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THE PROBLEMATIC CONCEPT OF MARITAL RAPE[#]**ABSTRACT**

“The lawful subjugation of a particular gender to another gender is totally incorrect, and has become one of the most serious impediments to social progress. It should be supplemented by a framework of complete equity, conceding to no influence and wealth or incapacity.”¹

Personal Integrity is what a civilised nation is all about. Whenever a female is addressed with the genuine sense of fairness as a male, is a nation deemed civilised. A framework that acknowledges females with disgrace and injustice, as well as segregates among males and females, will face the consequences of the Constitution's. Any law that received a peaceful seal of certification, several years ago, will have to succumb to the passage of time.

The Manusmriti² says that anywhere a woman is respected, holiness blooms, and anywhere a woman is scorned, every good deed, irrespective of how righteous it is, is fruitless.

It's frustrating to live with the fact that when it is about the status of women in the marital structure, our laws are shackled by chauvinistic mindsets.

Men and women are the same, however it is a shame that some men, even to this day, believe that by getting married, he acquires ownership of his wife's thought process, physical being and her whole life. Thoughts like these are abhorrent; a woman is not her husband's pawn, and she obviously cannot be forced to have the same mindset like her husband, because it destroys her individuality.

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¹The Subjugation of Women, Chapter 1, John Stuart Mill, 1869.

²Manusmriti, Chapter 3, Verse 56.

INTRODUCTION

If a woman is over the age of eighteen years, the Indian Penal Code (IPC) absolves a man for the crime of rape with his spouse. Within the past years, calls for the incarceration of marital rape elicited polarised reactions in the society. Former Chief Justice of India - Dipak Misra's remark that marital rape does not have to be a crime has sparked a controversy³. The objective of this section is to explore the situation of stigmatisation by analysing the reform measures that underpin it. A person's honour, sexual freedom, the sanctity of marriage, and adherence to prohibitionist concepts have all been identified as important government legislations. These legislation concerns, it is reasoned, should be taken into consideration when discussing the incarceration of marital rape. This debate supports the claim that enacting criminal justice system without thought leads to mass incarceration. As a result, in answering the questions of criminalisation of marital rape, relevant provisions took an equitable and rational approach.

Another significant factor to examine before tackling the issue of incarceration is to have a good understanding of the 'legal vibration.' Even after a fresh legislation is enacted, cases and the thought process of judges are critical in gauging the legislation's efficacy. Because the judicial system is responsible for enforcing the law, an effort has been done to ascertain the judiciary's outlook towards current rape laws with the ability to estimate how the judicial system will respond to the incarceration of marital rape. This section examines the hurdles and opportunities of criminalising marital rape in India, on the basis of court attitudes, relevant legislations, and the current regulatory policies for dealing with rape offences.

MEANING OF RAPE AND MARITAL RAPE

MEANING OF RAPE – Any unlawful sexual activity and usually sexual intercourse carried out forcibly or under threat of injury against a person's will or with a person who is beneath a certain age or incapable of valid consent because of mental illness, mental deficiency, intoxication, unconsciousness or deception is called rape.

³See Marital Rape Needn't Be an Offence: Ex Chief Justice of India Deepak Misra Times of India (9 April 2019,08:00PM), <https://timesofindia.indiatimes.com/city/bengaluru/no-need-to-make-marital-rape-an-offence-ex-cji-dipak-misra/articleshow/68785604.cms>.

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MEANING OF MARITAL RAPE - The action of sexual activity with one's partner without the permission of the partner is known as marital rape. Marital rape is a type of domestic and sexual violence that occurs when two people are married.

CONSENT

Explanation 2 of Section 375 of the Indian Penal Code (IPC), 1860, defines it. Here is a statement from the said section:

Explanation 2 – “Consent implies an unambiguous discretionary decision when a woman conveys her desire to engage in a particular sexual activity through utterances, gestures, or any other type of spoken or non-spoken interaction: Presented, however, that a woman who does not openly reject the action of intercourse must not be considered as agreeing to the sexual intercourse solely because of that real sense.”

