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MARITAL RAPE- Anjali Thakural¹**ABSTRACT**

Marital rape is a situation where our country has no law to enforce, in other countries like United States, United Kingdom, Canada, South Africa, Bhutan, Nepal, Philippines etc. consider marital rape as a crime. Marital rape is a forced sexual intercourse by victim's spouse; it's a rape by the person whom you are married. This paper attempts to discuss on whether a husband forcing and threatening his wife to have sex will be charged with rape? Can a husband rape her wife? How not to treat an "unlawful" act as a crime in expectation of a relation. In India, Marital rape is a disgraceful offence which scarred the trust and confidence on law to give equal protection. This paper argues about the consent on sexual relation, and what should be the legal procedure of the non-consensual sexual relation in marriage. The right to sexual self-determination cannot be violated even in husband-and-wife relation. Marital rape should be treated as strict offence against women.

INTRODUCTION

Marriage is an Anthropological, traditional, cultural, and legal institution that establishes socially sanctioned rights and obligations between individuals. Marriage is a traditional and religious sacrament. It is a bond and relationship between the bride and groom. In India, Marriage is considered as consent to sexual relation. Society and law have given women right to fight for safety but not in marriage

In today's world women safety is a crucial which is heavily challenged especially in a country like India, where women are given right to fight for justice through article 14 guarantees of equality, article 15 no discrimination, article 21 right to life and dignity. Establishment of feminism

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Marital rape is a non-consensual sexual intercourse with spouse. It is an act of forced sexual intercourse. Marital rape is not considered as rape in India; it is being state that marriage comes with the consent. However, if a married couple live separately, then he is guilty of the offence of rape, if he maintained a forced sexual relation with his own wife without consent. Marital rape exception is a law, but it does not allow any absolute license to commit any crime against society. In India marital rape is not considered as rape, in earlier era, Sexual coercion was treated as a moral defamation, Sexual violence or Sexual coercion should be considered as crime whether performed between any relation. Any legal contract and social institution cannot wave off persons bodily autonomy, fundamental right, legal right. Any law does not give power or authority to treat another person as his property or does not provide right over body and mind. Sexual coercion effects the mental and physical health of a victim. Marital rape is a huge challenge however should be introduced as crime in law, an accusation can be easily made and very difficult to be proven and harder to be defended by the accused, it will be tough to differentiate innocent and guilty, but when a crime is difficult to be proven doesn't mean it should not be considered as crime.

BACKGROUND

In the 17th century, Lord Mathew Hale is an English jurist, introduced "marital exemption" doctrine, stating it as a common law, a husband cannot be accused of raping his wife because marriage is an implied consent to sexual intercourse which is non revocable.

Hale also stated that marital rape could not be a crime because marriage itself is a mutual matrimonial contract. Wife has given herself up to his husband which cannot be further retracted. The mentioned a doctrine of coverture, which means that a woman's rights are all covered by his husband, she is not legally capable of bringing any action against the husband, and wife could not appeal to the state for protection.

In United Kingdom, Marital Rape was criminalized in 1991

This exemption was rejected under the case *R v. R* [1991] UKHL 14 is a landmark judgement delivered by the United Kingdom, the common law changes according to the societal views, it was stated in the judgement that marriage is not an authority to spouse to override the other's consent in sexual matters. They specifically reject the marital rape exemption, also

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include reinforce of the concept of consent in all sexual relations. This judgment impacts the societal and cultural attitude towards marriage and consent.²

Marriage is a religious sacrament which is a bond and relationship between the bride and groom.

In South Korea, on May 16, the Supreme Court sentenced a 45-year-old man for three and half year of imprisonment for threatening her wife with a weapon for sex. All thirteen judges bench agreed that forced sexual intercourse within the marriage should be treated as marital rape.³

In India, *Hrishikesh Sahoo v. State of Karnataka*⁴

In 2017, a women filed a complaint against her husband Hrishikesh Sahoo accused of threatening of causing harm, marital rape and sexual coercion. He was also accused of abusing their daughter under Protection of Children from Sexual Offences Act, 2012. The matter reached in the supreme court on 9 January 2023,

In India, sexual intercourse without consent outside the marriage is consider as rape but sexual intercourse without consent during the marriage is not consider as rape. This ideology promotes the specific mind set of treating spouse as an object or property that he has the ownership of the spouse, this approach appreciate inequality, discrimination, mental harassment, physical torture, etc. Marital rape should be criminalized it does not only affect a person's body, but it also majorly impacts the mental health.

