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**A CRITICAL ANALYSIS OF THE STANDARD OF CONSENT OF RAPE  
IN INDIA**- Sanya Kumari<sup>1</sup>**CONSENT UNDER THE INDIAN PENAL CODE**

Consent under the IPC is a crucial aspect in determining the legality or illegality of certain acts, particularly those related to offenses against the human body and personal liberty. The concept of consent is addressed in various sections of the IPC, particularly in relation to crimes such as rape, hurt, and defamation.

Consent in Rape (Section 375): In cases of rape, consent is a central issue. Section 375 of the IPC defines rape and lays down provisions regarding consent. According to this section, a man is said to commit rape, if he has sexual intercourse, with a woman against her will, without consent or with the consent obtained by deceit, coercion, or fraud, or when the woman is incapable of giving consent.

Section 375<sup>2</sup> deals with the offense of rape and outlines the conditions under which sexual intercourse amounts to rape. Consent plays a crucial role in determining whether an act constitutes rape under this section. Here's an overview of how consent is addressed within Section 375:

According to Section 375, a man is said to commit rape if he is involved in sexual intercourse with a woman under any of the circumstances mentioned below:

Against the will

Without the consent of the woman

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<sup>2</sup> Section 375 of IPC

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With the consent, if the consent is obtained by putting her or any of the person in whom she is interested in fear of death or hurt.

With consent, if a man knows he is not her husband and the consent is obtained with the belief of lawful marriage.

The section also specifies that consent obtained through coercion, deceit, or fraud nullifies the legality of the sexual act. If the consent is obtained under any of these circumstances, it doesn't absolve the accused of the charge of rape. Additionally, Section 375 considers sexual intercourse with a woman incapable of giving consent as rape. This includes situations where the woman is not able to understand the consequences of the act due to unsound mind or intoxication or for any other reason.

It's important to note the exception to rape within the marital relationships. The sexual intercourse by a man with his wife who is above the age of consent is not a rape even done without her consent of her. However, the expectation is not applied if the wife is living separately from the husband under decree of separation or custom or any of usage.<sup>3</sup>

Consent in Assault or Hurt (Section 87): In cases of hurt or bodily harm, consent is relevant to determine whether the act was committed with the consent of the victim or not. Section 87 of the IPC states that consent is not a valid defense if the act done is likely to cause death, or grievous hurt, or any harm to the person to whom consent is given.

Consent in Defamation (Section 499): In cases of defamation, truth is a defense against the charge. However, if the defamatory statement was made with the consent of the person defamed, it might not constitute an offense under Section 499 of the IPC.

Section 90<sup>4</sup> pertains to the definition of consent when the person giving it is not aware of the circumstances or the full extent of the consequences of their actions. This section is crucial in determining the legality of actions that involve consent but are obtained under certain conditions. This section defines defamation as making or publishing any statement that harms the reputation of another person. The harm caused by defamation

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<sup>3</sup> Vidushi Aggarwal, Psychological perspective on sexual coercion and rape, Psychologys, May 8th 2020

<sup>4</sup> Section 90 of IPC

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can be through spoken words, written words, signs, or visible representations. It is essential to note that the intention to harm the reputation of the person is a crucial element of defamation.

Section 499 IPC distinguishes between two types of defamation: Libel and Slander. Libel is defamation in written or permanent form and slander is defamation in spoken or transient form. To constitute defamation, the statement must be false and must injure the reputation of the person about whom it is made. Defamation is a criminal offense punishable under Section 500 IPC. A person found guilty shall be punished for the term which shall extend to two years or a fine or both.

The certain exceptions to defamation under the IPC, include:

Statements made in good faith to protect the interests of the person making them, or any other person, or public good

Statements made in judicial proceedings or legislative proceedings.

Imputations made in good faith by a person to protect the interest his or other person.

Section 499 IPC, is frequently invoked in cases where individuals or entities make false statements about others with the intent to harm their reputation. Defamation cases are common in various contexts, including media, politics, and interpersonal conflicts.