INDIAN SITUATION OF MARITAL RAPE

Section 375 of the Indian Penal Code, 1860 (referred to as the IPC), defines rape and explicitly excludes marital rape in its distinction⁴. Pressured sexual activity with one's own spouse, who is estranged from her husband due to a divorce decree or anything else is subject to punishment under Section 376B of the Indian Penal Code (IPC)⁵.

The irony of Exception 2, mentioned in Section 375 of the Indian Penal Code, is that if a woman is a minor (under the age of 18) and wedded, her groom is not guilty of rape if he performs any sexual intercourse listed in Section 375 of the Indian Penal Code, with or even without her assent. If a man does a similar act with any other female of the same age group, who is not his spouse, then it is regarded as a despicable crime with severe penalties under Section 376 of the Indian Penal Code.

According to the National Crime Report Bureau's data from 2020, a vast bulk of atrocities against women were classified as 'Cruelty by Husband or His Relatives' (30.9%), accompanied by 'Assault on Women with Intent to Outrage her Modesty' (19.2%), and 'Rape' (28.064 %).

⁴IPC S. 375.Rape...Exception 2- Sexual intercourse or sexual acts by a man with his own wife, the wife not being under 15 yrs. of age is not rape.”

In 2020, the crime rate against women population was 3,71,503, down from 4,05,326 in

2019.⁶ Due to the lack of laws, the National Crime Report Bureau has no statistics on the amount cases regarding marital rape. Spousal bodily and/or sexual abuse is experienced by 30% of married females between the ages of 15-49 years, at least once in their life.⁷

The United Nations Committee on the Elimination of Discrimination Against Women, suggested India that it must "Expand the interpretation of rape in its Penal Code to represent the complexities of sexual assault encountered by females and to eradicate the exclusion of marital rape from the interpretation of rape...."

In the year 2013, the Justice JS Verma Advisory Board on Amendments to Criminal Law recommended that the exemption of marital rape be removed from the Indian Penal Code⁸, however, the Indian government quickly disagreed.

The Non-Governmental Organisation, 'RIT Foundation' lodged a writ petition in the year 2015, opposing the validity of Section 375 of the Indian Penal Code, claiming that it is discriminatory and violates the modesty of women in a marital relationship. The Delhi High Court observed that married partners can say "no" to physical relations.

The Indian government is unconcerned about legalising marital rape. It has repeatedly argued that "marital rape cannot be considered as a crime because it might become a trend that destabilises the concept of marriage and provides an effective instrument for tormenting the husband." Laws are being used to legalise marital rape while also safeguarding the rights of the victims.

The sanctity of marriage is being distorted by marital rape; government interference brings justice to the victims of marital rape. There have been numerous incidents when a court's involvement by way of regulations has guarded female rights as well as upheld their modesty and sanctity in the face of prejudicial thinking. The most neoteric law makes Talak-e-Biddat illegal⁹.

⁵IPC S.376B. Sexual intercourse by husband upon 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. Explanation- In this section, "sexual intercourse" shall mean any of the acts mentioned in clause (a) to (d) of S.375.

LAWS AND SECTIONS RELATED TO MARITAL RAPE

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This section of the research paper examines the legal policies in place to address the issue of marital rape. It examines current solutions and evaluates their effectiveness whilst taking into account the severity and character of the offence.