Rape should be consider as rape irrespective of the fact whether it is committed within the marriage or outside marriage.

The history of marital rape in India and its deeply connection with the Doctrine of Coverture, the article focuses on how the refusal of recognition of marital rape violates the constitutional rights of women and at the same time violates her overall bodily integrity that forms the very core of her existence, focusing on international standards and human right instrument, India violates women's constitutional right, Indian government provides countless reasons for not

²R v R [1991] UK House of Lord, October 23, 1991,

³Supreme court of Korea, May 16, 2013, criminal case

⁴*Hrishikesh Sahoo v. state of Karnataka*, 2017, decided by the Karnataka High Court, the petition was accused under rape and POSCO act, the matter is still pending in the Supreme Court.

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criminalizing marital rape in India as was elaborated in A Comparative Analysis of the legal status of Marital Rape by Neves Jujevaz Dsouza

Marital rape is an act of comprehensive offense which challenges the persons health at large level including physical and mental health. It causes mental disorder, prepartum depression and postpartum depression. It is being scientifically observed that it causes Post traumatic stress disorder and Suicidal behavior. It became a daily challenge for a spouse to face and is also seen as an unavoidable marital duty. Marriage can be seen as traditional spiritual sacrament which induce the bond and relationship between husband and wife but does not include the ownership of someone's body and mind. Rape should be considering rape whether the relationship is whatever because sexual intercourse without consent is against the spouse's right and will. Sexual coercion is a situation that should be questioned in marriage as well, which a spouse has been faced, should be address

TYPES OF MARITAL RAPE

Battering Rape –Battering rape harms physical and mental health. Battering rape is severe form of intimate sexual relation where sexual assault, physical violence, verbal and non-verbal abuse.

Obsessive Rape is also known as Sadistic Rape, it involved husband torturing her wife and committing rigorous sexual acts. It includes forced bizarre sexual act which forces her wife to perform painful sexual acts.

Force-Only Rape husband using his physical force to succeed in raping. Dominating wife and controlling her to have sex. This attack take place when wife refuses for sex.

Sakshi V. Union of India⁵

In this case, NGO file a PIL writ petition under article 32 of Indian Constitutional, wherein the petition was filed to expand section 375 of Indian Penal Code which talks about rape, the petitioner prayer for judicial interpretation and expansion of section 375 to include all forms of penetration and sexual act. The victims suffer from severe trauma cause by various form of sexual penetration and need for broader protection under the law.

⁵Sakshi V. Union of India [Sakshi V. Union of India, (2004) 5 SCC 518: 2004 SCC (Cri) 1645],

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Supreme court denied judicial interpretation to include all forms of penetration, such interpretation requires addition of new words and terms, which is not allowed in the statutory interpretation. Legislatures are responsible for interpretations.

How to consider the consent was present or not?

Considering the presence of consent is typically tough But it is crucial at the same time, it can be verified through certain procedure and evidence.

The present evidence could be Messages, emails, or chats before after the incident, Lack of consent, Medical Report, Nature of offence, Behavior of victim, Action of defendant, Testimony of witness, Statement of both spouse, Condition of marriage, prevision pattern of abuse and coercive control, whether there was force, threats, intimidation, or incapacity before the offence.

CONSTITUTIONAL AND LEGAL ANALYSIS

Marital rape exception is vulnerable contradictory to constitutional law which establish a huge gap between women equality and safety. The Juvenile Justice (care and protection of children) Act, 2015, which adopts to provide protection against sexual offences. The Protection of children from Sexual Offences Act, 2012, which works on safety of child.

