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## “Why Culture over the Consent in Marital Rape”

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### Abstract :

*"There are no blurred lines when it comes to consent."*

*-United Nations Women*

*Marital rape is a burning issue in contemporary times. It is a very sensitive topic for our society. This paper explores the historical theories of marital rape, basically its based on Matthew flake's theory. This paper explain the definition of marital rape and the existing laws about it in India. The author tries to explore the rode of consent in marital rape and the legal age of consent in India. This law is patriarchal in many ways but also draws attention to the most important word in the whole argument is consent, lack of consent is most important what creates the whole issue. This paper shows traditional values about marriage and sex in India. It raise a question why in our society culture is more important than women's right? This paper is an attempt to analyze through various cases the question whether or not criminalizing marital rape in India is the need of the hour.*

**Key Words** - Consent, Spouse, Marriage Intercourse, Marital Rape

*"There are no blurred lines when it comes to consent"*

*-United Nations Women*

Marital rape is a burning issue in contemporary times. In India the fight to criminalize marital rape has been going on for decades. Marital rape is a very

sensitive topic for our society. Not many women who undergo this are aware of it, let alone being comfortable talking about it. The word sex is a taboo for our society even is good or bad. This does not come as surprise in a country where sexual violence in any form goes largely unreported for fear of social stigma. This law is patriarchal in many ways but is also draws attention to the most important word in the whole argument is consent. Lack of consent is most important what creates the whole issue. A husband does not need to take consent for touching, Kissing or having sere with his wife. No it is not just men who think like this. Surprisingly a huge amount of women also believe this to the extent that they justify violence too. According to them violence by a Spouse is justified under extreme situations. This is many ways highlights the plight of a woman in a marriage in India.

One of the most heinous crime that may be committed in India is marital rape. The crime of marital rape is not less serious than that of rape, rather it's a form of rape. Marital rape typically affects married women. It poses on the largest risks to India's gender justice system. It is one of those social ills that has been in India from antiquity and still causes havoc today.

**Marital Rape-** The 8th edition of Black's Law Dictionary classified marital rape as, a husband's sexual intercourse with his wife by force or without her consent."

Marital rape or spousal rape is the act of sexual intercourse with one's spouse without the spouse's consent. The absence of consent is an essential element and need not include physical violence. Marital rape is considered a form of domestic violence and sexual abuse. Marital rape is not a husband privilege but rather a violent act and injustice.

Marital rape has been impeached in more than 100 countries but unfortunately India is one of the only 36 countries where marital rape is still non-criminalized.

The exception for marital rape can be traced back to colonial-era doctrines. The Indian Penal Code (IPC) of 1860. Created during British Colonial rule, is based on an 1847 draft by Lord Macaulay of the First Law Commission of India. An exception from rape changes initially applied only to girls over to years of age, later raised to 15 and further still 18 as per 1940 and 2017. Furthermore, marital rape exceptions reflect colonial-era doctrines:-

1. **Matthew Hale Doctrine-** This doctrine states that a husband can not be accused of raping his wife since her consent through marriage precludes such action from happening.
2. **Doctrine of Coverture-** This doctrine asserts that upon marriage, women lose their legal identity and merge it with that of their husband's, thus giving her no freedom of action against his will.

These colonial legacies have had an influential role in shaping discussions regarding marital rape in India. In India marital rape is legal till now, but in U.K. Under the several offence Act 2003, rape within marriage is explicitly illegal.

### **What is Section 375 of the Indian Penal Code:-**

Section 375 of IPC defines rape as, "sexual intercourse with a woman against her will without her consent by coercion, misrepresentation or fraud or at a time she has been intoxicated or duped or is of unsound mental health of age".

Exception 2 to Section 375 states, "Non-consensual sexual intercourse by man with his wife if she is over fifteen years, does not amount to rape."

Beyond fifteen years of age there is no legal protection accorded to the wife except in cases when she is living separately under a decree of judicial separation or other. -wise, under any custom or usage and the husband forcibly has sexual intercourse with her without her consent. then in such cases the husband faces imprisonment of either description for a term which shall not be less than two years but which may extend to seven years under section 376 B of the amended IPC.

In 2017, The Supreme Court of India vide its landmark judgment in the case of Independent thought Vs UOI, raised this age from 15 to 18 to bring our law in conformity with POCSO and Child Marriage Prohibition Act Now, consent of a girl below eighteen years of age is immaterial and sexual intercourse with a girl below eighteen years of age (married or unmarried) would necessarily amount to rape even if she had consented to the same.

**Role of Consent in Marital Rape:-** Consent is defined as clear, Voluntary communication that the woman gives for a certain sexual act. Marital rape is an exception to giving consent as it is not a crime under the IPC as long as the woman is above eighteen years of age.

Consent is the core ingredient of rape or marital rape. The right to withdraw consent at any given point in time forms the core of the woman's right to life and liberty which encompasses her right to protect her physical and mental bring.

