

## Issues & Challenges Related To Marital Rape in India

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**ABSTRACT** “Rape”, the most basic yet the most severe violation of human rights of women, is punishable by law and unanimously treated as a heinous crime across the globe. The Supreme Court of India has very clearly stated that “Rape is a deathless shame & the gravest crime against the human dignity”. Marital Rape, on the other hand is rape which takes place within the confines of the institution of marriage. It is physical violence which is committed by one’s own husband. As per Indian scenario, according to Section 375 of Indian Penal Code, the rape of one’s wife, who is above 15 years of age, is not considered to be as a punishable offence. The exemption clause is not just an accidental loophole in the law but has its roots in English legal system which can be traced from a judgment delivered almost 300 years ago by CJ Lord Hale in the 17<sup>th</sup> century. According to National Family Health Survey (2015-16) 10.4% of married women across age groups complain of spousal sexual violence. Even Social Constructivist Theory suggests that this social reality is because of the fact that men have dominated the law making & political sphere since ancient times. The rationale behind keeping marital rape under exemption is the notion of “Implied Irrevocable Consent”, which in simple word means that once a woman gets married, she has given her consent.

The present research is a doctrinal study and secondary sources are derived from books, journals, online databases.

The Objectives of the current research are:

- To study the magnitude of marital rape in India.
- To study the national and international legislative measures regarding marital rape.
- To suggest measures and remedies to strengthen the existing sociological, psychological & legal mechanisms.

However, the recent landmark judgment of the Supreme Court where privacy has been upheld as a fundamental right can be used to strengthen the argument to criminalize marital rape irrespective of age. The researchers will thus deduce a workable blueprint for the systematic handling of victims of marital rape.

**KEYWORDS:** Consent, Marital , Privacy ,Rape, Rights,

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### I INTRODUCTION

Violence within the four walls of one’s home or violence which is committed within the confines of family, has always preoccupied law reformers not only in West but in India too. The marital rape exemption clause, which grants complete immunity and benefit of doubt to the husband

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has been debated and questioned a lot in recent times. The most basic premise behind rejecting marital rape as any other normal rape is that it happens within the confines of the socially accepted institution of marriage. Thus, it is accepted that a woman gives her consent of lifetime for sexual intercourse by accepting the proposal of marriage. Herein, lies the basic fallacy of social institutions devised by mankind. Through the course of the marriage the lawfully wedded couple will go through several experiences, where they will go through several social, psychological, emotional upheavals. However, due to the acuteness of the lawmakers foresight during the framing of the laws related to rape, it was expected that the married women will never object and will give up her most fundamental right at the altar of marriage.

The Webster dictionary and socially accepted definition<sup>3</sup> of rape indicates that any man can rape a woman irrespective of the relationship status between the two. It is only the judicial & criminal law interpretation of the same which has sought to separate forced sex by husbands as rape. The rationale behind it, if one may read into various legal arguments is because the courts expect the wives to engage in sex with their husbands in the contract of marriage. This “compulsory nature of sexual relations”<sup>4</sup> arrangement most time, works to the advantage of men as the “duty” of sex is forced due to the fact that men in the Indian society get the resources, money & provide for the women/family in the house.

To understand the implications of marital rape & the seriousness of issue at hand one must first understand the various types of Marital Rape that have been broadly defined by social scientists.

#### **Forms of Marital Rape:**

- Sexual coercion by non-physical – it’s a social coercion where the wife is forced for a sexual intercourse and is reminded about her duties as wife.
- Forced sex- when a woman is not willing to have intercourse and use of physical force is involved
- Battering Rape- use of aggression and force against the wife for sexual intercourse
- Force only Rape- does not necessarily batter the wife but uses force against unwilling wife
- Obsessive Rape-involves sexual sadistic pleasure by the husband

The reason why the issue of marital rape has not been discussed till date is due to lack of awareness about women empowerment and the dismal literacy rates, especially in a country like India<sup>5</sup>, The propagation of social norms which have been hegemonically dominating the female psyche for centuries has also been a prominent reason for women never treating marital rape as rape. Right from the Manusmriti<sup>6</sup> where beating of wives and sexually assaulting them is justified on grounds of maintaining the family hierarchy, women have sought to believe that following the husband’s orders and fulfilling his sexual desires is their duty as an ideal wife.

The issue of marital rape can draw similarities to the issue of child abuse / child violence from their own parents which till very recently was debated as an act which did not need any legislation as it was the domestic family matter under the assumption that the parents always have the best interests of the child at heart, even when they engage in violent behavior.

