

# LEGALFOXES LAW TIMES

## RAPE: IS MARRIAGE AN APPROVAL TO RAPE?

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### ABSTRACT-

Rape as such is an offense against woman, disregarding her nobility and sense of pride and when it happens inside the four-dividers of a matrimonial home, it lessens the woman to the status of an item utilized simply for sexual gratification.<sup>1</sup> There is an urgent requirement for a particular law on conjugal/spousal rape in India, which ought to be at standard with the acknowledged worldwide norms on this issue.

Rape within marriage is an idea that anguishes the wife to the very centre. The fear of confronting it and still need to quietly endure it is an agonizing idea that influences the mind of the women.

This self-authorized silence has an inconvenient impact on the emotional, psychological, and mental solidness of women. However, this silence isn't actually self-authorized. The absence of laws and plentiful social stigma against the act of marital rape is one of the essential reasons that the shrewdness of marital rape is as yet holed up behind the hallowed of marriage. The woman has been given the right to battle for protection when the violators are outsiders, yet when the culprit of her bodily integrity is her better half, who she wedded with all the ceremony and show, such security is withdrawn by the legislators.

Considering this, the possibility that a woman (wife) must have sex with her better half regardless of her will, assent, well-being, and so on, is totally unsatisfactory to a socialized society. Subsequently, there is no defence or pertinence of the idea of marital exception in the current times. The facts demonstrate that de-criminalization of marital rape in India won't end the issue; however, it is a significant advance towards changing women's understanding of sexual

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<sup>1</sup>Gupta, B., & Gupta, M. (2013). Marital Rape:-Current Legal Framework in India and the Need for Change. *GALGOTIAS J. OF LEGAL STUD.*, 1, 16-26.

savagery in a marriage. The opportunity has already come and gone that the idea of rape is rape, regardless of the relationship between the victim in question and the culprit is perceived by the law and put carefully to constrain.

### ◆ INTRODUCTION-

“The day will come when men will perceive lady as his companion, not only at the fireside, yet in committees of the country. At that point, and not up to that point, will there be the ideal comradeship, the perfect joining between the genders that will bring about the most elevated improvement of the race?” - Susan B. Anthony

Most countries in the world perceive that rape is rape, and that rape is a wrongdoing. All in all, what's holding India, a prospering superpower, back? A cautious examination focuses to a few factors: an obsolete IPC going back to the Victorian period; and unbendingly male-centric culture, over India's horde religions, that stifles women voices and organization; and, a culture where marriage and family, in the dated feeling of the words, despite everything hold most extreme importance as the structure squares of society.

Violence against women delineates intensity of the men on women. It shows that men are more grounded and make the women their property or article for amusement. This has prompted different violations, improper acts done against women in an entirety. It has prompted domination and discrimination against women and brutality against them is one of the pivotal social instruments by which women are constrained into a subordinate position contrasted with men.<sup>2</sup>

The Indian Penal Code, 1860, in Section 375 defines rape this way: ‘that a man is said to commit rape when he has sex with a woman against her will, without her consent or where that consent has been obtained under threat, unsound psyche, and intoxication or affected by substances, or by means of pantomime of her husband’. A glaring provision is: Sexual intercourse or sexual acts by a man with his own wife, the spouse not being under eighteen years of age is not rape.

As Susan Brown mill operator attests, “The old patriarchs who met up to compose their initial contracts had utilized the rape of women to forge their male force how at that point would they

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<sup>2</sup>The United Nation Declaration on the Elimination of Violence against Woman, General Assemble Resolution, December 1933.

be able to consider assault to be a crime of man against woman? Women were entirely claimed auxiliaries and not free beings.”<sup>3</sup>

India is the 7<sup>th</sup> largest country in the World. Its populace is over 1.2 billion and is the most-crowded majority democracy in the world. It is a nation with a mix of different religions, societies, dialects, customs, utilization, and considerably more. The crime percentage in India is expanding at a disturbing rate. According to the Crime Index for 2018, the wrongdoing file in India is 383.5 and according to the reports of the National Crime Record Bureau, wrongdoing against women during the year 2018 was noted to be roughly 58.8.