Section 63 of Bharatiya Nyaya Sanhita, 2023 defines the offence of rape, it also has the exception states that sexual intercourse by man with his own wife, wife not being under the age of fifteen, will not consider as rape. It is completely against the right of body integrity, right of sexual choice, it is conflicting to humanly and constitutional right.⁶ The Independent V. Union of India case is a landmark case talks about the

Article 14 of Indian constitution talks about equality before law and equal protection by the law, which is conflicting to women rights to protection against marital rape, in India, no law

⁶In Section 63 of Bharatiya Nyaya Sanhita Rape is considered rape when sexual intercourse take place

Rape is a sexual act which includes oral contact, penetration without consent, against will, or consent is attained via threats, extortion, fear of death or hurt, misappropriation of facts, incapable to communicate the consent

or the women gave consent due to mental incapability or intoxication.

or Sexual contact performed with the girl under age of 18 whether without or with consent.

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provide protection to women against the forced sex during the marriage. It is considered as an unavoidable marital duty, which promotes the physical integrity.⁷

Article 15 provides no discrimination on any basis which directly focus on providing justice against the unfair treatment, women are treated unwell.

Article 19 provides freedom to speech & expression, freedom to movement, freedom to live with dignity. The term “expression” directly indicates about the personal choice, sexual expression and intimate decision-making. In India this article is a fundamental right but does not apply in marriage. Spouse’s sexual autonomy should be treated as respected.

Article 21 of the Indian constitution provides that protection of life and personal liberty, in Indian constitution, in this article we talk about personal liberty, liberty of body, right of privacy, right of bodily integrity, right to reproductive choice this article is a fundamental right of a human it mentions about the right over own body, but in India during marriage, spousal legal rights are ignored regarding the choice over her own body.⁸

Exception 2 of section 63 BNS is inconsistent with provision of POCSO (protection of child against sexual offence). And it is arbitrary, capricious and violative to the fundamental right of girl child, it is discriminatory and violative of article 14, 15, 21 of the constitution. As per supremacy of constitutional law should prevail over the exception 2 of section 63 of BNS.

Justice K.S. Puttaswamy v. Union of India is a landmark case, which the supreme court recognized the right to privacy and bodily autonomy which strengthens that a married woman has right over her body.⁹ A woman does not lose her right to privacy, bodily autonomy, dignity, sexual agency or right to make decision about her own body merely because she is married.

It affects the fact that our nation believes and follows gender equality, secularism, equality before law. Marital rape is a prevalent and unaddressed issue in India. The principle of justice for victims of crimes is being challenged. People consider sexual intercourse as an unavoidable marital duty, but marriage does not extinguish consent. The intimate relationship between

⁷ Article 14 of Indian constitution that The state shall not deny providing any person to equality before law or the equal protection of the law within the territory of India.

⁸ No person shall be deprived of his life and personal liberty except the procedure established by law.

⁹ Justice K.S Puttaswamy v Union of India (2017) 10 SCC 1, The Supreme Court of India

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husband and wife still require consent, Silence cannot be a right choice to make over this situation. In global world consent cannot be presumed with in marriage.

In South Africa it is being criminalized, spouse don't have the bodily autonomy regardless marriage.

According to WHO, 27% of women face rape with their intimate partner from the age group of 15 to 49 years.

Nigerian community survey found 15.3% women has faced marital rape.

In United State, 34% of women faced sexual coercion with their husband. 10-13% of women are being raped by their married partner.

56% of women face marital rape in India, around 80% of women face sexual coercion by their intimate partner or husband.

EFFECT OF MARITAL RAPE

The extreme endurance and pain that a women experience while she is being raped cannot be compared by any pain, it is just not limited to physical suffering it includes mental suffering.

It causes depression, mental agony, post-depression, post-traumatic stress disorder, increase the level of anger, fear, guilt. The women face the trauma of hating her own body, Marital rape harms a women's self-esteem. Rape causes extreme suffrage to women and her family's reputation.

INTERSECTION: DALIT WOMEN AND ADIVASI WOMEN

In India, there are plenty of existing communities Dalit and Adivasi communities which are historically backward, these communities are facing socioeconomic, cultural and political difference on behalf of the basis of caste class gender, communities face discrimination at large level.