Pauline Bart’s survey conducted in 1975<sup>7</sup> showed that only 0.4 percent women in the sample survey of 1000 women admitted to rape by husbands, thus showing the social stigma attached to these

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<sup>3</sup> *Rape* . (1828, March 2). Retrieved January 21, 2017, from Merriam Webster: <https://www.merriam-webster.com/dictionary/rape>

<sup>4</sup> Chael David (2003) : *Family : Critical Concepts in Sociology* : London Routledge.

<sup>5</sup> *Government of India* . (2011, May 22). Retrieved December 2, 2017, from Census 2011: [http://www.censusindia.gov.in/2011census/population\\_enumeration.html](http://www.censusindia.gov.in/2011census/population_enumeration.html)

<sup>6</sup> Bhargva Deepali (1989); *Manu Smriti : A Sociological Analysis*; University of Virginia; Rawat Publications

<sup>7</sup> Richard Gelles (Oct, 1977) *Power Sex and Violence : The Case of Marital Rape* Vol. 26, No. 4, The Family and the Law ,pp. 339-347

events. The argument against criminalizing marital rape here is if we give marital rape a legal status, then the already overburdened judiciary with long pendency history will be flooded with cases of inter marital disputes and women might tend to misuse this provision, which is the exact argument and criticism against article 398A (Dowry provisions). To prevent this from happening we can have separate courts on the line of fast track courts for rape victims for speedy delivery of justice and to prevent frivolous cases from flooding the courts, the penalty, if the case proves to be false, should be high and stringent.

Giving sanctity / legal status towards marital rape can be considered to be as a progressive legislation and will be in sync with that of a slowly empowering society where the literacy rates amongst females is increasing and awareness about sexual rights, human rights, and domestic violence is being promoted by governmental and non governmental agencies. It will go a long way in changing the mindset of a majorly patriarchal society where the societal relationships are dominated by historically steeped misogyny.

In *S v. H*, the case which deals with a husband who is charged with indecent assault after he tries attempting rape on his estranged wife subsequently appeals against the resulting conviction for common assault. The Judge, hearing the case, opined about the submissions made on behalf of the appellant and gave his remarks in the following words: "A husband cannot be convicted of raping his wife. That is said to be the law of the land. And if this is so . . . he can likewise not be guilty of an assault on his wife if he uses physical force in order to have sexual intercourse with her against her will. Such force is part of rape or attempted rape. What is condoned for purposes of rape cannot be condemned for purposes of the lesser offence of assault." Thus, without even hearing the matter further, the judge assumed that the marital rape exemption is a part of the law of the land. On the basis of this set assumption, he held that the appellant's argument was absolutely unsound.<sup>8</sup> This one sided argument takes a toll on a female emotionally and psychologically. This was just one example of one case where the pre conceived bias works against basic human rights. Non-reporting of cases thus becomes a norm since no law is formulated in this regard and the judicial bias is set against the rights of women.

## **II OBJECTIVES OF THE RESEARCH:**

- To study the magnitude of marital rape in India.
- To study the national and international legislative measures regarding marital rape.
- To suggest measures and remedies to strengthen the existing sociological, psychological & legal mechanisms.

## **III RESEARCH METHODOLOGY:**

The researchers have done a doctrinal research.

### **Research Design:**

The researchers have used exploratory & analytical research design for the current study.

### **Sources of Data Collection:**

The researchers have used secondary sources for data collection like books, journals, online data bases, research publications and articles.

### **Scope of study:**

The study seeks to address the magnitude of the problem of marital rape in the evolution of mankind and the evolving definitions of fundamental human rights which are getting asserted around the globe by several interest groups. The researchers are looking at the problem in a holistic way to bring about collective societal legal change to address the issues of the subaltern group which do not find any voice in the socio, political discourse of the land.

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<sup>8</sup> *S v. H* 1985 (2) S.A. 750 (NPD) J. R. L. Milton, "Rape in Marriage and Assault in Rape" (1985) 102 S.A.L.J. 367.

**Further research:**

The researchers would be doing a non-doctrinal research in future.

**Emergence of the concept:**

Despite the revolutionary legal reforms undertaken over the last century and half which has led to several rights being granted to women and wives specifically, the law and the lawmakers have surprisingly remained silent over the issue of overturning the marital rape exemption for husbands. Blackstone, the much renowned 18<sup>th</sup> century British Jurist has written about the marital contract between a man and women under the category of "private economical relations,"<sup>9</sup> Thus he sought to compare the relationship between a husband and his wife with that of other private, yet purely economically based relationships like that of the master and servant or that of a parent and their child. In the 18th century, due to the prevalence of patriarchy, husband's were definitely considered to be as more superior and the discourse of rights too was discussed within this supposition, of which Blackstone referred to as their "rights and duties" in private economical relations.<sup>10</sup>

