

MARITAL RAPE IN INDIA: DOES THE LEGISLATION UNDERSTAND THE CONCEPT?

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ABSTRACT

Marital rape is sexual violence within the ambit of marriage. It is sexual intercourse imposed or forced by the husband on his wife, as a matter of right, without considering her right to choose and free will. Though it is a form of violence, it lacks criminal sanction. The definition of "Rape" as per the Indian Penal Code, 1860 includes in its scope any non-consensual sexual intercourse with a woman. However, there is an exception to the heinous crime of rape when its occurrence is within the sacrament of marriage.

It is the need of the hour to criminalize the offence of marital rape by amending procedural and substantive laws. This Legislative move will protect the livelihood, rights and interests of women, uplifting the status of the feminine gender, stepping towards a developed nation from a mere patriarchal society. As rightly stated in the case of *K.S Puttaswamy v. Union of India*, such laws will affirm the right of privacy of an individual by giving them the yardstick of control in making decisions concerning their own body. This also reinstates the right to self-determination.

The Authors seek to address the problem of the inability of the Legislature and Judiciary in dealing with the concept of marital rape. The essay has four sections. The first dealing with the definition of rape, marital rape given by various scholars belonging to different schools of thought and how it is a form of sexual violence. The second section deals with the scope of rape and marital rape in India. The third component of the essay focuses on how the crime of Marital Rape is approached by the United Kingdom and Canada. The essay is concluded by the fourth section emphasizing the need for marital rape laws in India, what can be adopted from foreign legislations and the importance to reinstate that a marriage certificate is not

treated as a license to rape one's spouse.

INTRODUCTION

The question arises as to the reasons withholding the world's largest democracy in criminalizing the atrocious crime of marital rape. Owing to its history, India is assumed to be a patriarchal society. The culture and mind-set has not changed to a large extent. The cornerstone of criminal law, where the act or omission of the accused is to be judged from the viewpoint of 'reasonableness' or 'reasonable person', depends entirely on the basis of a male perspective. Women, therefore, end up being individuals who lack their right to bodily autonomy. The Judiciary is also responsible for the inability in identifying rape within Marriage as a criminal offence. As per the case of *RIT v. Union of India* W.P (C) No. 284/2015, the High Court of Delhi held that, marital rape cannot be recognized an offence as it has the ability of destabilizing the institution of marriage and can be arbitrarily used to harass innocent husband.

Laws have strengthened the position of women, in general. However, this strength is not assured in case of marital rape as it indirectly discriminates women by holding an erroneous presumption that women are the property of the men. By virtue of this lacuna that exists in the legislation, the right to dignity and bodily integrity is compromised and there is the absence of the right to decline to indulge in sexual intercourse with one's own husband.

Absence of marital rape laws in India directly strikes the Fundamental Rights envisaged under Part III of the Constitution of India, 1950, that is guaranteed to all citizens irrespective of any grounds of discrimination. Article 14 of the Indian Constitution, i.e. equal protection of laws and equality before the law, is being discriminated upon as there is a demarcation between married women in terms of the kind of protection they receive from matrimonial offences. To evidence this is, Section 375 of the Indian Penal Code, 1860, envelopes the definition of rape and envelops it as the non-consensual sexual intercourse of a wife below the age of fifteen. However, this discriminates those wives who are victims of rape who cannot enforce their right for the basic reason that they are above the age of fifteen.

As per the case of *K.S Puttaswamy v. Union of India*, Writ petition (Civil) No. 494 of 2012, the right to privacy was included in the ambit of Article 21, "the right to life and personal

liberty". It was cited in this case that, "*While the assertion that the exception to Section 375 of the Indian Penal Code 1860 protects the most intimate sphere of personal privacy of married couples, it actually infringes on the individuals' right to privacy, dignity, and personal liberty. The exception should be removed in order to ensure that women can exercise their constitutional right to decisional privacy regardless of their marital status.*" The moment one's free will is curtailed by another, and such curtailment is backed by the Act of the Parliament, Article 21 springs into action as it degrades the constitutional assurance of one's right to a dignified life.

Banking on the assumption and understanding that laws should cater to the future and not restrict its boundaries on the present situation, it is imperative for the Country to look into such issues. Since women have always been considered and treated as the inferior gender, such laws will give them equal status enhancing their position in the household and in the society, as a whole.

WHAT IS SEXUAL VIOLENCE?

According to the **World Health Organisation**, Sexual violence is defined as, "*any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed, against a person's sexuality using coercion, by any person regardless of their relationship to the victim, in any setting, including but not limited to home and work.*"ⁱ

The definition of sexual violence depends on the element of „consent" of the victim. Where any sexual activity, gesture or advance is imposed on another, without their free will or acceptance, it culminates into sexual violence. Irrespective of its nature and form, it has a huge traumatic impact on the physical and mental health, not forgetting the temporary or permanent repercussions incurred by the victim.ⁱⁱ

WHAT IS RAPE?

