of all social institutions and in order to prevent any possible instability, such an exception was maybe introduced. It should also be taken note of here, that the socio-economic background and prevalent illiteracy did not invite any sort of objection and hence, the existence and usage.

So while the founding premise of such a law is justifiable on grounds of the then existing factors in India, there stands no prudent reason for its continuity into present time. Women are no longer subordinate possessions of men and the validation lies in the enormous achievements in every field, so to begin justifying on the very surface. It is time to withdraw the distinction between rape within or external of the relation of marriage and prey on the fact, that the action lacks willingness and consent. On concordance with the fact that an endeavour is scarce of mutual approval, law must step in and aim to provide recourse for the same. The argument of implied consent gradually supplements the implausibility of such thought, for the very reason that an individual enters the institution of marriage at a time and position where such violence may not be possible to foresee. Marriage is not a one-time entry contract and as individuals, situations and phases of life change, so does the activity alter. One cannot expect that a human

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<sup>3</sup> Harman, John D. "Consent, Harm, and Marital Rape," *Journal of Family Law* vol. 22, no. 3 (1983-1984): p. 423-444

enters into any social institution with such a level of comprehensive and calculative insight into the future, that all probabilities and possibilities to be considered is the sole responsibility right then. As research scholar Barry phrases it, "A new bride would be surprised indeed to find that she has agreed to give up her right to bodily privacy and to submit to any force, brutal or otherwise, her new spouse might use against her."<sup>4</sup>. A brutal crime such as rape must be confined, in ambit, to engage in the crime of sexual intercourse that lacks consent and marital exemption must find no place in such a provision. The narrow definition provided for in the Indian Penal Code further restricts the benefit of availability of such a law to its citizens. Rape in matrimonial relations is an obnoxious action and must terminate through strict repercussions, irrespective of root cause or reason.

The present day studies elucidate the fraction and extent of marital rape prevalent in India. Between 10 and 24% of married women are raped by their husbands: the incidents of marital rape soars to roughly about 1/3 to 1/2 among the available clinical samples of assaulted women. Sexual assault by the female individual's spouse accounts for nearly 25% of the rapes committed<sup>5</sup>. While one may expect the numbers to be low in urban circumstances, the theory does not follow. It is a conscious process of intimidation and assertion of the superiority of men over women. Moreover, these limited statistics are only based on available assertion. Thousands of cases must be going on each day without anyone noticing at all. Illiterate women, who are not even aware about the concept of 'consent', do not even realise they are being raped everyday. While the very notion of self-will and consent is not understood to some, even those women who are aware of the brutal crime in conduct, are unable to do anything about it. Section 122 of the Indian Evidence Act, 1872 prevents any communication during marriage to be disclosed in the court of law, barring few exceptions. So, privilege of communication is granted in matrimony unless in exceptional cases, wherein such privilege between the spouses is rendered void, with a special reference to the Protection of Women Against Domestic Violence Act, 2005. In simple terms, communication may be disclosed in the court of law in cases of a spouse being prosecuted in view of offence to the other. The problem here lies in the fact that marital rape is not an offence in the Indian legislation to begin with. So evidence in the vocal form such as inflicted threats, will not be admissible in the court of law. This portrays the lack

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<sup>4</sup> Barry, Spousal Rape : The Uncommon Law, 66 A.B.A.J 1088 (1980)

<sup>5</sup> Priyanka R., *Marital Rape in the Indian Legal Scenario*, India Law Journal, Vol. 7

of minimal technical and administrative support that is necessary for change. What disappoints more, is the unfortunate truth of deficiency in social moral support as well. Innumerable families, even today, do not accept and embrace the women who return home as a consequence of collapsed marriages, especially on account of marital rape. The notion of sexual activity and sexual intercourse is still conveniently viewed as her 'duty' and on most occasions, the wife is asked to clear the 'misunderstanding' and proceed further with life as it was. Hence, marital rape in India stands not only unaddressed by the legislative authorities, but is a social stigma as well. Such encompassing factors are unable to instigate any sense of fear in husbands and the crime rate is as it was, if not increasing.