However, it is not that simplistic because the ideology that works behind the social contract of marriage distinguishes the relationship between man and women from that of the other private relationships that humans get into. According to the principle of Marital Unity, which is in itself problematic, but to which we will come later, a man and women after marriage become one entity. However, what is more important for our study here is that, even their legal identities get merged. In simpler terms, the very legal existence of the woman gets suspended as soon as she decided to take the sacred vows with a man. Worse, it is assumed that her rights are consolidated with that of the husband, and whatever is right for her husband will also be considered to be right for her. She is expected to perform all her daily activities under the wing, protection, cover, care and supervision of her husband, with whom her legal identity has been tied up. That is probably why after marriage, women are expected to add their husbands name and surname to their name and use it on all legal documents henceforth<sup>11</sup>

However, more shockingly, the 19<sup>th</sup> century legal discourse sought to justify this unequal and unjust arrangement between a man and women on the grounds of natural law. Using the physical power argument as a reason, they justified women being the protectorate and responsibility of men. The fact that even since men and women are unequal in physical strength was used to explain how even nature wants men to be superior than women.<sup>12</sup> Schouler's description of the family structure sheds some light on this entire plight: "The domicile of the wife follows that of the husband; the domicile of the infant may be changed by the parent. Thus does the law of domicile conform to the law of nature." Despite the fact that the ideological considerations have undertaken considerable revisions over the years and women's rights and empowerment has forced the society to look at the man women relations in a different light, the issue of how to justify the individual rights of women in a marriage have surprisingly still remained regressive.. To the utter dismay and disgust of champions of women's rights, the definition of marriage within the purview of law and within the broad dialectics of rights still remained the same over the centuries.<sup>13</sup>

The major question which must be addressed at the outset is, can we or should we investigate a phenomenon which, by legal definition, does not even exist? Since forced sexual relations between a husband and wife are not legally considered cases of "rape," the question arises whether or not a wife herself views the incident as a "rape". A survey on Rape-Crisis Centers in London undertaken in the 1970's was part of a larger study of physical violence between husbands and wives. The investigation

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<sup>9</sup> American & English Encyclopedia of Law ; (1765) *William Blackstone Commentaries* Clarendon Press; Oxford

<sup>10</sup> Id. at 325.

<sup>11</sup> Id. at 441

<sup>12</sup> John Locke, 2 *Two Treatises of Government*, ed. P. Laslett (2d ed. Cambridge: Cambridge University Press, 1967).

<sup>13</sup> Schouler, *Treatise 4*

analyzed transcriptions of interviews with women who had been beaten by their husbands to see what information could be gleaned on the sexual aspects of the beatings. The increased attention on the plight of victims of sexual assaults led to the establishment of Rape-Crisis Centers throughout the world which provide legal, medical, and social services to victims of rape. The reports from these centers has shed light on this sinister problem in the society. The women interviewed through these surveys described the act conducted by their husbands which fell in the traditional definition of rape. The rape crisis centre in South Africa proved that of the number of women who were raped, only 15 percent were raped by complete strangers<sup>14</sup>

Many wives view themselves to blame for the incidents of forced sexual intercourse. Because of patriarchal hegemony the women are made to believe that providing her body for sexual pleasure of her husband is her duty and failing to do so will be going against societal, family norms<sup>15</sup>. With reference to Marital Rape, The *Feminist theory* suggests that the legal system, since times immemorial has been formulated and remodified by men and judiciary which is predominantly male dominated, thus the interpretation regarding family behavior is also male centric<sup>16</sup>. The *Sex-Role Socialization* theory, which is another variant of the Feminist Theory talks about how particular gender role guides the sexual interactions between the spouses in a marriage.<sup>17</sup> It talk about how in a marriage, women are always taught to be calm and passive whereas men are trained to be dominant and aggressive.

### **Concept of Consent:**

There is an apparent difference between the consent that a person gives to the liberal state as a citizen and the consent one gives to the various social relationships he shares as a member of one's family. Consent theorists have over the years failed to give due credit or offer a space for debates on consent to the several relationships the citizen shares. The most intimate relationship which is shared by a women with her husband has to be governed by consent. Right from the first stage where she agrees to marry the man to the point where she agrees to engage in sexual intercourse with him, consent has to be established at every stage quite clearly. Since history and societal studies have been dominated by patriarchal supremacy, it has been assumed that women will always give their consent. The existence of women has never got an independent identity and therefore decisions related to women have always been taken by the men in her life. If ever a women resorts to explicit non consent, it is considered to be as irrelevant or some sort of minor resistance which can then be converted and reinterpreted as consent.<sup>18</sup> The portrayal of the leading ladies in Hindi Cinema over the years has also looked at how an explicit rejection of consent by the lady is still taken to be as a green signal to the leading man to continue his pursuit of winning over the lady.