In legal terms, 'rape' is defined as, "*The unlawful carnal knowledge of a woman by a man forcibly and against her will.*"ⁱⁱⁱ According to **Schulhofer's** idea of rape, it comes within the

ambit of a sexual crime and has expressive action of intercourse committed without consent or the freedom of choice.^{iv}

Historically, *Brownmiller's* perspective of rape was in consonance with property crime.^v This regarded persons to also fall under the category of 'property', which meant any harm done to women is treated as the theft of a women's dignity and integrity without her consent.^{vi} This perception was acknowledged and practiced in Athens, Greece, England and Babylon.^{vii}

During the course of the 20th century, theories explaining sexual aggression came into the picture, which primarily focused on the growing sexual urge of a man and their inability to control their impulses. This further led to the conceptualizing of rape as an act of violence.^{viii}

Many research studies and discussions have proved that there is no necessity that what one defines as rape is accepted to another in the same way.^{ix} This shows that rape is subjective and the understanding of the concept cannot be generalized, however it is imperative to know different philosophies in order to think rationally of its evil in society.

This notion is properly emphasized in the case of *Zabusk*, where the Pasadena Supreme Court Judge, J. Gilbert C. Alston, dismissed charges of rape on a Hispanic prostitute as he believed that a prostitute can never claim rape even though she was subjected to forceful sexual intercourse. In this case, the prostitute accepted only oral copulation and was violently forced into sexual intercourse. The Judge dismissed the case commenting, "*A whore is a whore is a whore.*"^x

Rape is regarded to be a raging topic in today's world because of its frequencies and the stage the world is in today- one that gives equal rights to men and women.^{xi} From time immemorial, rape has been a weapon used to instill fear in the woman which directly targets their integrity and dignity.^{xii}

As stated by *Rachael Jewkes*, the Director of 'What Works to Prevent Violence against Women and Girls, "*Rape is an extreme consequence of sexual harassment*".^{xiii} Rape is one of the most common forms of sexual violence and has the scope of being addressed as there has been a paradigm shift in the outlook of people in terms of required safety of a woman at every juncture of their life. The subject of rape was once a hushed up affair because it was believed to lower the status of women and her family in society. Due to this man-made perception, perpetrators were never brought to ask and given the punishment they deserve.

Feminists believe that when a question of rape is brought before the court, the court focuses on what way they can penalise the wrong-doer coupled with the physical and mental injury succumbed by the woman.^{xiv} The idea that men own women have been done away with and been replaced by the interests and bodily control that women have on themselves.^{xv}

Over the last decade, countries have developed to such an extent that they have initiated special programs to assist the victims of rape, their families and friends in coping with an aftermath of the incident.^{xvi} The perception of rape has changed over the period of time and has engulfed more into its ambit to protect the dignity of women, married or unmarried.

WHAT IS MARITAL RAPE?

In layman's terms, marital rape is the rape of the wife committed by her husband. Marital Rape is said to be the most widespread problem for women, one that has been in existence for a long time but has never recognised. The perspective of a women being raped by her own husband was never taken seriously which is why there was not much one could do about it.

Consensual sexual intercourse between husband and wife is said to take place when both consent to the act out of free will, where there is a request from one party and the acceptance of the request by the other.^{xvii} Free will is when the decision is taken voluntarily, without fear of the consequences of not accepting, coercion or any type of misrepresentation. Moreover, it is important that both parties understand the act in the same way.

According to *J.D Goodchilds and G.L Zeelman*, marital rape is when the male partner aggressively seeks sexual intercourse and assumes consent present from his partner without the need to get a verbal confirmation on the same. When there is no meeting of minds on this matter, there is a misunderstanding which leads to unwanted marital rape.^{xviii} This theory also believes that men assume that when a woman is showing resistance, it is 'token resistance' and not actual.^{xix} Token resistance is the traditional myth that is practiced only by women wherein a sexual engagement, she refuses to be involved in sexual intercourse, when they actually want it.^{xx}

Burgess believed that rape does not only have to be constricted to sexual intercourse but also to psychological and physical abuse that arise from it, which can involve being punched,

beaten, hit, cut, burned. Psychological abuse includes threat to harm a loved one, loss of employment, usage of weapons.^{xxi}

Alex Lyon, Minister of State at the Home Office, United Kingdom Parliament (1974), commented on the aspect of Marital Rape to the *Select Committee on Violence in Marriage*, and expressed that he believed it is a waste of time for the Judiciary if they envisaged into attempting to solve the difficulties and sufferings faced by battered wives.^{xxii}

The outlook was of such that the nature of rape laws extended to only between those who did not share an intimate relationship, i.e. strangers. It is a highly complex issue and one that is particularly hard as the victim has to differentiate on the basis as to what extent of sexual acts are with consent and is voluntary and not coerced.^{xxiii} It was always perceived that there was always implied consent on the part of the wife which showed her willingness to participate in the act and hence could not be taken up as an assault or harassment before the court of law.^{xxiv}

THE CONCEPT OF MARITAL RAPE IN INDIA

Crimes against women have been on the rise in India. The *National Crime Records Bureau* (NCRB)^{xxv} in its report on the Crime Statistics in India 2016 show an overwhelming number of 39 crimes reported against women per hour. The most number of crimes against women were perpetrated by the husband or by his relatives or family members accounting to 33% of total crimes in that year.^{xxvi} The crime of Marital Rape in India falls within the purview of cruelty by the husband under domestic violence and is handled by the family courts of the country. It is not taken up as a criminal matter, in the sense that it is not against the State like other criminal offences where it is the State prosecuting the victim.