There is an unseen barrier to access the civil and criminal remedies for such backward communities, if the marital rape is criminalized than also it is uneffected and inefficient to these communities because they live in remote areas in order to protect their own way of living, also there is lack of awareness of justice, culturally sensitive care, fundamental human

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needs, judicial accountability etc. For Dalit women and Adivasi women are discriminatively intersected in their society.

It clearly indicates only criminalization of marital rape is not enough, unless the law is accompanied by grassroots awareness campaigns.

CHILD MARRIAGE

In the history of India, people before 1929 appreciate child marriage, in which girl child (under age 15) gets marry to an old or mature man, almost double her age, the husband after marriage maintains sexual relation with the young girl. In some villages, in India this concept of child marriage is still existing which leads to conduct of marital rape in India. Marital rape's existence is a threat to women and child safety, it requires a better implantation of child marriage act 2006, POCSO Act,

Girls who get married at very young age often have more risk to susceptible of health issues which are associated with early sexual Activities. These health problems are also transmitted Diseases, such as HIV and obstetrics fistula.

Young girls who often get married at young age are not knowledgeable about sexual intercourse and also don't have power and maturity so become victim of domestic violence, social isolations, sexual abuse and mental harassment.

The consent of the young girl (under the age of 15 year) is null for marriage and sexual relation in the eyes of law, it is against the article 14, 15, 21 of the Indian constitution. Preparing an act or law over marital rape is not sufficient to maintain the women safety, it requires proper implementation of law and order. Educating and aware the people of India for well fair.

DOMESTIC VOILENCE

Domestic violence is any act omission or conduct that include Harms and endangers to health, safety, life, well-being. Domestic violence is a crime commit by a male person who has the living relation with the aggrieved party, victim is being dominated and not providing money for livelihood. Women face severe issue like mental torture, physical abuse, sexual abuse, economic abuse, verbal and non-verbal abuse.

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Domestic violence explicitly includes sexual abuse and marital rape, this act provides a civil remedy, protection against the accused, residence order and monetary relief. Domestic Violence Act 2006 provide a solution for violence and abuse, but it does not provide a complete satisfied remedy, it can help women but does not provide complete justice for sexual abuse and it shows the need to criminalize marital rape as a crime and provide women fair and just.

Civil remedies are inadequate; protection order does not guarantee, economic dependency on husband challenge women's integrity sometimes, let women to compromise and bear wrong behavior.

In India, criminalizing marital rape is not enough taking major steps are crucial like establishing foundation of education among girl child, working on employment sector for women, creating an independent women idealism.

COUNTRIES ON MARITAL RAPE

Countries have different opinion over criminalizing marital rape. Basically criminalising marital rape is removing discrimination against women. 189 countries has criminalised marital rape.

In Sri Lanka Marital rape is not fully criminalized the wife under the age of 16 years having sexual relation with her will be considered as marital rape or spouse judicially separated still maintaining sexual relation without consent can be considered as marital rape The prevention of domestic violence act does not include sexual violence it includes physical harm mental harm or torture

In Nepal, case name Forum for Women, Law and Development, Thapathali V His Majesty's Government ('FWLD Case') or cited as Meera Dhungana V. Government of Nepal,¹⁰ Supreme Court of Nepal stated that marriage does not remove consent it clearly means a marriage still requires consent to maintain a sexual relation with spouse. Marital rape is now a criminal offence under section 219(4) Criminal Code bill 2017.¹¹ The punishment of the offence 5 year imprisonment. The punishment is different from other rape offences.

¹⁰Forum for Women, Law and Development V. His Majesty's Government states Marital Rape immunity was unconstitutional.

¹¹Criminal Code (Bill) 2017, 219(4) addresses marital rape.