Rape committed by a husband against his spouse is known as marital rape. If the bride is over the age of 18 years, Exception 2 of Section 375 of the Indian Penal Code (IPC) states that the husband cannot be charged with rape with his lawfully married spouse. The consensual nuptial agreement, that does not permit a bride the power to rescind her spousal assent to participate in sexual intercourse with her husband, may be the basis for the marital rape distinction. 'Sexual activity by a husband with his spouse does not amount to rape,' according to Clause 359 of the Indian Penal Code Draft. The Select Committee, on the other hand, limited this distinction by requiring the spouse's age to be greater than ten years. 'Sexual contact by a husband with his spouse, her not being under 10 years of age, cannot be considered rape,' mentioned Exception 2 of Section 375 of the Code since it was implemented in 1860. The Criminal Law Amendment Act of 1840¹⁰ raised the age by 5 years. The Protection of Children from Sexual Offences Act of 2012 (POCSO Act) has effectively raised the age limit to 18 years. In the case of *Independent Thought v. Union of India*, the Apex Court of India interpreted Exception 2 of Section 375 of the Indian Penal Code to introduce it in accordance with the Constitution and POCSO¹¹."

It is not true that marital rape has no consequences. The current situation of the law is unsatisfactory because it does not sufficiently punish it in order to bring it at equal levels with other rape offences. Rape of a bride under the age of 18 years or at the time of a divorce is considered rape. The husband can be prosecuted for offences such as outraging a women's modesty, employing violent methods, and inflicting harm or severe harm. In addition, under the pertinent marriage law, the bride can pursue divorce on the premise of inhumane treatment.

⁶8.3% dip in crimes against women in 2020: NCRB report. <https://www.hindustantimes.com/india-news/83-dip-in-crimes-against-women-in-2020-ncrb-report-101631730781414.html>

⁷International Institute for Population Science (IIPS) and ICF. 2017. National Family Health Survey (NFHS-4), India 2015-16, Mumbai.

⁸Para 79, Reports of the committee on Amendments to Criminal Law, January 23, 2013

⁹*Shayara Bano v Union of India & Ors* (2017) 9 SCC 1

¹⁰Criminal Law Amendment Act, 1840

When someone talks about criminalising marital rape, what they're really saying is that a

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different punitive arrangement or action must be included in the legal system. A different requirement not only punishes the behaviour, but also signifies to the civilisation that marital rape is strongly criticized and rejected by the community at large. A distinct legislation also aids in the deconstruction of chauvinistic and antiquated conceptions about females in the society. In this context, criminal law serves a noble purpose by instilling ethical values in society.

NEED FOR LAWS ON MARITAL RAPE

History shows that a thing which destroys the freedom of one group of people over another, is met with a great deal of restlessness, fury and dissent from the victimised people. Whether it's a democratic country, the rule of the aristocrats, complete liberty, persecution or same marital privileges for females.

The Indian justice framework is built on the theory that one guilt-less person must not be penalised if a hundred offenders are exonerated. The Indian government has enacted a number of laws, the majority of which are being abused, but that is not a justification for delaying the passage of laws that would maintain female integrity in the marital framework. These kinds of laws could have some drawbacks, however there are tribunals to consider the glitches and the parliament to make needed adjustments. None of us can make a brilliant legislation, and there is nothing called a brilliant legislation since our civilisation itself is flawed. As a result, the legalisation of marital rape should not be hindered.

The chauvinistic mindset is the cornerstone of people having equality. Previous experiences demonstrate how the community has become more equitable as a result of government involvement by way of laws. Legislations are not the ethics of a single individual, but the collaborative values of the community. Take, for example –

- Extermination of the practice of Sati
- Inculcating the practice of Monogamy among Hindus
- Banning Child Marriage
- A modern development of criminalizing Talak-e-Biddat.

¹¹Independent Thought v. Union of India, (2017)

Article 14 of the Indian Constitution guarantees Equality Before The Law¹², while Article 21

guarantees the Right To Life¹³. The Apex Court of India, in *Kharak Singh v. State of Uttar Pradesh* [AIR 1963 SC 1295], clarified the interpretation of the word “life” in the Article, means something beyond just animal existence.

The Supreme Court of India granted a different meaning to Article 21 in *Maneka Gandhi v. Union of India* [1978 SCR (2) 621], holding that the Right To Live is not just a corporeal right, but also involves the Right To Live with dignity.

