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**DELVING INTO MARITAL RAPE - A NEVER ENDING BONE OF
CONTENTION**Devansh Ganatra¹**ABSTRACT**

With the world aiming towards bringing equality to the forefront, we still have few contentious issues to fathom upon.

As the title propounds, this paper dives into an unresolved and a much disputed subject, which is “Marital Rape”. Reading the two words surely gives you a thought of an oxymoron being used in the legal fraternity, which although does not seem to sound well together, but are surprisingly making headlines. Not dissenting about the fact that this subject has been discussed for over a decade now, we still have a second perspective when we read or perhaps even hear about it. With time immemorial, we see how the customary concepts relating to marriage, sexual intercourse, consent, love are being given new meanings and new facets in the contemporary times. Mr. Mohan Kumawat, (Director at ANHAD Media) said that, “Marital rape is a more dangerous form of sexual violence. A rape is normally a one-time occurrence, but marital rape allows for the victim to be raped over and over again. And the perpetrator here is not a stranger but the husband.”². This suggests how appalling and grave marital rape is.

Moving on, this research discusses the, status of marital rape in different countries and on a global front. It also brings forth the possible impacts of criminalization of marital rape on men and women as well as the sacred marital relationship between the spouses.

Key Words: Rape, Consent, Women, Equality, Marital Rape, Marriage, Relationship, Crime

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² Aslesha, “*It’s time we recognise marital rape for the crime it is*” (13th March, 2013)

INTRODUCTION

Looking into the impact of social and moral inclined views of our society and the complexities of this issue, it seems this subject matter is a never ending book of perspectives! Nevertheless, it is time that we bring an impartial and unswayed legislation relating to the contentious matter in question. After all, the phrase “Justice delayed is justice denied” still holds significant importance.

Exception 2 of Section 375 has been a part of Indian Penal Code, 1860, since its inception! Initially, marital rape as an exception appeared in the “Hale’s doctrine”. Mathew Hale, the Chief Justice of the Court of King’s Bench (in England) in a book published in 1670’s wrote 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 has given up herself in this kind unto her husband, which she cannot retract”³. It was because of such beliefs marital rape found its place in section 375.

As per the data provided by The Print - “**One in every 25 women in India** reported being subjected to sexual violence by her husband often or sometimes, according to data from the National Family Health Survey-5 (NFHS-5), conducted in 2019-21”⁴. As well as, reports from The Better India signify that, “The latest National Family Health Survey states that **83% of married women** between the ages of 15 and 49 who have ever suffered sexual abuse cite their current husband as the perpetrator.”⁵

At the moment, The Hon’ble Delhi High Court, is hearing a number of petitions on the issue to decide the **constitutional validity of Exception 2 of Section 375, IPC**^{6,7}. The said provision reads

³ Umang Poddar, “*Explainer: Why is marital rape not a crime in India – and can the courts make it one?*”(21st January, 2022)

⁴ Nikhil Rampal, “3.9% Indian women who were ever married reported sexual violence from spouse, 9.7% in Karnataka”, The Print (24th January, 2022)

⁵ RinchenNorbyWangchuk, “*Survey Takes Veil Off Marital Rape in India: Its Time We Had a Serious Discussion*”, The Better India (16th March, 2018)

⁶ Indian Penal Code, 1860, § 375, exception 2

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

To decide the same, a slew of arguments from both the ends are coming before The Hon’ble Court. The petitioners in the given case are challenging the provision. One of their arguments being that the exception in section 375 infringed their “right to autonomy and privacy under Article 21”⁸ and that it is a disadvantage for married women.

On the other hand, the opposition is of the view that if the above mentioned provision is struck down it may be misused. “If (a) husband has used force or intimidation in the case of so-called marital rape, there are other sufficient provisions in IPC and other statutes.”⁹ And that “marital relationship cannot be a labelled as rape, and at the worst it can be called a sexual abuse only”¹⁰. The arguments also stress on the point that this exception is not only important for the spouses, but also for their family. Moving forward, it is also imperative that we view this issue from the stance taken by other countries.