Section 90 IPC: Consent granted by a person who is under fear of injury or misconception of facts, and who because of such fear or misconception, is not capable of giving rational consent, is not valid. This means that if a person gives consent because they are under the impression that certain facts are true, or if they give consent out of fear of harm, and as a result, they are incapable of giving rational consent, then that consent is not considered valid under the law. This section provides clarification that consent given under certain conditions, such as fear of injury or misconception of facts, is not genuine consent if the person giving it is not capable of making a rational decision. It highlights the importance of ensuring that consent is given voluntarily, without any external pressure or misinformation.

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Section 90 is often invoked in cases where consent is obtained through coercion, intimidation, or deception. It underscores the principle that true consent must be given freely and with full understanding of the circumstances and consequences. If consent is obtained under duress or based on false information, it is deemed invalid under the law. This section is applicable in various contexts, including cases of sexual assault, where the victim may give consent due to fear of harm or under the misconception that they have no other choice. It is also relevant in contractual agreements, where consent obtained through misrepresentation or coercion may render the contract voidable.<sup>5</sup>

It's important to note that consent must be voluntary, informed, and given by a person capable of understanding the nature and consequences of their actions. Any consent obtained through force, coercion, fraud, or from a person who is incapable of giving consent (such as a minor or someone mentally incapacitated) is not considered valid under the IPC.

Section 376A IPC deals with the offense of causing death or causing the victim to be in a persistent vegetative state in cases of rape or attempted rape. It specifies that any person who commits rape that leads to victim's death or causes the victim to be in a persistent vegetative state shall face rigorous imprisonment for twenty years which may extend to life imprisonment, or with death.

Section 376B IPC pertains to sexual intercourse between husband and wife during separation where the age of wife is below 15 years . It states that whoever has sexual intercourse with his wife, who is living separately, and she is below fifteen years of age, shall be punished with imprisonment of at least two years and shall extend upto the term of seven years along with a fine.

Section 376C deals with sexual intercourse between a person in authority and a woman under his authority. It covers cases where a person in authority or control over a woman, such as a police officer, public servant, or a superintendent of jail, commits sexual intercourse with a woman in his custody, or the woman is in a state of helplessness or in a

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<sup>5</sup> Kulshreshtha, Nikunj, A Critical Analysis of the Standard of Consent in Rape Law in India, Onati Socio-legal Series (2023)

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situation where she cannot consent. The punishment under this section is rigorous imprisonment for a term not less than 5 years and extend to 10 years and shall also be liable for a fine.

Section 376D IPC section concerns gang rape. 376 D provides for rigorous imprisonment for a term not less than twenty years, but may extend to life imprisonment and shall also be liable for fine, and shall also be liable with fine

Furthermore, the Indian legal system often scrutinizes the circumstances surrounding the purported consent to ensure that it was not obtained under duress or undue influence. This is particularly important in cases where power imbalances or vulnerabilities exist between the parties involved.

### **INDIAN EVIDENCE ACT 1872**

It doesn't specifically address the concept of consent in rape cases. However, consent is a crucial aspect of rape trials, and it is established through evidence presented during the trial.

In rape cases, the prosecution must prove beyond a reasonable doubt that sexual intercourse occurred without the consent of the victim. Evidence related to consent or lack thereof may include:

**Testimony of the victim:** The victim's testimony regarding whether they consented to the sexual activity is crucial evidence in rape trials. Courts consider the victim's statements about the absence of consent and any circumstances surrounding the incident.

**Medical evidence:** Medical examinations and reports may provide evidence of physical trauma or injuries consistent with sexual assault. While the absence of injuries doesn't necessarily imply consent, the presence of injuries can support the victim's account of non- consensual sexual activity.

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Witness testimony: Witness testimony from individuals who were present before, during, or after the incident may corroborate the victim's account or provide additional context to establish lack of consent.<sup>6</sup>

Forensic evidence: Forensic evidence, such as DNA analysis, may be used to establish sexual contact between the accused and the victim. However, the presence of DNA evidence alone does not determine consent; it merely establishes contact.