It has been properly said that ‘the value of a nation can be decided from the position that it provides for women’. Women have never been given significance in India; their position is still not what it ought to have been. In India, Women have consistently been viewed as mediocre compared to men who have prompted India to be created as a nation with male jerk belief systems. Women in India are exposed to criminal outrages, for example, Rape, Domestic Violence, inappropriate behaviour, dealing, and constrained prostitution. This is only a little piece of an endless rundown of violations against women.

Marriage, additionally called matrimony or wedlock, is a socially and lawfully perceived joining between mates that builds uprights and commitments between them, their kids, and their in-laws<sup>4</sup>. As indicated by antiquated Hindu sacred writings no strict ceremony can be performed with flawlessness by a man without the investment of his better half. Spouse's investment is fundamental in any strict ritual. Spouses are in this way befittingly called Ardhangani. They should be given significant as well as equivalent situation with men.<sup>5</sup> But regarding late occasions, it tends to be seen that the situation of women is disintegrating.

The issues of sexual and aggressive behaviour at home inside marriage and the nuclear family, and all the more explicitly, the issue of violence against women, have come to developing universal consideration from the second half of the twentieth century. In any case, in numerous nations, marital rape either stays outside the criminal law, or is illicit however broadly endured.

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<sup>3</sup> Susan Brown Miller, *Against Our Will: Men, Women, and Rape* (Penguin, 1975) p.18.

<sup>4</sup> Haviland, William A.; Prins, Harald E. L.; McBride, Bunny; Walrath, Dana (2011). *Cultural Anthropology: The Human Challenge* (thirteenth ed.). Cengage Learning.

<sup>5</sup> Dr. (Ms.) Rekha Singh, *Status of Women in Indian Society*, (Visited on July 11, 2015), available at: <https://www.bu.edu/wcp/Papers/Huma/HumaSing.html>

Laws are infrequently being upheld, because of components going from hesitance of specialists to seek after the crime, to the absence of open information that sex in marriage without assent is illicit.

Marital Rape is more generally experienced by women, however not only. Marital rape is regularly a constant type of viciousness for the casualty which happens inside oppressive relations. It exists in a mind-boggling web of state governments, social practices, and cultural belief systems that join to impact each unmistakable case and circumstance in fluctuating manners. The hesitance to condemn and indict marital rape has been credited to customary perspectives on marriage, translations of strict conventions, thoughts regarding male and female sexuality, and to social desires for the subjection of a spouse to her better half perspectives which keep on being regular in numerous pieces of the world.

The possibility of the consecrated organization of marriage depicted in India is opposite and a long way from women view of the real world. Covered up under the iron cloak of marriage lies the terrible truth of crimes like marital rape, abusive behaviour at home, and so forth. Marital Rape isn't lawfully perceived as a crime in India and in this way, there is no punishment for the equivalent.

Through this research article, the researchers make an endeavour to condemn the discrimination faced by women as to marital rape and the deficiencies of the Indian Judicial System by not yielding marital rape as an offense. The researchers likewise give contentions and reasons supporting the requirement for the criminalization of marital rape in India, and further propose certain legitimate changes fundamental to accomplish the ideal destinations.

#### ◆ MEANING OF MARITAL RAPE-

At the point when one mentions the word rape, the propensity is to consider somebody who is a more peculiar, a noxious individual. Generally one doesn't consider rape with regards to marriage. Women themselves think that it is hard to accept that a husband can rape his better half. All things considered, in what capacity can a man be blamed for rape on the off chance that he is profiting his marital rights? It is demonstrative that a woman has no privilege to her own body, and her will is dependent upon that of her better half.