Thus, marital rape must be made illegal to shield women's sexual privileges under the marital framework in line with Articles 14 and 21.

The aggrieved has the right to seek lawful recourse, however the ones looking for justice do not have the necessary laws and execution of the same. Such a Hobson's choice circumstance requires significant improvement in order for justice to be served.

PRACTICES TO STOP RAPE CULTURE

"Men will be men."

"The girl was inebriated."

"Women tend to say "no" when they actually want to say "yes."

The prevalence of rape is widespread. This is ingrained in our thought process and ideas, communicate and live around. The glorification of rape is generally ingrained in patrilineal opinions, authority and influence, regardless of the circumstances.

The culture of rape is the communal framework that enables for the normalisation and justification of sexual abuse, which is stimulated by prolonged gender disparities and perceptions towards masculinity and femininity. The first stage of demolishing the prevalence of rape is to name it.

¹²Article 14. Equality before law- The state shall not deny to any person equality before the law or the equal protection of laws within the territory of India.

¹³Article 21. Protection of life and personal liberty- No person shall be deprived of his life or personal liberty except according to procedure established by law.

Day after day, we get the chance to evaluate our actions and opinions for prejudices that

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allow the existence of rape to spread. We can all speak up to combat the culture of rape, from our perceptions towards sexual orientations to the initiatives we encourage in our societies.

Some of the ways in which, we as individuals can curb rapes are mentioned below.

- **Promote an environment where clear assent is the norm.**

At each moment, voluntary consent is required. Instead of waiting for a "no," ensure that everyone associated is saying "yes." Create a positive attitude toward assent and speak about it.

- **Speak up against the roots of the problem.**

When we accept notions of male supremacy that involve abuse and hegemony as "powerful" and "manly," and when females are undervalued, rape thrives.

It's also based on blaming the sufferer, which implies that an attack is the fault of the sufferer and not that of the abuser.

The sufferer's state of mind, clothing, and sexual orientation are unnecessary when considering instances of sexual abuse. Rather, refute the belief that men and boys should gain control by means of conflict and cast doubt on physical intimacy as a right.

- **Masculinity should be redefined.**

Examine what masculinity means to you and how you demonstrate it. Men and boys (as well as women and girls) can use self-reflection, community conversations, and artistic expression to examine and redefine masculinities based on feminist principles.

- **Maintain a no-tolerance policy**

Create no-tolerance practices for sexual abuse and misconduct in the places where one resides, works and visits for recreation. Officials should make it obvious that they are devoted to enforcing a no-tolerance practice, which should be followed on a daily basis.

- **End only holding the victim responsible**

We could neglect the fact that the things we use to communicate every day, mould our lives as language is firmly ingrained in society.

Our language contains beliefs that in a way glorify rape: "She wore such a lewd outfit." "She was asking for it."

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A very popular line from many songs is: "I know you want it."

It has been normalised in the entertainment industry by sexualizing women.

We have the ability to dismiss victim-blaming statements and songs that disrespect females and justify sexual misconduct. It is not an opportunity to rape female on the basis on what outfit she has worn, what she has consumed, and where she was at a given time.

- **Expand your knowledge of the rape culture**

Rape culture assumes several manifestations throughout time and situations. It's critical to recognise that rape culture encompasses more than just a man abusing a woman.

Rape culture, for example, includes a variety of dangerous practises that deprive females of their freedom and entitlements, like child marriage and mutilation of the female genitals¹⁴.

Whilst no one can deny that rape is immoral, sexual assault and sexual misconduct are normalised and trivialised by statements, deeds and neglect, guiding us down a dangerous path of rape culture.

- **Understand the origins of rape culture.**

All through the ancient times, rape has been utilised as a military tactic and subjugation. It's been utilized to oppress girls and societies, as well as forced displacement and mass slaughter.