It is wrong to assume that just because rights have been granted to women in several "progressive" countries, the issue of consent will be a thing of the past.<sup>19</sup> The initial versions of the consent theories in the 17<sup>th</sup> century were very crystal clear about the importance of individualism in

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<sup>14</sup> Rape-Crisis Center Report (May 1979) Cape Town; South Africa

<sup>15</sup> Freeman, *But If You Can't Rape Your Wife, Who(m) Can You Rape?: The Marital Rape Exemption Re-Examined*, 15 FAM. L.Q. 1, 29 (1981)

<sup>16</sup> Catharine A. MacKinnon, "*Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*," Signs: Journal of Women in Culture and Society 8, no. 4 (Summer, 1983): 635-658.

<sup>17</sup> Susan Hesselbart, *An Evaluation of Sex role theories : The clash between Idealism and Reality*; (1981)NA Advances in Consumer Research Volume 08, eds. Kent B. Monroe, Ann Abor, MI : Association for Consumer Research, Pages : 570-575

<sup>18</sup> Klopper and Human, *If God is Male, then male is God*, Pretoria University Law Press,2007, p.no-3

<sup>19</sup> U.N. , Progress of the World's Women,(2011-2012), p.no-33

the relationship of men and women. The initial consent theories focused on the aspect of human beings, irrespective of their genders, being “naturally free” or born free and equal and therefore consent from both ends was naturally given importance. Thus, if a human being is born naturally free, it raises the most fundamental question then, and about whether another human can impose his/her will on others. However, as was justified by Hobbes in his conception of “state of nature”, humans have to come together and sacrifice some of their basic freedoms for peaceful co-existence in the society. If, we don’t allow that, the society will fall into chaos and this will be detrimental to the existence of the civilization in general. Thus, the existence of some well defined authority is necessary for the basic lawfulness in the society. However, if the freedom and individual identity of a citizen has to be preserved, such authority must receive explicit consent to conduct its activities. Consent theory, thus focusses on this explicit consent given by every individual in the society voluntarily, without any external pressure as a part of its several societal relationships<sup>20</sup>.

The cases where submission happens with consent, unless resistance can be proved, has a problematic historical origins. The difficulty in this case is to prove whether the acts have been performed "against the will" of the women, and similar acts which were performed "without her consent." This distinction is important to understand, especially to deal with cases where consent is achieved through cheating, deceit, fraud, dishonesty or through cunning trickery. Thus, since this distinction is very difficult to justify, most of the legal debates right since the starting of the 19<sup>th</sup> century have focused on the cases where intercourse is conducted and consent is achieved by fraud.<sup>21</sup> To give a straight example, in a married relationship, if the women has given her “consent” to her husband, but the husband has impersonated, or pretended to be another person or has resorted to fraud and trickery to achieve her consent and which the wife founds out eventually, then it is very difficult to prove that the intercourse was against her will and was indeed rape, especially if physical force is not involved in achieving consent.<sup>2223</sup>

However, there is still no legal clarity between the basic difference between “submission” and “voluntary consent” as they are completely different state of mind altogether. Also, the definitions of “force” and “threat” have also not been clearly defined. The Sexual Offences Act 1956 (UK) tries to tackle these complications but has been only partially successful<sup>24</sup>

As per Indian scenario consent cannot be proven if there is absence of Injury. As per Supreme Court in case of *Tukaram vs St.of Maharastra* <sup>25</sup> SC revised the decision of Bombay high court and held the accused not guilty. One of the reasons being under section 375 IPC, the fear of death or hurt can only vitiate consent for sexual intercourse. Without any recording, it will be considered habituated to sexual intercourse. Another case which also highlighted the vulnerability of females was the *St of Maharashtra vs Madhukar Narayan Mardikar* <sup>26</sup> where it was postulated that a prostitute too has a “right to privacy”. The court made it clear that even a woman of “easy virtue” is entitled to privacy and no one can invade her privacy as and when he likes. The women working in brothels too are

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<sup>20</sup> Burton B, e. a. (2002). Justice, Change, and Human Rights. *International Research and Responses to Domestic Violence* , 22.

<sup>21</sup> Harris, L. R. (1975). Towards a Consent Standard in the Law of Rape. *University of Chicago Law Review* , 43 , pp. 632.

<sup>22</sup> Koh, K. L. (1.968). Consent and Responsibility in Sexual Offences. *The Criminal Law Review* , pp. 81-97 and 150-162

<sup>23</sup> Scutt, J. A. (1975). Fraudulent Impersonation and Consent in Rape. *The University of Queensland Law Review* , pp. 59-65.

<sup>24</sup>Scutt, J. A. (1976). The Standard of Consent in Rape November . *New Zealand Law Journal* , p. 64-65.