Circumstantial evidence: Circumstantial evidence, such as the victim's behavior before or after the incident, communications between the parties involved, or any coercion or threats made by the accused, may also be considered in determining consent.

#### Section 114-A

Presumption as to absence of consent in certain prosecutions for rape.

"In a prosecution for rape under clause (a) or clause (b) or clause (c) or clause (d) or clause (e) or clause (g) of sub-section (2) of section 376<sup>7</sup>, where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the court that she did not consent, the court shall presume that she did not consent."

In simpler terms, Section 114-A establishes a legal presumption regarding the absence of consent in certain rape prosecutions under Section 376<sup>8</sup>. If the sexual intercourse is proved and the woman alleges in her evidence before the court that she did not give the consent, it is required for the court to presume that no consent was given. This provision aims to shift the burden of proof to the accused to establish that the sexual intercourse was consensual, once the fact of sexual intercourse and the lack of consent are established by the prosecution.

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<sup>6</sup> The Indian Evidence Act, 1872, Ratanlal & Dhirajlal, 21st edition reprint 2009

<sup>7</sup> section 376 of the Indian Penal Code

<sup>8</sup> Section 376 of the Indian Penal Code

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While it provides rules and procedures for the admission and assessment of evidence in court proceedings, the determination of consent in rape cases is primarily based on the facts and circumstances of each case and the credibility of the evidence presented.

Consent – an unequivocal agreement

The term "consent" refers to an unequivocal agreement or permission given voluntarily by an individual to engage in a particular action or activity. In various legal contexts, including criminal law, contract law, and medical ethics, consent plays a crucial role in determining the legality or validity of certain actions. Here's an overview of what constitutes consent:

**Voluntary Agreement:** Consent must be given freely, without any form of coercion, manipulation, or undue influence. It should be a result of the individual's own free will, without any external pressure or threat.

**Informed Decision:** Consent requires a clear understanding of the nature, purpose, and consequences of the action or activity in question. The individual giving consent must have sufficient information to make an informed decision.

**Capacity to Consent:** The individual giving consent must have the legal capacity to do so, meaning they must be of sound mind and legal age (according to applicable laws). Consent obtained from individuals who are mentally incapacitated, intoxicated, underage, or otherwise unable to understand the implications of their decision may not be valid.

**Specificity:** Consent should be specific to the particular action or activity for which it is given. General consent does not necessarily apply to all situations and may need to be obtained separately for different actions or circumstances.

**Revocable:** Consent is revocable, meaning that the individual has the right to withdraw consent at any time before or during the action or activity. Once consent is withdrawn, the action should cease immediately.

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Mutual Understanding: For consent to be valid, there must be a mutual understanding between the parties involved regarding the terms and conditions of the agreement. Any misunderstandings or misinterpretations may invalidate the consent.

In legal contexts such as criminal law, the presence or absence of consent can significantly impact the determination of liability. For example, in cases of sexual assault or rape, the accused may argue that the act was consensual, while the prosecution may argue that consent was not given or was obtained under duress.

### **AGE OF CONSENT IN POCSO ACT**

In India, POCSO Act, 2012, defines the age of consent differently than the traditional understanding of the term. Under the POCSO Act, the age of consent is not relevant for determining whether a sexual act is lawful or not. Instead, the POCSO Act aims to protect children from sexual abuse and exploitation.

The POCSO Act defines a "child" as any individual under the age of eighteen years. It prohibits various forms of sexual offenses against children and provides for stringent punishment for offenders. There are wide range offenses covered under the act which include penetrative sexual assault, sexual assault, sexual harassment, and use of the children in pornography.

Therefore, the POCSO Act is, sexual act with a person below 18 years of age, regardless of the consent given to it or not, is considered as a criminal offenses'. It's important to note that the POCSO Act prioritizes the protection of children and aims to prevent their exploitation rather than focusing on the concept of consent as understood in adult relationships.<sup>9</sup>

Section 5(l), is indeed relevant to the discussion about the age of consent.