- **Consider a cross-cutting method**

Irrespective of one's gender, sexual orientation, financial standing, caste, creed or maturity level, the rape culture impacts everyone. Getting rid of it entails letting go of stringent sexual identity and sexual preference meanings that restrict an individual's ability to determine and articulate oneself.

Female's frailty to abuse is increased by some features like as sexuality, impairment, or nationality, as well as a few situational variables. People who identify as LGBTQI could be subjected to "gender corrective methods," where the abuser tries to impose a particular gender on the sufferer. Bias against females is common at times of refugee crises, exacerbating sexual abuse.

¹⁴<https://www.unwomen.org/en/news/stories/2018/12/take-five-jaha-dukureh-migrant-women-and-girls>

- **Spend on females**

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Contribute to organisations that help victims, promote equality and encourage inclusion of all sexual orientations and genders.

UN Women strives to cease abuse of women, support victims and ensure that females all over the world have equality.

- **Pay attention to the voices of victims**

Victims of abuse are voicing out about their experiences more than they have ever done before through movements like #MeToo, #TimesUp etc.

Paying heed to their experiences, reading about victims and campaigners from across the globe is essential.

Refrain from say things like, "Why didn't she try to stop it?"

Instead, saying things like, "I'm here for you", "You're not alone" or "I will help you" are much more assuring.

- **Rape is not to be laughed at**

Rape is never a laugh-out-loud situation. Sexual abuse is delegitimized by offensive comments, making it more difficult for survivors to stand up to rape when their assent is breached.

It is never okay to make jokes that normalise and justify sexual abuse.

- **Participate**

The omission or failure of execution of legislations covering abuse of women, as well as unjust legislations on land rights, marital rights, separation and parental rights, keep rape culture alive¹⁵.

- **Take an active role as a passer-by**

Harassment affects 33% women on the planet. Non-consensual or aggressive conduct towards females is surprisingly prevalent, and some of us might have even witnessed it. Meddling as an active passer-by sends a message to the abuser that their actions are inappropriate, and it could save a person's life.

Initially, evaluate the circumstance to see the sort of assistance, if any, is needed.

One might be ready to assist the victim of sexual abuse by inquiring how they're doing or if they need assistance, or by capturing the altercation, generating diversions to defuse the tension, or creating a clear and concise comment straight away to the abuser, like "I'm queasy with what you're doing."

¹⁵<https://evaw-global-database.unwomen.org/en>

- **The new generation must be educated**

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It is up to us to motivate the nation's feminists of the future. Kids are exposed to gender inequality and hostile values in the news, on the roads, and in school too. The home must be a secure place for children to be their true self. We should encourage them to make their own decisions and instil the value of assent in them at an early time.

- **Initiate a discussion — or participate in one that is already going on**

Talking family members and companions about things that can be done to eradicate the rape culture in the vicinity.

It takes, not one, but each one of us to speak up opposing the rape culture, if it's sponsoring an event to unwrap the significance of manliness¹⁶, crowdfunding for a female's privileges organisation, or teaming up¹⁷ to resist rape-glorifying ideas and laws.

CONCLUSION

“Justice must serve offenders and victims as well as the economy and the general public.” It is high time that we recognise that a husband is not the owner of his bride in the 21st century where justice and equality has taken long strides. Every ancient perspective that sees women as mere objects must vanish as the ruling criterion is equal treatment of all human beings, irrespective of their gender. India is a free nation with a huge population in existence with a strong democracy that is connected to its customs and heritage. It is the shared liability of legislators, intellectuals, campaigners, and people like us, the future of the country, to devise a rather constructive and pragmatic, albeit rigorous, way to annihilate marital rape. The issue of severity is one that must be addressed by humanity's morals.

¹⁶<https://www.heforshe.org/en/barbershop>

¹⁷<https://www.unwomen.org/en/what-we-do/ending-violence-against-women/take-action/16-days-of-activism>