<sup>25</sup> (1979)2 SCC 143:1979 SCC(Cri)381

<sup>26</sup> (1991) I SCC 57: 1991 SCC(Cri)I

equally entitled to protection of the law. Thus, extending it further, even women too, have her rights intact, even after marriage and can claim protection of her rights based on the above mentioned arguments.

Thus, Consent must always be given in a relationship, especially in a married life, it is always women who should give consent to the man. However, what happens is that the "naturally" superior, active, and sexually aggressive male makes an initiative, or offers a contract, to which a "naturally" subordinate, passive woman "consents." An egalitarian sexual relationship cannot rest on this basis; it cannot be grounded in such a simplistic version of "consent." Perhaps, the most inherent problem is the inability to create a common framework, language or a discourse through which we can look at personal relations where two individuals can form an association for lifetime based on mutual respect, consideration and respect for human rights.

### **National & International Perspective:**

In Saitan theatre group's play ' Pinjra'<sup>27</sup>, the character of Jaanki is married to a man who derives lust from the physical pain he gives to his wife while engaging in sexual intercourse. He clearly doesn't care for the consent of his wife to undertake his lustful expeditions. The relationship of Jaanki with her husband is purely based on force, torture, physical intimidation and coercion. Unfortunately, this is the stark & grim reality for lot of women in India<sup>28</sup>. According to the National Family Health Survey conducted in 2005-06 in which a total of 62,652 married women were surveyed, at least 36.7 per cent of them reported physical or sexual violence from their husbands and 9.7% reported just sexual violence.<sup>29</sup> Thus although, the evil practice of Sati has been abolished in our society, the practice of marital rape has even got legal protection.

Haribhai Chaudhary, Minister of State for Coal and Mines in Government of India, in a public statement had opined that it is absolutely impossible to implement the laws related to criminalizing the marital rape in India due to the inherent flaws within the socio economic reality of the land. Issues like the high illiteracy rate prevalent in the rural areas, poverty estimates by several commissions, religious beliefs that border on extremism and the very nature of marriages in India, where it is considered to extremely holy and sacred were given as some of the reasons by the minister for the impossibility of criminalization of marital rape laws. Although all his pre suppositions can be answered back by hard facts, there is definitely some grain of thought in his arguments which has stopped the courts of our land from venturing further in terms of progressive legislations.<sup>30</sup> The best way that the law protects women subjected to marital rape is by charging the husband with a minor offence of cruelty, the punishment of which goes up to three years in jail or a fine. In worse cases, she can seek restraining order and protection under domestic violence legislation.

Section 375 of The Indian Penal Code which defines the term "rape"<sup>31</sup> exempts marital rape from its ambit of a crime. The legislature also felt sexual intercourse within marriage should not be

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<sup>27</sup> *Pinjra*. (2016, September 21). Retrieved December 22, 2017, from Time of India:

<https://timesofindia.indiatimes.com/entertainment/hindi/theatre/Pinjra-digs-deep-at-the-underlying-hypocrisy-surrounding-marital-rape-case-in-India/articleshow/54266592.cms>

<sup>28</sup> *Government of India*. (2005, December 20). Retrieved December 22, 2017, National Family Health Survey of India : [http://rchiips.org/nfhs/sub\\_report.shtml](http://rchiips.org/nfhs/sub_report.shtml) -lists figures of married women who have faced spousal sexual violence.

<sup>29</sup> *Government of India* . (2011, December 22). Retrieved December 22, 2017-National Family Health Survey : [http://rchiips.org/nfhs/a\\_subject\\_report\\_gender\\_for\\_website](http://rchiips.org/nfhs/a_subject_report_gender_for_website). Calling out the persistent dichotomy regarding the age of consent, the 2011 data presents the highest percentage of women victims of spousal sexual violence under the 15-19 years age bracket (13.1 per cent). While 10.5 % of women in the age bracket of 20-24 experienced sexual violence from their husbands, in the next bracket of 25-29, the percentage of women falls marginally to 10.4%. The lowest percentage of women having suffered spousal sexual violence is reported in the 40-49 age group (8.2%).

<sup>30</sup> *First Post* . (2018, Feb 25). Retrieved January 12, 2018, from <http://www.firstpost.com/india/concept-of-marital-rape-cant-be-applied-in-india-here-marriage-is-sacred-says-govt-2219128.html>

<sup>31</sup>*Section 375 of IPC* . (2014, 5 10). Retrieved March 20, 2018, from Indian Law : <https://indiankanoon.org/doc/623254/>

treated as rape and also should not be treated as an additional ground for seeking divorce by wife<sup>32</sup>. The recent Right to Privacy judgment by India's Supreme Court examined in detail the concept of personal autonomy and its relation to privacy. They also discussed the right to privacy of rape survivors and the right to privacy in relation to abortion but sadly, missed an opportunity to enlarge upon the rights of marital rape cases and to get them under the ambit of law. At the very basic premise, by not criminalizing rape by husband the state is violating article 14 of the Indian Constitution, where it seeks to guarantee equality, but where the classification should be based on "Intelligent Differentia". There should be a connection between the classification & the object which we are seeking to achieve.<sup>33</sup> Thus, a married woman, if subjected to an act of molestation or rape by a stranger, is punishable under Section 354 & 376 of IPC, but if the same offence is conducted by one's husband it amounts to no offence. This anomaly is something that we seek to address and in the evolving space of human rights, the rights of married women too should be addressed by making marital rape a criminal offence.