IPC, 1860 does not define the term consent in very clear terms. It just mentions what cannot be regarded as consent in Section-90. Thus a person is presumed to have consented only when the consent was given freely, voluntarily and without the influence of an fear, force or fraud operating on the mind of the victim. A person, who is drugged. intoxicated (unable to understand the nature and consequences of the act to which she consents) or under the influence of anesthesia, unsoundness of mind, coma or paralysis is incapable of giving consent to the act. To constitute consent under section 375 makes, there must be an intelligent and mature understanding of the nature and consequences of sexual act.

Explanation 2 to section 375 makes it clear that the consent should be voluntarily given and the participation must be a willful participation. Consent is certain u an act of reason, accompanied with deliberation, the mind of weighing, as in a bad balance, the good and evil on each side."

### **Why Culture Ove the Consent:-**

"No means No", whether it is a stranger, your girlfriend, a prostitute or even your own wife. No means always no not anything else... This is a very strong and powerful dialogue from an Bollywood movie 'Pink' which gives an outstanding message to our society.

In India, where culture is so damn important and everything related to it is sacred. Indian marriages sanctity is also at its peak in name of culture. But con there be two yardsticks to define rape-rape of an unmarried woman and that of a married woman? Is it acceptable to discriminate against a woman just because she is married to a man who raped her? The simple answer is 100. Sexual intercourse without the consent of your partner has only one name and that is rape. Whether then it's with your wife in your bedroom. It's a rape. In the whole world it's known as marital rape except India.

The Director of Social and Economic Development at the International Centre for Research on Women (ICRW), Priya Nanda had told the leading portal, u the



reason men don't for want to criminalize marital rape is that they don't want to give the woman the power to say No."

The Indian law holds an anachronistic view on conjugal relationship, where it is believed that a wife must submit to all the needs and desires of her husband in order to maintain the sanctity of their marriage. The government feels that criminalising marital rape would destabilise the institution of marriage and allow for the possibility of false allegations used to harass the husband for personal or economic gain. The government remains wary of false rape accusations that might put innocent husbands in jail. These arguments of government raise a question like. Is our culture greater and more important than women's right? Is marriage a license to rape his wife? How can rape within the marital bond be justified? Rape is rape nothing else. How can the institution of marriage be called a sacred one if the wife suffers both physically or mentally?

#### **Legal age of consent-**

The age of consent is dynamic topic that is subject to extensive deliberation and Legislation every now and then. The age of consent for engaging in Legal sexual activity as of sight now in India is 18. Any sexual activity that takes place between individuals under the prescribed age constitutes an offence. The age bar for engaging in sexual activity is in line with the age of marriage for girls, but the age of marriage for boys is 21. The age of consent at which an individual can independently enter into a contract is 18 years old. The right to vote and many other privileges are conferred on a citizen at the age of 16. As for other status, the age of consent plays enormous role in determining the modus operandi of proceedings and the repercussions of breaking the law.

The age of consent in India is 18 for females and 21 for males as per the Special Marriage Act 1954 and The Prohibition of Child Marriage Act 2006. If a man has sexual intercourse with his wife (consensual or not) who is aged 15 years or more. It does not come under the purview of rape as it is marital rape and as such does not come under Section 37.5 of the IPC. A discrepancy in the age of marriage and the age of consent for engaging in sexual activity has always existed. A contract of marriage that took place when a girl was below 18 but above 15 is not void but is voidable on the wish of the girl before she reaches the age of 18. Recently, a Bill was introduced in Parliament which stirred up much controversy nationwide. This was

the "Prohibition of child Marriage (Amendment) Bill 202f which proposes increasing the age from 18 to 2f for girds. This Bill has been subject to refensive deliberation and hence there has been much delay in ifs passing.

**Judicial Stand:-** The Indian Judiciary offers some optimism in this area but its constrained by the fact that the legislature not the judiciary is responsible for making legislation.

**Independent Thought V. Union of India and Others (2017) :-**

SC of India passed a judgement regarding marital rape. where it was held that husband having sex with his wife aged between 15 to 18 years would constitute as rape and not exception. However, this judgement came only for a particular age group and not for the victims particular as a whole. It was clearly argued by the petitioner that it has no concern with wives whose age is above eighteen.

**Nimeshbhari Bhenat bhai Desai Vs State of Gujrat (2018) -**

In this Corse Gujrat High Court held that husbands are to be reminded that being married to a women doesn't necessarily give you a license to rape your wife. The husband does not own his wife's body, nor her consent just because they are married.

**Dilip Pandey Vs State of Chhattisgarh (2021)-** The court ruled that any sexual act performed by a legally married spouse is not considered rape, even it is done against the woman's consent or under dures. X Vs The Principal Secretary, Health and Family Welfare Department Govt. of NCT of lathe & Arr. (2022) The Supreme Court of India ruled that unmarried women as well as survivor of marital rape have the legal right to terminate their pregnancies at 20-24 weeks under Rule 33 of the Medical Termination of Pregnancy Rules. The ruling stipulated that under this act the definition of rape should encompass marital rape.