"(l) 'sexual assault' means—

- (i) penetration of the vagina, anus, mouth or urethra of the child with any part of the body of the child or any other person or any object or a manipulation of any part of

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<sup>9</sup> Manuraj, Expanding the scope of POCSO, The Hindu, May 25, 2021

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the body of the child or of the other person so as to cause penetration, of the vagina, anus, mouth or urethra of the child;

- (ii) making the child to do any act with any other person or to permit the child to do any act with the person or any other person;
- (iii) sexual exploitation of the child for pornography;
- (iv) any other act or conduct by which the child is induced to engage in any unlawful sexual activity or exposes the child to obscene or pornographic material or acts or displays the child in any sexual manner with intent to gratify the sexual desire of any person or to intimidate, threaten or harass any person;"

As per Section 5(l) (i), "sexual assault" encompasses penetration of various body parts of the child by any means. Additionally, subsection (iii) explicitly mentions "sexual exploitation of the child for pornography."

This definition provided by Section 5(l) of the POCSO Act highlights the broad scope of what constitutes sexual assault under the law, focusing on protecting children from various forms of sexual abuse and exploitation rather than determining consent.<sup>10</sup>

Section 6 of POCSO Act, 2012, deals with the punishment for sexual assault on a child. Here is the text of Section 6:

"6. Punishment for aggravated penetrative sexual assault. - Whoever commits aggravated penetrative sexual assault shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine."

This section specifically addresses aggravated penetrative sexual assault, which involves certain aggravating factors such as the use of force, threat, intoxication, etc. The person who commits such an offense shall be punished with rigorous imprisonment for a minimum ten which may extend up to imprisonment for life, along with fine.

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<sup>10</sup> Anushka Sheth & Niki Shah, decriminalizing domestic violence and cruelty in India, JCIL (2020)

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## VERMA COMMITTEE REPORT AGE OF CONSENT

The Verma Committee Report, also known as the Justice Verma Committee Report, was an important document produced in response to a violent gang rape and murder of a young woman in Delhi in December 2012. The report provided a comprehensive examination of sexual assault laws and proposed modifications to strengthen the legal framework for dealing with such offences.

However, the Verma Committee Report did not address the age of consent. The idea of age of consent relates to the minimum legal age for engaging in sexual behaviour. In India, the age of consent is established by the IPC and other legislation, rather than the Verma Committee's recommendations.

The Verma Committee Report focused more broadly on issues such as defining and expanding the scope of sexual offenses, enhancing the punishment for such offenses, improving access to justice for victims, and addressing systemic issues related to gender-based violence.

The age of consent in India is established in Section 375<sup>11</sup>, which was revised in 2013 in response to the Verma Committee's recommendations. The age of consent for sexual conduct was raised from 16 to 18. The amendment aims to offer great protection for minors from sexual exploitation and abuse.<sup>12</sup>

### Obligatory reporting

Obligatory reporting is a legislative requirement that certain persons or professionals report particular sorts of incidents or information to authorized authorities. This reporting responsibility is frequently required by law protected vulnerable people and avoid harm and provide appropriate intervention or support.

In the context of issues such as child abuse, elder abuse, domestic violence, and sexual assault, mandatory reporting laws typically require certain professionals, such as healthcare workers, educators, social workers, and law enforcement personnel, to report

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<sup>11</sup> Section 375 of IPC

<sup>12</sup> Namrata (2024) From Consent to Coercion: Decoding Marital Rape Laws in the Indian Context <https://www.leed-initiative.org/blog/consent-coercion-decoding-marital-rape-laws-indian-context>

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suspected cases of abuse or neglect to appropriate authorities, such as child protective services or law enforcement agencies.