LEGAL STATUTES AND THE VIEWPOINT OF THE JUDICIARY

Marital Rape is not recognised as a legal offence in India and there is no legal sanction to enforce it though society is aware of its happenings. However, rape in India has been identified under the category of “sexual assault” by way of Section 375 of the Indian Penal Code, 1860.

Section 375 of the Indian Penal Code, 1860

The section defines sexual assault as any of the acts- penetration of the penis into the mouth, vagina, urethra, anus of a woman or forcing her to do so with another man. It includes inserting a foreign object into a woman, manipulation of her body part or application of his mouth to her body. All this is considered sexual assault only if it is done by a man on a woman and not vice versa.

There are circumstances listed in the Section which gives the mental state of the woman to enforce this section. Rape is committed when a man has sexual intercourse with a woman against her will or without her consent or with her consent when this consent is procured by inducing fear of death or of hurt or when the woman consents thinking she is legally married to the man but the man is aware that he is not her husband.

Another component in the definition that caused upheaval in the country was that only if the wife is below the age of 15 years, it can be classified as rape irrespective of her consent. This rage was because it meant that a wife below the age of majority in the country, i.e. 16 to 18, could be raped by the husband and the perpetrator could not be punished just because he was married to her.

The punishment for rape is imprisonment of seven years which may extend to ten years and/or fine deemed fit by the court.^{xxvii} In the case of *State of Uttar Pradesh v. Chottey Lal*^{xxviii}, the Supreme Court defined “against her will” as, if the intercourse was imposed on her in spite of her resisting or opposing the same.^{xxix}

The Court in the case of *Sheoji Singh v. State*^{xxx} distinguished between consent and submission, where the latter is with free will and fully aware of the implications, whereas the latter is resorting to the fact because of helplessness.

In 2004, a fast-track court in the country's capital Delhi, repeatedly relied on this exception to the rule in sexual intercourse and held that even if sex was taken forcefully it cannot be classified as rape as the victim and the accused are married.^{xxxi}

Sakshi v. Union of India^{xxxii}, where rape was free of its restrictive meaning. This case brought forward the Amendment of 2013 of the Indian Penal Code, 1860 where the definition was given a wider meaning so as to keep up with the changing times. Before the amendment of

2013, rape referred only to penile and vaginal penetration.^{xxxiii} The Amendment of 2013 encompassed acts under the purview of rape even if it does not include the penetration by a male organ. It included foreign objects, oral sex and manipulation of a woman's body part.
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In 2017, the definition was refined a little more due to the case of *Independent Thought v. Union of India*,^{xxxv} which removed the earlier discrimination that the Indian Penal Code had with respect to the sexual intercourse of husband and wife when the latter is between 15 years and 18 years of age. The Court decided that the discrimination was arbitrary and not in consonance with the true spirit of the act and principle of equality under the Constitution of India, 1950.^{xxxvi}

This judgment seemed to be long due by the Indian Judiciary as according to the Indian Majority Act, a minor is one who is under the age of 18.^{xxxvii}

Protection of Women from Domestic Violence Act, 2005 (PWDVA)

This Act is said to be a mixture of civil and criminal law, since women require civil remedies such as protection and residence orders and also criminal remedies like the enforcement of abuse.^{xxxviii} The Act defines domestic violence as any harm or injury that affects the health of the victim which includes abuse of physical, sexual, verbal, emotional or economic nature.^{xxxix} Sexual abuse is given in the act as any conduct which is of sexual nature that abuses, degrades or humiliates the woman, thereby lowering her dignity.^{xl}

The Act deals with any form of abuse perpetrated by any member of the family on a female in that family. Therefore, with respect to a married woman, the Act secures her rights in the matrimonial home.

This Act specifically does not deal with marital rape and is very wide in its scope and extent of operation and hence does not serve the purpose of eradicating marital rape or bringing the perpetrator to task.

Section 498A of Indian Penal Code, 1860.