OUTLOOK OF DIFFERENT COUNTRIES ON THIS MATTER

Before moving on, it is worth mentioning the views from a global perspective. This helps in getting a wider approach over the topic and understanding the grave scenario on a global footing!

As per the news provided in United Nations Human Rights (Office of the High Commissioner) website, a UN Special Rapporteur on violence against women, said that all the countries which

⁷ Nupur Thapliyal, “*Husband Having Forcible Sex With Wife: Rebecca John To Delhi High Court*”, Live Law (21st January, 2022)

⁸ Gautu Bhatia, “*The arguments made against making marital rape a criminal offence are not valid*”, Hindustan Times (27th January, 2022)

⁹ “*Intercourse between husband, wife can’t be labelled rape, HC told*”, Indian Express (25th January, 2022)

¹⁰ *Supra* note 8

have not yet recognized marital rape as illegal (against the international standards), must do it urgently.¹¹

Furthermore, The CEDAW Committee has proposed that India should “widen the definition of rape in its Penal Code to reflect the realities of sexual abuse experienced by women and to remove the exception of marital rape from the definition of rape.”¹² It is pertinent to cite this as marital rape has grave repercussions on a victim, in terms of physical and psychological effects.

Now coming back to the status of marital rape in other countries, there are several countries that are in the same boat as India is. “As of November 2020, **36 countries had still not criminalized marital rape.**”¹³ Afghanistan, Pakistan, Bangladesh, Libya, Botswana, Iran and Nigeria are some of them. Whereas marital rape has been criminalized in countries like Brazil, UK, Australia, Cuba, Paraguay, Chile, Bhutan and Peru.

1. **United Kingdom** - Marital rape in UK was criminalized in 1991 through a landmark case of *R v. R*, in which the Courts of England and Wales.¹⁴ Their reasoning can be related to the arguments transpiring today. A wife’s consent for sexual intercourse taken earlier cannot be used as an assumption for future.
2. **United State of America** - Marital rape in every state in USA was criminalized in 1993. In addition, according to a research carried out in the country, about 10 - 14% of the women face the issue of marital rape and of all kinds of rape in USA, 25% account for marital rape.¹⁵
3. **Bhutan** - In Bhutan marital rape is considered as a crime. It is considered a fourth felony in the country leading to an imprisonment of 3 to 5 years.¹⁶ Section 199 and 200 of the

¹¹ “*Harmonization of criminal laws needed to stop rape – UN expert*”, OHCHR (28th June, 2021)

¹² Aslesha, *supra* note 1

¹³ SreemoyeePiuKundu, “*Why we still pussyfoot around criminalising marital rape*” Firstpost (15th January, 2022)

¹⁴ Julie Bindel, “*The long fight to criminalise rape in marriage*”, Al Jazeera (15th June, 2021)

¹⁵ KetanTewari and Mansi Bisht, “*Marital Rape: License to Rape or Not?*”, ILJMH

¹⁶ NamgayZam, “*Rape laws in land of happiness*”, Mint (17th June, 2018)

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Penal Code of Bhutan, recognizes marital rape to be an offence and grades the same as a petty misdemeanour.¹⁷ It is also observed that, in order to access justice, the victims of sexual violence have to go through a lot of hurdles. Some of them include social stigma, prevailing public attitudes towards sexual violence, which result into less sexual violence cases being reported, dawdling of court proceedings, etc.¹⁸

4. **Australia** - South Australia was the first state in the country to criminalize marital rape. Subsequently, Queensland (in 1989) and Northern Territory (in 1994)¹⁹ and the other jurisdictions declared rape in marriage an offence too. Moreover, Section 73 of The Criminal Law Consolidation Act Amendment Act 1976 (SA)²⁰, criminalizes marital rape in South Australia.

IMPACT OF NON - CRIMINALISATION/CRIMINALISATION OF MARITAL RAPE

Before declaring any act or omission of an act as a crime or perhaps not a crime, it is necessary to look at the problem from different paradigms so as to analyse the impact of it with efficacy. Therefore, we must consider the impact of the decision on the principal stakeholders, i.e. the husband and wife.