Despite the fact that marital rape is the most widely recognized and offensive type of masochism in the Indian culture, it is very much taken cover behind the iron drape of marriage. While the legal definition shifts, marital rape can be characterized as any undesirable intercourse or entrance (vaginal, butt-centric, or oral) acquired forcibly, the danger of power, or when the spouse can't assent. Regardless of the commonness of marital rape, this issue has gotten moderately little consideration from social scientists, specialists, the criminal justice system, and the bigger society all in all. The term rape has been imitated from the word rapio, which means to seize.

Rape is in this manner, coercive seizure, or the ravishment of a woman without her assent, forcibly, dread or extortion. It includes coercive, non-consensual sex with a woman. Rape can be seen as a demonstration of the brutality of the private individual of a woman, a shock definitely. It is simply a definitive infringement of the modest of a woman. The Supreme Court of India has suitably depicted it as an immortal dishonour and the gravest crime against human dignity.<sup>6</sup>

Rape isn't simply a physical ambush; however, it is dangerous of the entire persona of the person in question. The law didn't conceptualize it as an offense against the individual of the woman, one that pulverizes her opportunity; rather, it considered rape as an instrument for defending a man's property from the sexual conflicts of other men. Along these lines, the demonstration of rape inside marriage was not perceived as an offense as a woman was viewed as the property of the spouse, and a man couldn't be seen to abuse his own property.

Marital rape is especially convoluted in light of the fact that the mind-boggling, individual nature of marital relationships makes it difficult for the victim to try and consider herself to be a victim, not to mention detailing the culpable demonstration to the specialists, which is the reason Marital Rape is one of the exceptionally under-announced fierce violations. Indeed, even the women who do view themselves as victims are unwilling to move toward the specialists since they are monetarily needy upon their spouses, and announcing the issue could bring about the withdrawal of money related help leaving them and their children without food and shelter.

Marital Rape alludes to the sex between a man and a woman, who is lawfully acknowledged as a couple, where the woman doesn't give assent for such intercourse. Marriage, as examined prior is

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<sup>6</sup> Bodhisattwa Gautam v. Subhra Chakraborty AIR 1996 SC 922.

an irreproachable bond in which the man and a woman promise to live respectively in bliss just as in torment by welcome the blemishes of one another. Marriage likewise gives a privilege to the couple to legally perfect their marriage.

Culmination is viewed as an important essential after the marriage has occurred. Marriage is a steady relationship where a man and a woman are socially allowed to have Children inferring the privilege of sexual relations.<sup>7</sup>

Being a part of the wedlock doesn't allow the man to compellingly engage in sexual relations with his better half. The option to have sex must be consensual and not a commitment of the spouse. The wife ought to have the freedom to decline to engage in sexual relations and can't be constrained by her better half to do it. Indeed, even today the law system in India doesn't perceive marital rape as a crime. It is far from being obviously true issue on which so far no end has been drawn.

Marital Rape otherwise called 'Spousal Rape' or 'Inmate Partner assault' is an assault submitted by one companion against the other.<sup>8</sup> To comprehend the difficulties of Marital Rape one should initially comprehend the distinction between Rape and Marital Rape as both the terms have various implications and can't be utilized reciprocally.

The dictionary meaning of the word rape is the beguiling or infringement of a woman. The rundown of the meaning of Rape as characterized and acknowledged by the FBI seems to be "Penetration, regardless of how slight, of the vagina or rear-end with anyone part or article, or oral entrance by a sex organ of someone else, without the assent of the victim."<sup>9</sup>

As per Morton Hunt, "The run of the mill marital rapists is a man who despite everything accepts that husband should manage their wives. This broadens, he feels, to sexual issues: when he needs her, she ought to be happy, or possibly willing; in the event that she isn't, he has the option to constrain her. Yet, in driving her he increases unmistakably in excess of a couple of moments of

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<sup>7</sup> Meaning of Indian marriage, Visited on July 13, 2015), accessible at: <http://vapsoft.org/which-means-of-indian-marriage/>

<sup>8</sup> Marital Rape, (Visited on July 11, 2015, available at: <http://rapeinfo.wordpress.com/2008/05/25/marital-rape/>