Key points regarding obligatory reporting include:

**Mandatory Reporting Laws:** Many jurisdictions have laws that mandate the reporting of suspected cases of abuse or neglect involving vulnerable individuals, such as children, elderly persons, or individuals with disabilities. These laws outline who is required to report, what types of incidents must be reported, and the procedures for reporting.

**Scope of Reporting:** Obligatory reporting laws typically cover a wide range of situations, including physical abuse, sexual abuse, emotional abuse, neglect, and exploitation. The reporting obligation may apply not only to incidents that have occurred but also to situations where there is a reasonable suspicion or risk of harm.

**Confidentiality and Privacy:** Professionals who are mandated to report suspected abuse or neglect are usually required to maintain confidentiality to the extent possible, but they must prioritize the safety and well-being of the victim. Reporting obligations may override confidentiality requirements in certain circumstances to ensure that appropriate action is taken to protect the victim.

**Immunity and Protection:** Obligatory reporting laws often provide immunity or legal protection for individuals who make reports in good faith, even if the reported suspicions are later found to be unsubstantiated. This protection encourages reporting and helps prevent retaliation against reporters.

Professionals who are subject to mandatory reporting legislation may be given training and instruction on their reporting responsibilities, such as recognising indicators of abuse or neglect, knowing reporting protocols, and adhering to legal requirements.

Noncompliance with obligatory reporting responsibilities can result in legal penalties such as civil liability, professional disciplinary action, and criminal prosecution.

Obligatory reporting laws play a crucial role in safeguarding vulnerable individuals and ensuring that incidents of abuse or neglect are promptly addressed and investigated.

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These laws aim to promote accountability, prevent further harm, and facilitate access to support services for victims and survivors.<sup>13</sup>

#### Age discernment

Section 34(2) of the POSCO Act pertains the "Presumption as to the age of child." This section is important in cases where the age of the child is in question or needs to be determined for the purposes of prosecution under the POCSO Act.

Here is a breakdown of Section 34(2) of the POCSO Act. **Presumption of Age:** Section 34(2) creates a legal presumption about a child's age in instances when it is not precisely known or documented. According to this provision, if it appears to the court that a person accused of violating the POCSO Act had sexual intercourse with a child and there is reason to believe that the child was under the age of 18 at the time of the offence, the court will presume that the child was under the age of 18 until proven otherwise.

**Burden of Proof:** Section 34(2) places the burden of proving the age of the child on the accused. In other words, if the prosecution presents evidence suggesting that the child was below the age of 18 at the time of the offense, the accused must provide evidence to rebut this presumption and demonstrate that the child was, in fact, above the age of 18.

**Protective Measure:** This provision serves as a protective measure for children by placing the onus on the accused to prove that they did not engage in sexual activity with a minor. It recognizes the vulnerability of children and the need to err on the side of caution in cases where the age of the child is uncertain.

**Prosecutorial Tool:** Section 34(2) facilitates the prosecution of sexual offenses against children under the POCSO Act by providing a legal mechanism to establish the age of the child when such information is not readily available or documented.

Overall, Section 34(2) of the POCSO Act helps ensure that perpetrators of sexual offenses against children are held accountable and that legal protections are in place to safeguard

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<sup>13</sup> Shobha Saxena, Crime against Women and Protective Laws, (2014)

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the rights and well-being of minors. It underscores the importance of prioritizing the interests of children in cases involving allegations of sexual abuse or exploitation.

### **MARITAL RAPE – DEMYSTIFYING “CONSENT” WITHIN MARRIAGE**

The All-India Democratic Women's Association and two individuals have been grouped together, and the case is currently being considered by the Delhi High Court Bench.

These petitions address a single issue - ‘criminalization of marital rape.

The courts have clarified that these are two separate tracks to proving rape: ‘against her will’ means the woman has resisted and there was opposition while ‘without her consent’ would comprehend an act of reason accompanied by deliberation<sup>14</sup>.