**Harishikesh Sahoo & State of Karnataka (2018):-**

This case was a challenge to the marital rape exception in the IPC. The case involved a woman who accused her husband, of rape, cruelty and other offenses. Husband filed a writ petition in the Karnataka IC, invoking the marital rape exception to have the changes dropped. However, the court rejected his plea, ruling

that the exception Loas regressive and violated the right to equality. The exception treats the wife as subordinate to the husband.

**RIT Foundation Vs Union of India (2022):-** This case was heard by Justice Rajiv Shakdher and C. Hari Shankar. In this case Court had given a split verdict on declaring marital rape a crime.

Justice Rajiv supported abolition of the marital rape exception the said that provisions allowing husbands to have sexual intercourse with their wives without their consent violate right to equality.

Justice Harishankar said that the exception under IPC is not unconstitutional. He said that considering a husband as the rapi of his wife would be detrimental to the institution of marriage.

In this case the Delhi High Court allowed the parties to file a petition in the SC.

In this article author clearly said that absence of consent is the core ingredient of marital rape. It is an assumption of Indian society them when a couple gets married, the woman gives consent in perpetuity to her husband and she cannot retract it.

The other assumption is that there is a reasonable expectation of see in a marriage and therefore the wife is obligated to M fulfill that expectation of her husband.

National Family Health Survey (NUFHS-5) 2019-21 shows that sexual violence is most often committed by individuals with whom women have an intimate relationship. The report shows that among ever-married women aged 18 to 49 who have ever experienced sexual violence. 85% report their current husband and 13% report a former husband as perpetrators.

A departure from the prevailing narrative became visible in 2012 when a committee constituted under J. S. Verma, a retired judge of the SC recommended the criminalisation of marital rape. The Verma committer argued that immunity stemmed from an outdated notion of married women being the property of their husbands and irrevocably consenting to the latter's sexual needs. The committee recommended that the exception clause be deleted and that marital relationship ought not to be a valid defense to determine whether consent existed. But the

Parliamentary Standing Committee on Home Affairs that examined the bill rejected my suggestion of criminalising marital rape. Its reasoning was that the "entire family system will be under greater stress and the committee may perhaps be doing move injustice."

In 2013 the UN Committee on Elimination of Discrimination Against Women (CEDAW) recommended that the Indian government should criminalize marital rape.

In September 2022 the SC issued a landmark ruling in the case titled *X Vs. The Principal Secretary, Health Welfare Department of POCT of Delhi, 2022*. This is the first Legal recognition of marital rape under an Indian statute the SC. The court ruled that pregnancy of a married woman due to forcible sex by her husband can be treated as rape under the Medical Termination of Pregnancy Act. The court removed the distinction between married and unmarried women in the MTP Act and said even the latter can undergo abortion up to 24 weeks of pregnancy; extended the freedom to trans people (in this case, biological women who identify as men) and minors and said that the only person who needed to sign off on the abortion was the woman herself, obviating the need for consent from her family. In this ruling the court held that an artificial distinction between married and single women is not constitutionally sustainable" since it is not only in direct conflict with a woman's reproductive rights but would also perpetuate the stereotype that only married women have sex.

In 2018, Congress MP Shashi Tharoor proposed, "The Women's Sexual, Reproductive & Menstrual Rights Bill" which recommended more freedom for women with respect to their "inherent right to their sexual and reproductive choices" and omission of Exception 2 of section 375 of IPC, but it's still pending in the Parliament.

There is no denying of the fact that proving non-consensual intercourse would be quite difficult in medical terms as well as otherwise but should this stop us from making law on it because rape is rape and the "Saat janmo ka Bandhan" does not give anyone any right to engage in several activity without the other person's (spouse here) consent.

Upendra Bakshi, a former professor at the University of Warwick and slethi University says. "In my opinion this law should be abolished." He says that in the last few years there has been some progress in Jaw related to domestic and sexual



violence against women in India, but no steps have been taken to prevent marital rape. Marriage is considered a sacred institution in our society but the point is that there should be equality in marriage and one party should not be allowed to dominate the other. You cannot demand sexual service from your partner.

It is high time that the legislature should take cognisance of this legal infirmity and bring marital rape within the purview of rape but by eliminating exception 2 of section 375 of IPC. By removing this law women will be safer from abusive spouses. There is a need for laws that clarify boundaries in how we relate to one another and uphold constitutional ideas of equality, dignity and bodily autonomy alongside the unpleasant social realities about their use in practice exception 2 of section 375 of IPC. By removing this law women will be safer from abusive spouses. There is a need for laws that clarify boundaries in how we relate to one another and uphold constitutional ideas of equality, dignity and bodily autonomy, alongside the unpleasant social realities about their use in practice.

#### **References:-**

1. Roof. S.M. Misra, The Indian Penal Code.
2. POCSO Act. 2012.
3. The Prohibition of Child Marriage Act, 2006.
4. Special Marriage Act, 1954.
5. Dr. Manish Dalal & Dr. Raj Kumar, Marital Rape: The Indian and Global Perspective.
6. Kurmari Muskam, Marital Rape.
7. Rishika Saluja & Megha Singh Porsuka, Marital Rape:- A Myth or a Scandalous Reality?
8. Times of India.
9. The Hindu.
10. Drishti: <https://www.drishtias.com>

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