A potent and constructive way to hope for a positive change would be utilise law as a deterrent, and not the final answer (*emphasis added*). Crime rates may not exponentially decline immediately if marital rape is criminalised, but the citizens will know that such actions will have consequences and a change will begin from there. When a country's penal code does not regard enforced sexual relations in marriage as a crime, how can one expect laymen to have any different a view? The penal code of any country is a superior substantive authority, and if unlike the Netherlands, India's penal code fails to recognise such a gruesome crime, the subsequent steps are bound to dissolve. The probability of hesitation among provoked husbands is minimal because surprisingly, they have law backing their actions and sending the message of requisite sexual obligation of women in matrimonial associations.

Another void in the provisions of section 375 of the Indian Penal Code is the absence of gender neutrality. It provides for a man enforcing sexual activity or sexual intercourse, but does not mention the possibility of the man being the victim. Section 375, defining sexual assault clearly reads-

*"375. Sexual Assault: Sexual assault means-*

*(a) The introduction (to any extent) by a man of his penis, into the vagina (which term shall include the labia majora), the anus or urethra or mouth of any woman or child-*

*(b) the introduction to any extent by a man of an object or a part of the body (other than the penis) into the vagina(which term shall include the labia majora) or anus or urethra of a woman*



(c) the introduction to any extent by a person of an object or a part of the body (other than the penis) into the vagina (which term shall include the labia majora) or anus or urethra of a child.  
(d) manipulating any part of the body of a child so as to cause penetration of the vagina (which term shall include labia majora) anus or the urethra of the offender by any part of the child's body;"

Such a provision makes clear the assumption that it is the man who is the offender, and it cannot be otherwise. This deduction is outright biased and discriminatory because it is evident, through reports and cases, that man is not the seducer in every situation. Various complaints of molestation and sexual harassment of boys and men have been filed, and there is a recent uprising in acceptance and discussion of such instances worldwide. The perceived notion of man or the husband being the wrong-doer again traces its path back to the historical conditions of women. Men were considered to be the physical superiors and in light of protection of the then illiterate and socio-economically dependent women, such a provision was deemed fit. But again, the scenario has changed, and men deserve as equal an opportunity of redressal in circumstances of such a crime. In the hope that marital exemption is held void in the situation of rape, it will be unjust if the husband lacks provision of approaching court, in case he is sexually assaulted. Gender neutrality means zero prejudice towards any gender or sexual orientation, and this provision is not prepared for that. In view of the dynamic progress of our country and the recent landmark judgement of *Justice KS Puttaswamy (Retd.) and Anr vs Union of India*<sup>6</sup>, it is not long before Section 377 is amended and the LGBT community is provided with equal rights of marital relations. The provision in Section 375 will prove to be insufficient then again and hence the most cautious protocol will be to maintain gender neutrality in legal provisions. Gender neutral legislations would provide for equal and fair opportunity of redressal to transgender and LGBT communities, which would promote uniformity and harmonise the functioning.

Marriage is upheld to be the most sacred social institution in India, and the criminalisation of marital rape is, in fact, necessary to maintain so. The society must allocate a collective support and dispense a positive outlook towards such changes. The law and the people need to work together in order to mitigate such criminal activities. Consent must not be compromised, whether for economic, social or religious reasons. Rape or sexual assault lacks the very essence

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<sup>6</sup> WRIT PETITION (CIVIL) NO 494 OF 2012

of any social interaction and association, i.e willingness and rapport, which is extremely disturbing. A matrimonial institution must aim to be one of mutual respect and consideration, but if not, law and society must step in together and provide for necessary redressal. The history is of the past for a reason. Assumptions or stereotypes such as the regressive state of women or the man being held as an offender in every situation is entirely unqualified. Today India stands be a democratic and independent state, and minor flaws of this form must not be allowed to penetrate. Times are changing and revolutionary judgements are being passed in the court of law. Justice will be provided when a problem arises, but it is the duty of all, to first and foremost recognise the very problem. Obstructions may arise on various fronts, but the citizens and their law will associate to emerge as an unstoppable unit. The citizens of this country-men, women and transgenders, will soon, sense a parallel amount of safety and security, in the very country they identify to be their own.