This gives us a clear picture of the instances which can come under the definition of rape and should be punished under S.376 of IPC. Wherever there is a lack of will or consent by the female partner under any kind of sexual intimacy, it will be called rape and thus calls for punishment. However, the wedlock is considered as the dead-end of a woman’s consent and will. Marriage, as per an Indian’s context tends to mean surrendering yourself whenever the husband asks for any sort of sexual favours. As per ancient historians such as Manu and Yajnavalkya, marriage in Hindu religion is a religious institution which is pious and sacramental in nature, and is essential to perform various religious duties.

A man’s life is incomplete without marriage, and he completes himself by taking up a woman as his better half.<sup>15</sup> The most basic function of marriage was to perform religious duties and both the counterparts were placed on equal footing. It was said that God resides in those homes, where females are respected. Manu was of the view that a wife is a divine institution given by Gods and one should think that she has been obtained his (Husband’s) choice.

However, there has been a paradigm shift in the true essence of marriage in recent days. It is becoming more of a sex-based institution from a religious-based institution with a

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<sup>14</sup> State of UP v. Chottey Lal, (2011) 2 SCC 550

<sup>15</sup> Paras Diwan, Peeyushi Diwan & Shailendra Jain, Dr. Paras Diwan on Hindu Law, 547 (2nd ed., 2005)

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predominance of men. The situation of women is still deteriorating in Indian society and the elite class is still silent on the topic concerning the infringement of basic right of a woman.

Sir Mathew Hale, Chief Justice in England, during the 1600s in his treatise *Historia Placitorum Coronae* or *The History of the Pleas of the Crown* wrote, “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.”

This statement was made during the 1600s but is still prevalent today, at least in case of India. There has been a lot of hue and cry for gender equality but nothing much has been done for a woman getting into the role of a wife. Most recently a Special Fast Track Court in New Delhi has ruled that intercourse between husband and wife, even if forcible, is not rape and no culpability can be fastened upon the accused<sup>16</sup>. Inside the definition of marital rape, the right of a woman to bodily integrity and to decline to have sexual intercourse with her husband has been statutorily taken away and nonconsensual sexual intercourse with her husband is not an offence under the IPC.

The following are the three kinds of marital rape<sup>17</sup>, generally prevalent in society;

**Battering rape:** In this type of marital rape, women experience both physical and sexual violence in the relationship and in many ways.

**Force only rape:** In this type of marital rape, husbands use only that amount of force, as it is necessary to coerce their wives.

**Obsessive rape:** In obsessive rape, assaults involve brutal torture and/or perverse sexual acts and are most commonly violent in form.

Looking into the definitions we can easily find out that each and every definition consists of words like force, assaults, physical violence, and each characterizes the absence of intention. Provided with these many clues, any layman can say that these words when connected with sex are no less than rape. When it is too clear and transparent that the

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<sup>16</sup> State v. Vikash, SC No.1/14 (Special Fast Track Court, Dwarka Courts, New Delhi, 07/05/2014)

<sup>17</sup> D.K. Gosselin., *Heavy Hands – An Introduction to the Crimes of Domestic Violence*, (1st ed., 2000)

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wife is subjected to force in order to surrender herself and give up on her will and consent than there should be no problem with those sitting on helm enacting a law which makes this forced intercourse, taking away the bodily autonomy from a woman and abridging her will and consent, a punishable offence.

It is said that “A good husband makes a good wife”, but we Indians have taken it a bit differently, making it ‘a good wife is the one who satisfies her husband all the times he wanted, and then call it as his love’ and a good husband is someone who can show his masculinity over his own better-half. The biggest irony in the law of India is that there are laws against stalking<sup>18</sup>, voyeurism<sup>19</sup>, post-marital harassment regarding dowry but the same law books don’t channelizes marital rape as a crime. These law books talks about modesty<sup>20</sup> of a women and imprison who either assaults or uses criminal force or by word, gesture or act intended to insult the women and outrage her modesty, but there is no talking done on the topic where a woman’s actual modesty, her self-respect and her autonomy over own body vanishes. She just becomes a sex toy for her husband, who comes home and rapes her, releasing all his frustration on his wife by way of domestic violence and physical torture which in itself encloses marital rape. Rape is defined by S.375 of IPC, however the definitions given are self-contradictory, in which on one side from clauses one to six either talks about will or consent of women, there is no reference of the aforementioned words when it comes to sexual intercourse between spouses where female partner is not below fifteen years and is called as an exception. If we go by the basic definition of rape and consider the case of marital rape at the same time, there lies no scope of sidelining the latter from the ambit of the former. In cases of marital rape, no one but the woman, the victim knows whether it was a rape or not, and thus it is necessary to get this offence registered as rape.