Article 21 of the Indian Constitution also speaks about bodily self determination where the individual has the sole right to take ultimate decisions about one's own body. However, unfortunately, when it comes to marital rape, this very right is snatched away as it is assumed that with the consent to marriage the wife has also given a lifelong consent for sex with the husband irrespective of the physical, emotional, psychological circumstances. This blanket cover results in marital rape and other forms of physical abuse without her will or consent. Thus, shockingly, the very basic fundamental right is snatched away with the social institution of marriage which puts millions of women under threat and reasserts patriarchy in the society.

However, all hope is not lost. The Supreme Court & high courts have, from time to time, through various milestone judgments shown the vision and audacity to challenge these social evils and change the historical wrongs. The rights of women, especially, the married women have been upheld in several cases. In *Maneka Gandhi vs Union of India*<sup>34</sup>, Justice Bhagwati famously described that the term "personal liberty" and held that personal liberty cannot be interfered unless there is a procedure established by law. However, the law must go through the golden triangle of article 14, 19,21 which requires the law to be fair, reasonable & not arbitrary.

The Supreme Court has, time and again, made it explicitly clear in several rape judgments, that the act of rape is a gross violation of basic human dignity and the most important right to life<sup>35</sup>. Also, moreover, rape is less of an sexual offence and more of an act of domination where the male perpetrator is imposing his will against the consent of the partner, thus asserting his masculinity and reinforcing patriarchy. It is a tool in the hands of the powerful patriarchy to degrade and humiliate women and "show them their place". We find the whole argument of domestic abuse woven around this plain fact but strangely the legislature has not evolved to protect the rights of its women. In a democracy, nothing can be worse than one half of the population living without the most fundamental rights and with no state protection for its life and dignity.

Article 21 also protects the right of sexual privacy, which is the most important aspect of marital rape, which is also constitutionally protected under article 21<sup>36</sup>. Thus in other words, if a woman is subjected to forced sex then it will be considered as a violation of her sexual privacy. This

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<sup>32</sup> Ratanlal & Dhirajlal, *The Indian Penal Code* (32<sup>nd</sup> Edition, Lexis Nexis Butterworths Wadhwa, 2012)

<sup>33</sup> *State of West Bengal v Anwar Ali Sarkar*, AIR 1952 SC 75,80

<sup>34</sup> AIR 1978 SC 597

<sup>35</sup> *The Chairman, Railway Board v. Chandriman Das*, AIR 2000 SC 988

<sup>36</sup> *Kharak Singh v. State of U.P.* , AIR 1963 SC 1295; *Govind v. State of Madhya Pradesh* , AIR 1975 SC 1378 ; *Neera Mathur v. LIC* (1992) 1 SCC 286



right should not be removed just because the woman is married. The Supreme Court, in the famous case of *State of Maharashtra v. Madhkar Narayan*<sup>37</sup> opined that “every” women has the right to sexual privacy and “no one “can violate this right. If the judgment of the honorable court is taken in spirit as well as letter, dignity of millions of women in India could be protected and secured and empowerment could be furthered in the truest sense.

Another important objective behind Article 21 is that it gives everyone the “right to live with human dignity”<sup>38</sup>. By the sufferings faced by Indian women in the form of marital rape, this aspect clearly gets violated using the exemption under Section 375 of IPC.

The point to be noted in this entire debate is, after independence the literacy rates of Indian women were extremely low and dependency on the male member of the family was very high. There were several societal and cultural reasons for this scenario. Having a debate about marital rape was next to impossible that time. However, 70 years after independence , when women empowerment has been a hall mark of several governmental public policies resulting in the overall literacy rates increasing from 18.3% overall to 74.04% and female literacy increasing from 8.9% to 65.46%<sup>39</sup>, it is still a shame that we cannot legally protect the human dignity and rights of a married women. For patriarchy to be completely abolished from the society, rights like legalizing marital rape will go a long way in creating a level playing field. The three waves of feminism have had a considerable impact on the public psyche around the world resulting in several constitutional and legislative changes in favor of women empowerment trying to correct the historical wrongs. One such consequence has been that almost 52 countries have criminalized marital rape around the world, as was informed to the High court in a recently filed petition.<sup>40</sup>

The anomaly in the law is also something nobody has sought to correct after so many years. Indian Law doesn't allow a girl below 18 years of age to marry but on the other hand protects husbands from sexual intercourse with his wife, if wife's age is above 15 years of age. This stand still law is unfair and unjust on several counts.