Since women do not have legal sanction to go to court if in case of marital rape, they use the provision of Section 498A of the Indian Penal Code, 1860. Cruelty is defined as any conduct that is imposed on the wife by the husband or his family which is the reason for her to suicide or injures her mentally or physically which may or may not lead to danger to life.^{xli} It includes any harassment which forces her to meet any demand which is of unlawful nature, monetary and non-monetary and draws a punishment of three years or/and fine as the Court deems fit.^{xlii}

The law itself shows that marital rape is not recognised or enforceable. The legislations dealing with cruelty or violence within a household does not do justice to the magnitude of the crime of marital rape. Societal and Political Perspective: To understand the societal viewpoint on the matter of marital rape in India and the opinion of various politicians, the researcher relies on newspaper reports. There lies no single reason behind marital rape in India but is certain that its non-enforceability is responsible for its growing trend. **Haribhai Chaudhary**, the Minister of State for Coal and Mines in the Government of India is of the view that Marital Rape is a far-fetched dream of the country and cannot be made a criminal offence due to reasons of poverty, illiteracy, varied religious beliefs and most importantly the sanctity of marriage.^{xliii}

Women from different races, age groups, social classes and backgrounds are exposed to sexual offences. However, those who are of lower classes of society are at a greater risk than others and this specificity is dependent on the circumstances and situation in that country.^{xliv}

Sexual abuse is common in India mainly because of it being considered a patriarchal society whereby the man is of a higher platform or value than a woman. This has been the root cause of many problems and of diminishing social order. Currently, India stands in the third position in the number of illiterates in the world. Every one out of three people are considered to be illiterate in the country.^{xlv}

Even though majority are literate, husbands are always given a higher status than the wife, irrespective of the social status or education or any other factor that exists. There is a social stigma which exists in the country where women are treated as mere objects of pleasure for a man and this is not something that will go away in the passage of years. The **Justice J.S Verma Committee** believes that society connotes marriage as the wife being the property of the husband and this is the root cause of marital rape.^{xlvi}

In 2011, a survey was conducted by the *International Centre for Research on Women* and found that every one out of five men in India force their partners into sexual intercourse.^{xlvii}

The world, till date, suffers from the inability to recognize women as equals in comparison to men. However, countries have been more feminist in the recent era by expanding the definition of rape and what it encompasses.^{xlviii} Countries have adopted laws to enrich women and protect their rights and interests in society.

The Parliamentary panel^{xlix} set up to examine the Criminal Law (Amendment) Bill, 2012 discussed on the facet of marital rape. The Chairman of the panel believed that if it were to be criminalized, it has the potential of destructing the institution of marriage.¹ In its report, the committee had commented stating that, *"In India, for ages, the family system has evolved ... Family is able to resolve the (marital) problems and there is also a provision under the law for cruelty against women, It was, therefore, felt that if marital rape is brought under the law, the entire family system will be under great stress and the committee may perhaps be doing more injustice"*

To reiterate, India has a diverse population in many ways- status, education, ethnicity and religion. What is common between all of them is that the man is always the head of the house and his word is law and women often believe that they have no choice but to give way to what their husband requires. Because of this mindset, they are not able to draw the line to what is consented to and what goes beyond.

The Indian Government commenting on this matter said that India does not have to blindly follow the doings of the Western Countries and criminalise marital rape as the country is facing its own set of problems like lack of financial empowerment of females, backward mindset of society which need to be addressed before thinking of punishing husbands for sexually assaulting their wives.^{li}

Resistance is present on the side of the Legislators; however it also is apparent on the side of society. This is due to the concept of subjectivity. As one is not aware about what constitutes marital rape, what appears to be marital rape to one wife may not be the same to another wife. This blurs the lines between what is enforceable and what is not.^{lii}

Giving the viewpoints of the judiciary by way of case laws, the thoughts of the legislature and that of society, the researcher affirms that everyone is aware of the concept of marital

rape and the evil it does to social development. However, there is not much anyone can do unless the judiciary takes sufficient steps towards its eradication.

MARITAL RAPE IN OTHER JURISDICTIONS:

According to *Dripps and Schulhofer*, different jurisdiction define rape in varied angles, in accordance with their domestic environment, two components are underlying and common in every definition- force and consent.

I. United Kingdom

Scotland and other such countries whose legal systems are embedded in English Law had criminalized marital rape but it took longer for England and Wales to shift their perspective from the theory of Sir Mathew Hale to the position of criminalizing it. In the 17th Century, *Sir Hale*, in his book^{liii}, had suggested that no husband can be held guilty for a rape committed on his own lawful wife since the wife had given up herself to her husband by matrimonial consent which cannot be retracted.^{liv}

There were many cases that came before the court with the crime of marital rape and it was interpreted in varied ways. The Ecclesiastical Court in the case of *Popkin v. Popkin*^{lv} held that the husband has full rights over his legally wedded bride as long as it does not endanger her health.^{lvi} Here the extent to which health is endangered was not given. It was no encapsulated whether mental health could also be included.

In 1976, the Amendment of the Sexual Offences Act, provided for the first time a solid and statutory definition of rape as a man who commits the act of unlawful sexual intercourse with a woman knowing fully well that she does not consent to it or when he not absolute about her consent but still commits the act.^{lvii}

The definition did not cater to marital rape as it gives the element of unlawful sexual intercourse which does not imply the intercourse in a marriage as it is regarded to be a lawful relationship. This showed that the legislature intended on keeping the immunity to husbands.^{lviii}

The scenario changed in time whereby the Law Commission Report in the 1990's urged the Parliament to make laws criminalizing marital rape as it was found that every one out of seven married women in the country fall victim to this.^{lix}

The Lords in the case of *R v. R*^{lx} reasoned a great deal about the element of consent in the ambit of rape and if it was forced in nature. In this case, a husband and wife were separated as per their own terms intending to get a divorce. The husband urged his wife to meet him to speak on the matter and when she was alone in her parent's home, he forced himself on her and attempted to have sexual intercourse with her against her will. In the course of such intentions, he assaulted her by strangling her neck with his hands.^{lxi} The question before the Lord Lane C.J, Sir Stephen Brown P., and the others at the House of Lords was if the husband could use his defence that they are legally married and intercourse between them, be it forced or unforced, does not constitute rape.