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<sup>18</sup> S. 354D, Indian Penal Code, 1860.

<sup>19</sup> S. 354C, Indian Penal Code, 1860.

<sup>20</sup> S.509 and S. 354, Indian Penal Code, 1860

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Even as the law protecting the rights of girls under the age of 18 years stand harmonized by the judgment, the question of rights of adult married women against sexual abuse remains open. The debate on the issue of criminalizing marital rape has always been a raging one. On one side are the increasing genuine instances of sexual abuse within marriage that are being reported by women, while on the other side, there is a real possibility of such a law being abused, with devastating consequences.

The Law Commission of India in its 172nd Report considered the issue of marital rape, but chose to ignore the voices that demanded the deletion of Exception 2 to s. 375 IPC on the ground that “it may lead to excessive interference with marital relationship” and may destroy the institution of marriage. The Supreme Court, while deciding the issue of marital rape of girls below the age of 18 years, made certain observations and comments that are equally applicable and pertinent to married women over 18 years of age. One of the foremost issues is that of the right to bodily integrity and reproductive rights. While referring to various precedents, the Court found that women’s right to make reproductive choice is also dimensions of “individual liberty” as per Art 21 of the Constitution. This right, in effect, would include women’s right to refuse participation in sexual activity.

The Court referred to *Eisend v. Baird*, where the US Supreme Court observed that a marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. It was further noted that marriage is not institutional but personal – nothing can destroy the institution of marriage except a statute that would make marriage illegal.

In fact, in a recent order, the High Court of Gujarat observed,  
“...Marital rape is in existence in India, a disgraceful offence that has scarred the trust and confidence in the institution of marriage...It is a non-consensual act of violent perversion by a husband against the wife where she is abused physically and sexually...”

Exception 2 to s. 375 IPC finds roots in the archaic English notion that a wife is but a subservient chattel of her husband. Under what is known as ‘Hale’s Principle’, a husband

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could not be held guilty of raping his wife on the ground that the wife gives up her body to her husband at the time of marriage. However, this notion has since been given up in the United Kingdom itself, where marriage is now understood as an equal partnership between man and wife.

While determining criminality, motive and mens rea are of foremost relevance. Exception 2 to S. 375 IPC, as it stands today for adult married women, circumvents this basic aspect of criminal law. Legislators and courts now have the task of finding a balance between the criminality of the act and a possible misuse of the law protecting married women from sexual abuse.<sup>21</sup>

### **Marriage is not a License to Rape his Own Wife.**

Marriage straight away gives permit and right to rape. As referenced over, the normal absurd supposition that directs the general public is that marriage is a permit to rape and when a lady enters the obligation of marriage, she wilfully agreed to be disregarded physically forever. Non consensual sex inside marriage has not been perceived in India and non-consensual sex are viewed as agreed. Regulations and practices need to comprehend the way that rape is a rape at whatever point, whoever and any place it has happened, whether it happens inside the room or at the public spot. The assent assumes a significant part whether she is hitched or unmarried and non-consensual sex is rape. In India we don't have privileges for wedded women and her assent isn't viewed as which is infringement of her common liberty. We want separate regulations to condemn marital rape for security of hitched women's right in light of the fact that a connection between a man and lady isn't a permit to rape.