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Women rights is involve in Convention on the elimination of all form of discrimination against women (Cedaw), it is an international Convention which globally, socially, economical and politically protects women from discrimination and provide equality before law. Despite India being a signatory of CEDAW the domestic criminal law of India does not align with the treaty obligations regarding women equality measures. The perpetuation of constitutional law of India does not grant marital non-consensual relation to be criminalised. In this convention Article 1 talks about Discrimination against women, Article 3 talks about basic freedom of women, Article 16 ensure equal right in marriage, divorce, parenting choosing, family name and owning property. There are 30 Articles in this convention frames a clarity about equality and rights of women.¹²

India is also a signatory of International covenant on civil and political rights (ICCPR) Which Provide protection against inequality discrimination Cruelty. It is a strong foundation for human right protection. Universal Declaration of Human Right and ICCPR focus on economical social political and cultural rights. United Nation committee of human right obligates to punishable marital rape by law, but India fails to implement marital rape as a crime.¹³

MARITAL RAPE COLLAPSE WITH INDIAN LAW

Where marital sexual abuse may result in pregnancy. As per Medical Termination Act 1971, A women is allowed to terminate her pregnancy if pregnancy cause through rape. It is allowed because lack of consent. Victim of rape got pregnant against her choice, will and capacity. A victim of rape go through mental agony, physical pain and societal defamation. This pain has no comparison which women faces. The question arises Criminalising marital rape will collapse with the existing laws, termination of pregnancy is one of the comprehensive question. In the case of marital rape the women will allowed to termination her pregnancy or not. It is a huge contradiction. If we talk about the solution and resolution part the government have to prepare proper policies and act To implement In India. The policy should emphasize on termination of pregnancy in marital rape as well.

ARGUMENT OF MARITAL RAPE

¹²“CEDAW: Convention on the Elimination of all form of Discrimination Against Women,” The convention was adopted in 1976.

¹³“ICCPR: International Covenant on Civil and Political Rights, adopted in 1966 by UN General Assembly, Ratified by India on April 10, 1979.

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India must recognize that criminalizing marital rape is essential for progress and for safeguarding women's rights. Unlawfulness must be understood as a universal principle, irrespective of women's right, it is crucial to recognize that unlawfulness apply universally, regardless of marital rape. It challenges the perceived legal right of a husband to sexual access within marriage.

If Marital rape is considered as crime in India so we must understand this clearly it is tough to apply in practicality, it can introduce new discrepancies in the laws followed in India, it will require procedural litigation. It is very difficult to judge what happened in the locked room between a husband and a wife the question also arises that, was it really a rape? and what could be the evidence for such accusation? If the evidence is opened in the open court whatever is discussion between a husband and a wife will affect the privacy of marriage. Countries over 100 have considered marital rape as crime, they also have prepared law system to be enforced on such a sensitive matter. In a marriage, it is obvious to have a Reasonable sexual expectation from the spouse, and it will gradually affect the life of husband who could be accused of fake rape case.

Many arguments have come up against criminalizing marital rape, the first argument that arises among people is that women will fabricate marital rape charges to escape marriage or to gain advantages in divorce proceedings. The solution to fake cases is build a strong procedural safeguard. Focusing more and deeper on facts, mens rea, behavior of victim, investigation, Action of defendant Testimony of witnesses, etc. An establishment of investigation teams for domestic cases and should be major focus on investigating.

The second argument arises against marital rape; it is difficult to prove that rape exist or was non-consensual, the burden of proving it as a rape should be on petitioner, women is liable for proving lack of consent and once it is proven the accused should be given chance to prove his innocence. The facts, medical report, previous pattern of abuse and coercive control, messages emails and chats before after the incident can be prima facie in marital rape.

The third argument is that marriage is a sacred institution and criminalizing marital rape can destroy a marriage, but if the marriage can be maintained by permanent irrevocable right to pursue forced sex is equal to meaningless marriage. It is threat to women safety and fundamental rights.

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A case arise one woman was pregnant, her husband forced her to maintain sexual relation with him while the pregnancy which was completely against her will and consent, the doctors denied for such relation for the sake of the health of child and mother, but the husband didn't stop, unfortunately the child in womb died. According to such cases there is a very urgent need to criminalize marital rape, with a systematic form to enforce.

CONCLUSION

Marital rape is an analogically psychological, physical and reproductive harm on the victim. It is a common issue faced by spouse which remains unaddressed. Solution for such act is considering it as a crime and removing all exception of rape, introducing and preparing new law and provision related to marital rape which offers a suitable procedure and punishment. A systematic approach should be made in such sensitive matters with proper procedural legislation. Marital rape is a heavily underreported and which is associated with major health harm, marital rape should be treated as serious violation of law.

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