Similarly, under article 375 of the IPC, an unmarried girl below 16 years of age cannot give her consent to have sexual intercourse hence it is not consent. However, as soon as she gets married and becomes a wife in the age group of 15-16 years of age and has intercourse with her husband, it is assumed that she is capable of giving consent and has given her consent for sexual intercourse.

By excluding marital rape, the law is taking away the agency over her own body, sexual activity as well as reproduction. By refusing to accept that marital rape is also a serious form of rape, the society and law is giving tacit support and legitimacy to sexual coercion and exploitation.

On one hand the Hon. SC has opined that rape is an act against humanity as a whole<sup>41</sup>, however it has strangely remained silent on the cases of marital rape. Furthermore, the state does not have any other strong and stringent mechanisms for women who want to raise their voices against sexual spousal abuse, thus making it an exercise in futility.

The addition of section 376-A is a positive step in this regard where the law seeks to prosecute the husband who uses force to have sexual intercourse with his wife who is living

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<sup>37</sup> AIR 1991 SC 207

<sup>38</sup> Francis Coralie Mulin v. Administrator, Union Territory of Delhi (1981) 1 SCC 608

<sup>39</sup> *Government of India* . (2011, July 20). Retrieved January 20, 2018, from Literacy Catalog : <https://data.gov.in/catalog/literacy-rate>

<sup>40</sup> *Times Now* . (2018, January 3). Retrieved January 20, 2018, from Times of India : <http://www.timesnownews.com/mirror-now/society/article/52-countries-have-criminalized-marital-rape-women%E2%80%99s-rights-activists-tell-delhi-hc/184391>

<sup>41</sup> *Bodhisattva Gautam v. Subhra Chakraborty*, SC 922 ( AIR 1996 ).

separately. This is a clear acknowledgement of the fact that since the wife is showing her disapproval towards her spouse by staying separate, she has definitely taken away her consent towards engaging in sexual acts with her husband. Similarly, the provision should also be broadened to also include the women who do not leave the husbands house and choose to stay in the same household but refuse to participate in any sexual activity. This will require us to revisit the definition of Consent which has been progressively broadened over the years in several countries to include the issue of marital rape in its ambit.

Marital rape, to a certain extent has been mentioned, although not explicitly in the Domestic Violence Act 2005. The act condones any form of sexual abuse in a live in or a marital relationship<sup>42</sup>. The definition of sexual abuse only takes into consideration life threatening or grievously hurtful abuse which can be physically shown or proven. This at least acknowledges the fact that a women, despite being in a marital institution, she retains her individual identity and status where she does not have to accept or concede any sort of physical overture , even if it is her husband.

The JS Verma committee, established about the brutal Nirbhaya gangrape in Delhi (2013) recommended that marital rape must be criminalized. It stated that “The law ought to specify that marital or other relationship between the perpetrator and victim is not a valid defense against the crimes of rape or sexual violence”

Thus, the Verma committee report<sup>43</sup> too is progressive in its mindset and nudges the lawmakers to change and reinvent as per the changing times. If not, then the law faces the inglorious distinction of getting redundant and a bane for the changing times Some of the practical challenges mentioned by Women and Child Development Minister, Maneka Gandhi<sup>44</sup> in including marital rape under traditional definition of rape were under the label of education/ literacy, poverty, myriad social customs and values, religious beliefs, mindset of the society of treating marriage as a sacrament act. is consistent with the patriarchal mindset of the lawmakers who play to the gallery and make it into a political issue as and when is the need, but refuse to tackle it at an institutional level to resolve the root cause of this social evil.<sup>45</sup>

It's not a question of being married or being a prostitute. It's all about respecting females and their rights. This can be understood by Article 10 of Declaration on the elimination of Discrimination Against Women, 1967 which directs to take necessary measures to ensure women whether married or

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<sup>42</sup> Section 3, Domestic Violence Act, 2005- (a) harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or(d) otherwise injures or causes harm, whether physical or mental, to the aggrieved person. Explanation I.—For the purposes of this section,—

(i) “physical abuse” means any act or conduct which is of such a nature as to cause bodily pain, harm, or danger to life, limb, or health or impair the health or development of the aggrieved person and includes assault, criminal intimidation and criminal force;

(ii) “sexual abuse” includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman;