Impact of Non - Criminalization of Marital Rape on “Married women”

The following are the ways in which married women (wife) will be affected if marital rape is not criminalized:

- 1) **Infringes their Fundamental Rights** - Non - criminalization of marital rape will violate the fundamental right of married women as given under Article 21²¹. The Hon’ble Supreme Court in the case of *Justice K S Puttaswamy (Retd.), And Anr. v. Union Of India*

¹⁷ Law Desk, “*Marital rape and the law*”, The Daily Star (10th November, 2020)

¹⁸ “*Paying ‘gao’ to the husband of a married woman discriminatory, says report*”, Kuensel (12th May, 2021)

¹⁹ Managing Editor, “*Rape in marriage: Why was it so hard to criminalize sexual violence?*”, Australian Women’s History Network (7th December, 2016)

²⁰ Criminal Law Consolidation Act Amendment Act, 1976, § 73

²¹ India Const. art. 21, “No person shall be deprived of his life or personal liberty except according to a procedure established by law.”

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*And Ors.*²², mentioned that the denial to involve oneself in sexual activity is a part of Article 21. That is to say that a women has the right to refuse to take part in sexual activity²³. For that reason, forcing a married women to engage in sexual activity is violating her fundamental right. To add, a similar decision was made in *Suchita Shrivastava v. Chandigarh Administration*²⁴.

- 2) **Physical and Psychological effects** - The physical effects on a married woman would include injuries to her private organs and other bodily wounds. In addition, the women may also go through internal body damages and be exposed to sexually transmitted diseases like HIV/AIDS. In the similar manner, psychological effects would be an indubitable result as the women are raped against their will. They may become a victim of mental trauma, stress, fear, etc²⁵.

Impact of Criminalization of Marital Rape on “Married men”

The following are the effects of declaring marital rape as an offence on married men (husband):

- 1) **Misuse** - The removal of exception 2 may lead to **misuse of the act**. As per reports collected by some activists, as huge as 85% of dowry cases turn out to be false, hence India cannot have such a situation again²⁶! Besides that, Deepika Narayan, a men's right activist, wrote an article in 2020 on the misuse of section 498A of The Indian Penal Code. The article states, that out of 1,11,549 cases registered under 498A in 2020, 5,520 were closed by Police citing as false²⁷. Therefore, we must take into consideration this issue, before it transpires into large numbers and a slew of false allegations get registered against married men.

²² Justice K S Puttaswamy (Retd.), And Anr. v. Union Of India And Ors., AIR 2017 SC 4161.

²³ Umang Poddar, “*Explainer: Why is marital rape not a crime in India – and can the courts make it one?*”, Scroll.in (21st January, 2022)

²⁴ Suchita Shrivastavav. Chandigarh administration, (2009) 9 SCC 1.

²⁵Himanshi Rathi, “*Marital Rape in India*”, TOI Readers’ Blog (18th August, 2021)

²⁶ OpIndia Staff, “*Marital rape debate: Case right now, arguments for criminalisation, and 5 arguments that need to be considered before legislating*”, OpIndia (20th January, 2022)

²⁷ OpIndia Staff, *supra* note 21

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- 2) **Burden of Proof** - Burden of proof has been defined under Section 101 of The Indian Evidence Act, 1872²⁸. In simple words, it is the duty of a party (to a case) to provide adequate evidence to prove an argument. Now, burden of proof in case of rape is quite difficult to apply in itself. Following the same in marital rape would be equally difficult. If the case is not resolved on an early basis, this might affect the livelihood and lifestyle of not just the husband but even the wife. Hence, pronouncing marital rape as an offence will be a burdensome for both the husband and the wife.

CONCLUSION

In the end, serving justice should be the aim of our legal fraternity and in order to make that happen it is imperative that we view the problem from different paradigms. For that reason, knowing the history, the current situation of the issue in our nation and its status on a global front is a requisite. Additionally, it is necessary that we understand the implications of the decision taken on various stakeholders. The above article seeks to dispense the same.

After innumerable years of anxiety and ambiguity, it is time that we enforce a law, which protects the rights of both the men and women without intervening into the sanctified relationship called marriage and brings equality to the forefront!

²⁸ Indian Evidence Act, 1872, § 101, “Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.”

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