Putting it all in perspective, the case removed the immunity given to husbands in the case of marital rape so as to put the wife and the husband on an equal standing. Pondering upon the belief of Sir Hale whose view was used as a precedent, it was made known that the book was published 60 years after the death of Sir Hale which made his thoughts oblivious to the autocracies that can emerge in a matrimonial home.

The case of *R v. R* brought forward the 1994 Criminal Justice and Public Order Act which recognized and criminalized rape within a marriage and also removed from it the word "unlawful" which made it apparent that even in a lawful relationship, there has to be willful consent from both parties to sexual intercourse.

Therefore, the definition of rape stands unshaken without the word "unlawful" and also requires consent which means that there must be consideration to ensure that the victim has consented having the same line of understanding that the husband has.^{lxii}

According to the House of Lords in 1991, Lord Keith made a statement that marriage is the union of two equals where the wife is no longer submissive to the husband.^{lxiii} As rightly put by *Estelle B. Freedman*, rape is the theft of a woman's virtue or a daughter's virginity or the married woman's honour.^{lxiv} The UK author encompasses in his straight forward definition that the woman maybe of any age group and also of any relationship status. It also involves the nature of the perpetrators- one who is unknown, known or even as close as the husband itself.

This shows the forwardness of the country in accepting that there is a possibility of a woman or a wife not always having implied consent to have sexual intercourse with her husband. This

shows that women are not objectified and they have the right to enforce if they are being wronged.

Apart from that, there were considerable efforts made by the judiciary in redefining the term rape and changing certain words so that the connotations can be apt to the current times.

2. Canada

Up until 1983, there existed a myth that wives were in the state of constant or continuous consent to sexual intercourse or activities within the relationship of marriage.^{lxv} It is for this reason that the Canadian Criminal Code did not encompass marital rape as a criminal offence. And for that reason, the husband could be taken to court on the grounds of indecent assault, common assault or assault causing bodily harm.^{lxvi}

The amendment in 1983 focused on uplifting the position given to women within the marital home by protecting her from this heinous crime of marital rape. The amendments removed this exemption of marital rape, the use of history of the victim, their reputation, the need for corroboration to the victim's statements.^{lxvii} Apart from this legislation had shifted from focusing on "sex" to "sexual violence" as an act that is violent and against one's personal dignity. Another important aspect was the duty of the Judges to use the "equality-based analysis" when looking into evidence.^{lxviii}

The Criminal Code caters specifically to sexual assault categorizing it as simple sexual assault,^{lxix} sexual assault with weapon, threat to a party or causing bodily harm,^{lxx} and aggravated sexual assault including wounding, maiming or disfiguring or endangering the life of the complainant.^{lxxi} Section 278 specifically states that a husband or wife can be charged under sections 271, 272 or 273 of the code irrespective of the living pattern, together or apart from each other.^{lxxii}

Further, Section 273.1 (1) defines consent as, "*voluntary agreement of the complainant to engage in the sexual act in question.*"^{lxxiii} However, this consent has to be given by the complainant, in the same understanding as the accused means it and by one who is capable of giving consent and who is not under duress by a person abusing his/her authority.

These amendments have its roots in the concept of „equality" embedded in Section 15 of the Canadian Charter of Rights and Freedoms.^{lxxiv} The Section states that every individual is equal before law and has equal protection of law without any discrimination on the basis of race,

nationality, ethnicity, colour, religion, sex, age or mental or physical disability.^{lxxv} The Supreme Court in the case of *Kapp*^{lxxvi} stated that a law is discriminatory and against equality if it creates a disadvantage based on analogous ground and its purpose is to perpetuate prejudice of society.^{lxxvii}

Canadian courts have taken a strict view of the element of sexual assault. In the case of *R v Chase*^{lxxviii}, the court held that any sexual act that violates the dignity, integrity of the victim/complainant is sexual assault.^{lxxix} This case gives the strictness of the law of rape and marital rape in the country. It keeps up to the 1993 Declaration on the Elimination of violence against women upholding their human rights and protecting their interests.

McLachlin CJC, in the case of *R v. JS*,^{lxxx} stating on behalf of the majority of the Supreme Court affirmed that though actus reus and mens rea is a significant part of establishing every crime, when it comes to the case of sexual assault or any of its elements, all cases must be treated in the same way irrespective of the relationship shared between the perpetrator and the victim.^{lxxxi}

With that, it is understood that Canada has developed and changed as per the needs of the society. The marital rape laws are based on the parameter of equality which implies that a woman's dignity must be kept intact and that she is no longer property for the man. The marital rape laws involve the aspect of consent which in its definition is clear that it must be given freely and without any fear or threat of hurt, injury or life even if one is married.