<sup>43</sup> *Ministry of Home Affairs Government of india* . (2012, December 25). Retrieved February 2, 2018, from Verma Committee Report : [https://mha.gov.in/sites/upload\\_files/mha/files/JS-VermaCommittee-2013.pdf](https://mha.gov.in/sites/upload_files/mha/files/JS-VermaCommittee-2013.pdf)

<sup>44</sup> *Rajya Sabha -Government of India* . (2016, March 10). Retrieved February 3, 2018, from Replies by MP's: <http://164.100.47.5/qsearch/qsearch.aspx>

<sup>45</sup> *U turn by Maneka Gandhi* . (2016, March 23). Retrieved February 3, 2018, from Huffington Post : [http://www.huffingtonpost.in/2016/03/10/india-marital-rape\\_n\\_9435470.html](http://www.huffingtonpost.in/2016/03/10/india-marital-rape_n_9435470.html)

unmarried, to be treated equally with men. One should not violate their right to equality and respect, irrespective of the circumstances.<sup>46</sup>

### **Consequences of Marital Rape:**

Although the above mentioned reservations might not be entirely wrong, the following consequences should be pondered over and given a serious thought.<sup>47</sup>

An unmarried rape survivor has several mechanisms to effectively chart her course towards justice. However, a married rape victim, without the protection of the law, has to live with<sup>48</sup>

1. Physical injuries to vaginal and anal areas, lacerations, bruises and other forms of injuries which might never get healed for the lack of immediate medical aid.
2. Anxiety, shock, depression and suicidal thoughts which might lead to lowering of optimal output capacity of the female. Without any helping hand, the women might take the recourse of suicide thus affecting her maternal duties if she has children.
3. Gynecological effects like miscarriage (when she gets pregnant without her approval or willingness), stillbirth, bladder infections, STD's etc. – again, because these medical complication are conducted due to sexual activities conducted by force in a marriage with the clear realization that there is no legal protections, more often the women suffers these physical and emotional damages and lives a substandard life. This is a classic case of modern day exploitation and a clear failure of the three waves of feminism, especially in a country like India.
4. Long drawn symptoms like insomnia, eating disorders, sexual dysfunction, negative self image etc. are some of the long term effects for which we do not have any legal, societal, governmental help at hand. If this continues there will a sizable section of the population who will continue to live a miserable life and no amount of government action/policies or uplift/empower them will work, because as we have rightly seen, the issue starts right behind closed doors.

### **Suggestions**

The researchers suggest following steps that could help in preventing this heinous act:

1. As per, Wolfgang & Schaffer - mutual victimization – mutual consent happens between both the parties. Women should voice out rather than remaining silent due to societal pressure. Men alone cannot be blamed for this act. “A person who silently bares the violence is also equally wrong”<sup>49</sup>.
2. The term “consent” should be defined to draw line between consent and coercion.
3. Gender neutral laws should be framed and inequalities should be eliminated.
4. Marital rape should be criminalized under Indian Penal code, 1860 and section 375 should be amended with certain conditions to avoid misuse of this section.
5. Marital rape should be considered one of the important grounds for divorce under all personal Laws.

## **IV CONCLUSION**

Marriage is a coming together of two individuals with mutual respect for each other. According to the United Nations<sup>50</sup>, educating boys and men to view women as valuable partners in life, in the development of society and the attainment of peace are just as important as taking legal steps protect

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<sup>46</sup> Dr.S.R.Myneni, *Women and Law* (Asia Law House ,Hyderabad 2002).

<sup>47</sup> Browne, A. (1993). *Violence against women by male partners: Prevalence, outcomes, and policy implications*. *American Psychologist*, 48(10), 1077-1087.

<sup>48</sup> Jacquelyn C. Campbell and Peggy Alford ; *The dark consequences of Marital Rape* ; *The American Journal of Nursing* Vol. 89, No. 7 (Jul., 1989), pp. 946-949

<sup>49</sup> Wolfgang & Schaffer (1978) - *Victim Categories of Crime*- 69 *Journal of Criminal Law & Criminology* 379

<sup>50</sup> *United Nations Department of Economic & Social Affairs* . (2008, December 12). Retrieved February 10, 2018, from Role of Men & Boys in achieving Gender Equality : <http://www.un.org/womenwatch/daw/public/w2000/W2000%20Men%20and%20Boys%20E%20web.pdf>

women's human rights" For this to happen, it's important to include marital rape in the ambit of law and educate the society right from the school. The researchers have tried to provide an understanding about the nature of this heinous act. The issue of Marital rape is neglected largely and thus needs our attention. Modern leaders (Kiran Bedi , 2015) who are supporters of victims of Marital rape too agree that this act is a form of rape and lays hidden under the cover of marital privacy<sup>51</sup>. It is not a guard to hide violent acts. This paper thus tries to cover the concept of "consent" in cases of Marital rape and why it needs to be defined under Indian Laws.

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