### **Purposes for marital rape**

However there have been a couple of reportable instances of rape, the rate is extremely low with regards to marital rape. There are many reasons, like family steadfastness or apprehension about the spouse, monetary reliance on the husband, absence of help from

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<sup>21</sup> Bar&Bench, *The Viewpoint: The law on Criminalisation of Marital Rape*, Dec 27, 2017

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relatives, cultural strain and defending the fate of their youngsters . Women consent to live with a spouse who manhandles them as opposed to living freely. The state of women being independent is as yet not much acknowledged in India. This makes the possibility of a solitary lady's life difficult to be acknowledged in India.

As per Hindu custom, when a lady weds, she is compelled by a solemn obligation to serve her significant other as per his desires and is considered as his property. While a women remain silent because of social and monetary retrains, many are prepped to comply with their companion and satisfy every one of their desires. Any difference is unsatisfactory. The incongruity is that couple of women know about this idea of marital rape. They are acclimated with the point that having intercourse in marriage appears to be an essential conclusion. Regardless of whether it is forced, they have acknowledged it. Therefore, women have less individual flexibility, more terrible mental and close to home prosperity and absence of confidence<sup>22</sup>.

The question on the independence of a lady over her body can likewise be seen from the focal point of S.9 of the Hindu Marriage Act 1955. As per this part either the spouse or wife can move to the court for compensation of intimate privileges and the court might pass the pronouncement of compensation as needs be. However this segment might seem like impartial, it is in clear infringement of the women's sexual security freedoms. Not just living together is constrained upon a lady by giving outright command over her body to another, yet in addition sets a lady in a weak situation in this association of equivalents. This regulation experiences cliché profound quality and originations of sexual jobs. Rather than having a solid sense of reassurance and agreeable inside her home, she needs to see the culprit every day and live with him. This main further epitomizes the male centric arrangement.

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<sup>22</sup> Patel, Krina. 2019. "The Gap In Marital Rape Law in India: Advocating for Criminalization and Social Change." *Fordham International Law Journal* 42 (5): 1534 & 1538

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One more justification for marital rape is the absence of sex mindfulness and sex schooling in India. There is not really any valuable conversation in families or schools. Youngsters are passed on to themselves to find their sexuality and know nothing about

the sexual improvements the other sex goes through. Its belongings should be visible after marriage when a ruled male forces himself upon an agreeable lady without understanding her psychological state and the aggravation that she goes through. Around 19% of at any point wedded women have revealed the controlling way of behaving of their better half in the marital relationship, going from being desirous assuming that she converses with other male companions to blaming her for being untrustworthy.

Administrators also have cheerfully avoided their obligations by contending that such relations are of private nature. It is hard to demonstrate the non-presence of assent and would prompt misleading indictments and provocation of spouses. Additionally, since the lady impacted has the choice to look for separate, it's anything but a legitimate safeguard for administrators to not perceive such a grave offense. The established plan of India gives security to even a solitary person in the event that his privileges are abused however doesn't completely follow Bentham utilitarian standards. This view is in opposition to nonutilitarianists who view a demonstration to be simply assuming it additionally helps the least advantaged people in a general public<sup>23</sup>.

Having said that, is it reasonable to allow women to endure due to dread of a couple of bogus cases? Isn't the legal executive there to eliminate such misleading objections? No regulation ought to bring about propagating the mistreatment of women. It no longer remaining parts simply an interior issue of the family. The view that perceiving marital rape prompts 'unreasonable obstruction with marital relationship' and has the capability of obliterating the foundation of marriage focuses to women's desired reality to end the sexual savagery confronted over and over in their marriage . Marriage is private and the organization can't be annihilated besides by a rule that makes marriage unlawful and culpable. Gujarat High Court in NimeshBhaiBharatBhai Desai versus State of Gujarat

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<sup>23</sup> Chhabra, Siddhant. "Marital Rape An Unjust Law." Legal Service India E-Journal

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underlined on the need to leave the thought of suggested assent in marriage. The court likewise additionally expressed that safeguarding women's independence inside marital connections are additionally pivotal.



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