CONCLUSION

Rape, in general, has become society's concern. The aim to put rapists behind bars do not vest only with the victim or the family of the victim but is also shared with friends, emergency room personnel, social workers and mental health therapists.^{lxxxii}

As rightly stated by **Justice Krishna Iyer**, a murderer kills the physical body but a rapist kills the soul.^{lxxxiii} India as a country is richly based on traditions, customs, religion, languages, cultures and varied ethnic backgrounds. Marriage is given a very sacred connotation in India. It is normally done by way of arrangement of couples by the parents rather than the concept of love marriage in western countries.

Generally, marriage is the smallest social unit in society which is based purely on mutual trust, love and affection. In India there are varied people, in terms of backgrounds, mind sets, education qualifications and understanding. Due to the patriarchal society, women often believe that they are under the authority of their male counterpart. However, there is a thin line between respecting your husband and be abused by your husband.

In the past women were treated as properties by their husbands. However, this trend has to end as women have achieved a lot more than men in many spheres and they deserve that dignity and respect from society, including their own husband. The concept of violence within the household, i.e. Domestic Violence, has been brought about by social action- non government organizations, women activists etc. This was, once, a hushed affair but since the number of victims have increased, it is brought into light.

Though marital rape is considered to be a form of domestic violence, it must be given more importance and recognized as an offence and the perpetrator has to be punished. Marital Rape is ripping out the trust that the wife had in the husband as he is misusing her without giving any care towards her choice and free will.

In India, women allow the husband to make decisions for her and for her well-being. However, the researcher believes that the misuse and abuse of this decision-making power is what goes against the interests of the wife and in this age and time, women are no longer lesser to men in any way and must deserve the rights and respect she has worked for.

Husband and wife having sexual intercourse is part of marriage but when it is not agreed upon by both parties or forced by the one on the other, is where the problem arises. Being forced into sexual intercourse is rape irrespective of the perpetrator being the husband of the victim or a third party.

India has not criminalized the concept of marital rape as it believes that it will destroy the institution of marriage. The patriarchal society believe that the institution would crumble and destroy the essence if the Courts interfere. However, the researcher affirms that by criminalizing it, it will make the role of a woman much stronger allowing her to not fear in such an abusive and violent relationship. It gives her the power to decline and enforce any infringement that she is succumbed to by her husband.

Canada and the United Kingdom have strict interpretations of the term consent. This makes

the possibility of misunderstanding the term very less. The legislations in UK and Canada have come very recently. Though there have been many cases of marital rape, the Court was able to address them because of the enforcing of such a law.

Both jurisdictions do not give the exemption of rape to the husband when the victim is his own wife because they have removed the notion that marriage is a contract to legalise unconsented sexual intercourse. There is no difference between rape and marital rape irrespective of the relationship the victim and the perpetrator share.

ROAD AHEAD

The Researcher affirms that India cannot legislate on the matter immediately or fully because of domestic situations. However, there are small steps in which it can deal with to achieve the greater goal.

Society must be educated at every forum, in educational institutions, political gatherings and other such places where the message can be spread that wives are not the property of their husbands and the concept of marriage is understood wrongly and the wives have the right to say „no” to their husbands in any matter as they are equal in marriage. This is essential because India has been a patriarchal society from time immemorial.

Social awareness will be redundant unless the Legislature **redefines the term consent** under criminal law. Consent, either verbal or non-verbal, must be willingness to participate or agree on a certain matter in the same light that it is advanced in. More women should be allowed to participate in drafting legislations and this topic should not be regarded as a platform to bridge gap between men and women. The awareness should be of such a nature that both parties are free from fears of being prosecuted and understand the subject matter objectively.

From Canada, the Indian Legislature must adopt the term sexual violence which is interpreted in a strict sense. Any such act, gesture or advance that takes away the integrity or dignity of the woman comes under this category. From the United Kingdom, the country must be willing to be prospective and identify that there is a lack in its legislation which is an impediment to the development of society.

The country, in general, must understand that Marital Rape laws will allow the growth of a woman and bring her in par with her husband. Once such laws are criminalized, it will also

be included as a **ground for divorce and maintenance**.

With that, every woman can live a life of self-respect, dignity, willful choices and the way in way she deserves and is destined to be.

REFERENCES

- ⁱ Etienne G, Linda L, *Sexual Violence, World Report on Violence and Health (2002)*, World Health Organisation, http://www.who.int/violence_injury_prevention/violence/global_campaign/en/chap6.pdf [accessed 14.05.2020.]
- ⁱⁱ Jewkes, R., Vundule, C., Maforah, F., & Jordaan, E, *Relationship dynamics and teenage pregnancy in South Africa*. Social Science & Medicine (2001) Vol 52 Issue 5. https://ac-els-cdn-com.ezproxy.library.qmul.ac.uk/S0277953600001775/1-s2.0-S0277953600001775-main.pdf?_tid=16e5d988-9727-452b-82a2-c04d847bbd2f&acdnt=1523896511_4847220eb9328f545ff3b737820c1d5c [accessed 14.05.2020.]
- ⁱⁱⁱ Blacks Law Dictionary, 2nd Edn.
- ^{iv} Schulhofer S, *Unwanted Sex- The culture of Intimidation and the failure of law*, (2000) Harvard University Press. <http://journals.sagepub.com.ezproxy.library.qmul.ac.uk/doi/pdf/10.1177/096466390000900311> [accessed 14.05.2020.]
- ^v Brownmiller S, *Against Our Will*, 1975, Bantam Books, New York.
- ^{vi} Nanda R, *Marital Rape: Recent Position with the Criminal Law Amendment Act 2013*, International Journal of Law and Legal Jurisprudence Studies, Vol 1 Issue 6. <http://ijlljs.in/wp-content/uploads/2014/10/Marital-Rape-Recent-Position- Rajni-Nanda .pdf> [accessed 14.05.2020]
- ^{vii} Johnson I, Sigler R, *Forced Sexual Intercourse in Intimate Relationships*, 1997, Ashgate Publishing, Farnham.
- ^{viii} Ibid
- ^{ix} Brookover L, *Defining Rape*, Social Forces, Duke University Press, 1989 Vol 70 Issue 4.
- ^x Ibid
- ^{xi} Painter K, 'Wife Rape In The United Kingdom' (1991), University of Cambridge. http://www.crim.cam.ac.uk/people/visitors/kate_paintor/wiferape.pdf [accessed 14.05.2020.]
- ^{xii} Brownmiller S (n 5)
- ^{xiii} Senthilingam M, 'Sexual Harassment: How It Stands Around The Globe' CNN (2017) <https://edition.cnn.com/2017/11/25/health/sexual-harassment-violence-abuse-global-levels/index.html> [accessed 14.05.2020.]
- ^{xiv} Brownmiller S (n 5).
- ^{xv} Roberts, Dorothy E., *Rape, Violence and Women's Autonomy*, 1993, Faculty Scholarship <http://scholarship.law.upenn.edu/facultyscholarship/797> [accessed 14.05.2020]
- ^{xvi} Brookover L (n 9).
- ^{xvii} Johnson I, Sigler R (n 7).
- ^{xviii} Ellis L, *Theories of Rape: Inquiries Into the Causes of Sexual Aggression*, 1989, Taylor & Francis, 1 edn, London.
- ^{xix} Ibid
- ^{xx} Muehlenhard C, Rodgers C, 'Token Resistance To Sex' (1998) Psychology of Women Quarterly. <http://journals.sagepub.com.ezproxy.library.qmul.ac.uk/doi/pdf/10.1177/0361684311426689> [accessed 14.05.2020.]
- ^{xxi} Johnson I, Sigler R (n 7).
- ^{xxii} Borkowski M, Murch M, *Marital Violence : The Community Response*, 1st edn 1983, Tavistock Publications.
- ^{xxiii} Nanda R (n 6).
- ^{xxiv} Johnson I, Sigler R (n 7).

- ^{xxv} National Crime Records Bureau, *Crimes in India- 2016*, Ministry of Home Affairs, Government of India <http://ncrb.gov.in/StatPublications/CII/CII2016/pdfs/Crime%20Statistics%20-%202016.pdf> [accessed 14.05.2020.]
- ^{xxvi} Ibid
- ^{xxvii} Indian Penal Code, 1860, Sec. 376
- ^{xxviii} (2011) 2 SCC 550
- ^{xxix} Ibid
- ^{xxx} AIR 1958 Punj 123
- ^{xxxi} *State v. Vikash*, Unique Case ID No. 02405R0349722013
- ^{xxxii} Writ Petition (Crl.) 33 of 1997
- ^{xxxiii} Ibid
- ^{xxxiv} The Criminal Law (Amendment) Act. 2013 (W.E.F. 3-2-201310).
- ^{xxxv} W.P. (C) No. 382 of 2013
- ^{xxxvi} The Constitution of India, 1950, Art 15.
- ^{xxxvii} Indian Majority Act, 1875, Sec 2.
- ^{xxxviii} Jha P, '*Is The Indian Law On Domestic Violence Fit For Purpose?*' Open Democracy, 2017 <https://www.opendemocracy.net/5050/prita-jha/is-indian-law-on-domestic-violence-fit-for-purpose> [accessed 14.05.2020.]
- ^{xxxix} Protection of Women from Domestic Violence Act, 2005., Sec 3.
- ^{xl} Ibid. Sec 3(d)(iii)
- ^{xli} Indian Penal Code, 1860, Sec 498A
- ^{xlii} Ibid
- ^{xliii} Sharma K, '*Why Isn't Marital Rape A Criminal Offence In India?*', 2018, ETimes <https://timesofindia.indiatimes.com/life-style/relationships/love-sex/Why-isnt-marital-rape-a-criminal-offence-in-India/articleshow/54223996.cms> [accessed 14.05.2020.]
- ^{xliv} Johnson I, Sigler R (n 7)
- ^{xlv} The Times of India, '*India Has A Third Of World's Illiterates*', 2017
- ^{xlvi} Rajiv Gandhi Institute for Contemporary Studies Policy Watch, '*Criminalizing Marital Rape in India*, 2017, Vol 6 Issue 3. http://www.rgics.com/wp-content/uploads/policy-watch/PW_6.3-August-2017.pdf [accessed 14.05.2020.]
- ^{xlvii} G Barker and others, '*Initial Results From The International Men And Gender Equality Survey (IMAGES)*' 2011, International Centre for Research on Women <https://www.icrw.org/publications/evolving-men/> [accessed 14.05.2020.]
- ^{xlviii} Roberts D, '*Rape, Violence, and Women's Autonomy*, (1993), Chicago.-Kent. Law Review 359, <http://scholarship.kentlaw.iit.edu/cklawreview/vol69/iss2/7> [accessed 14.05.2020.]
- ^{xlix} PRS Legislative Research, '*Report of the Committee on Amendments to Criminal Law*, <http://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committe%20report.pdf> [accessed 14.05.2020.]
- ⁱ B Jain, '*House Panel Backs Move Not To Treat Marital Rape As Sexual Offence*' The Times of India (2013) <https://timesofindia.indiatimes.com/india/House-panel-backs-move-not-to-treat-marital-rape-as-sexual-offence/articleshow/18759230.cms> [accessed 14.05.2020.]
- ⁱⁱ B Kentish, '*Indian Government Files Legal Papers To Try To Stop Marital Rape Being Outlawed*' INDEPENDENT, 2017, <http://www.independent.co.uk/news/world/asia/india-marital-rape-ban-fight-legal-papers-file-parliament-law-change-marriage-a7924106.html> [accessed 14.05.2020.]
- ⁱⁱⁱ Ibid
- ⁱⁱⁱⁱ Hale M, '*Historia Placitorum Coronae*, 2007, William S Hein
- ^{liv} Hasday J, '*Contest and Consent: A Legal History of Marital Rape*', (2000), 88 California Law Review 1373 https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=11686&context=journal_articles [accessed 14.05.2020.]

lv (1794) 1 Hag Ecc. 765n

lvi Ibid

lvii Section 1(1) (a)

lviii Reg. v. Chapman [1959] 1 Q.B. 100

lix Stead D, „*In Britian, a Move to make Marital Rape a Crime*”, (1990) The New York Times
<https://www.nytimes.com/1990/12/28/news/in-britain-a-move-to-make-marital-rape-a-crime.html>
[accessed 14.05.2020.]

lx [1992] 1 AC 599

lxi Ibid

lxii Catsjolin, „*Marital Rape – The Modern Law*” (*The Sexual Offence Hand book*, 7 January 2014)
<https://thesexualoffenceshandbook.com/2014/01/07/marital-rape- the-modern- law/> [accessed 14.05.2020.]

lxiii Dr. Lawrence W, *Rape*, L D Wilson Consultants, Inc., 2018, <http://drlwilson.com/articles/RAPE.htm>
[accessed 14.05.2020.]

lxiv Freedman, Estelle B, *Redefining rape: sexual violence in the era of suffrage and segregation*. 2013, Harvard University Press. <http://hdl.handle.net.ezproxy.library.qmul.ac.uk/2027/heb.32832.0001.001>. [accessed 14.05.2020.]

lxv Koshan J, Randall M, Sheehy E, *Marital Rape Myths have no place in Canadian Law*. The Global and Mail, 2017, <https://www.theglobeandmail.com/opinion/marital-rape-myths-have-no-place-in-canadian-law/article36749822/> [accessed 14.05.2020.]

lxvi Ibid

lxvii Koshan J, *The Legal Treatment of Marital Rape and Women’s Equality: An Analysis of the Canadian Experience*, 2010, The Equality Effect.
<http://theequalityeffect.org/pdfs/maritalrapecanadexperience.pdf> [accessed 14.05.2020.].

lxviii Ibid

lxix The Criminal Code, Sec 271

lxx Ibid, Sec 272

lxxi Ibid, Sec 273

lxxii Ibid, Sec 278

lxxiii Ibid, Sec 273.1 (1)

lxxiv Koshan J, (n 69)

lxxv The Canadian Charter of Rights and Freedoms, 1982, Sec 15

lxxvi R v Kapp, [2008] 2 SCR 483

lxxvii Ibid

lxxviii (1987) 2 SCR 293.

lxxix Ibid.

lxxx 2 SCR 440

lxxxi Ibid.

lxxxii Brookover L, (n 9)

lxxxiii Dixit S, „*Men: The Forgotten Gender*”, Journal on Contemporary Issues of Law,
<<http://jcil.lsyndicate.com/wp-content/uploads/2016/09/crimes-against-men-Somya-Dixit.pdf>> accessed 14.05.2020