<sup>9</sup> Definition of Rape, (visited on July 13, 2015), available at: <https://www.fbi.gov/about-us/cjis/ucr/later-program-%20updates/new-rape-definition-frequently-asked-questions>



sexual joy. He lowers her and reasserts, in the most sincerely ground-breaking way imaginable, that he is the ruler and she is the subject.”<sup>10</sup>

According to the Indian Penal Code, 1860, the meaning of Rape under section 375, states that “sex with a woman would be established as a rape on the off chance that it is without wanting to or without her assent. On the off chance that the assent of the woman is acquired by intimidation or causing fear of terrible hurt or demise, it will likewise be called rape. In the event that a man deceitfully causes the lady to accept that he is her better half and engages in sexual relations with her that is additionally rape. On the off chance that a man has sex with a woman who can't give consent because of unsoundness then it would likewise comprise rape”.

Sex with a young girl who is under sixteen years of age would likewise be called rape regardless of whether the young girl consented for such intercourse.

Aside from this the meaning of rape likewise includes an exception that expresses that a man having sex with his own better half, who isn't younger than fifteen years isn't rape.

Section 375, the provision of rape in the Indian Penal Code (IPC), echoes extremely bygone assumptions, referenced as its exemption clause- Sexual intercourse by a man with his own better half, the wife not being under 15 years old, isn't rape.

There is a clear preference for the rights of the husband over his wife against the wife's right to herself.<sup>11</sup> It can be obviously observed that the special case in this area doesn't recognize a wife being raped by her better half, given that she is over 15 years old. The Indian Penal Code Simply disregards an offense as terrible as marital rape by not having an arrangement for it.

The court in a case stated that:

“Defence counsel appropriately contended that IPC doesn't perceive the idea of marital rape. In the event that the complainant was a lawfully married spouse of the accused, the sex with her by

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<sup>10</sup> Morton Hunt, Legal Rape, Family Circle (January 9, 1979), p. 38.

<sup>11</sup> Dipa Dube, License to Rape: The Indian Viewpoint, Indian Institute of Technology - Rajiv Gandhi School of Intellectual Property Law, February 14, 2006

accused would not comprise offense for rape regardless of whether it was forcibly or against her wishes.”<sup>12</sup>

#### ◆ MARITAL EXEMPTION ORIGIN & RATIONALE-

Since the commencement of most social orders, it has been adequate for men to drive their spouses to have intercourse without wanting to. The customary meaning of rape in many nations was sex with a female not his significant other without her consent.

This gave the spouse an exception from arraignment for raping their wives—a permit to rape. The establishment of this an exception can be followed back to articulations made by Sir Matthew Hale, Chief Justice in seventeenth Century England. Lord Hale composed that: “the spouse can't be liable of rape submitted without anyone else upon his legal wife, for by their common consent and agreement, the wife hath surrendered herself this sort unto her better half which she can't retract.”<sup>13</sup>It is astonishing to take note of that Lord Hale didn't offer any contention, case law or lawful premise to help his attestation.

He asserted that, upon marriage, the spouse consequently hands over her legal individual to the husband and agrees to every single sexual act, which can't be withdrawn at any later date for reasons unknown at all. He presented inside the marriage, an idea of suggested consent that began at the hour of the marriage and proceeded for the whole course of the marriage, and such consent was regarded as unavoidable by Lord Hale. This built up that once wedded a woman doesn't reserve the option to reject sex with her better half. Because of the development of sex as a woman obligation inside a marriage, there is consistently an assumption of her consent.

A female slave has a conceded right, and is considered under an ethical commitment, to reject her lord the last commonality. Not so the spouse. Anyway ruthless a dictator she may, tragically, be affixed too. He can guarantee from her and authorize the most minimal corruption of person that of being made the instrument of a creature works in opposition to her inclinations<sup>14</sup>.

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<sup>12</sup> The Life and Times of an Indian Homemaker,(Visited on July 25, 2015), available at : <https://indianhomemaker.wordpress.com/2012/12/04/why-is-forcible-sex-or-lack-of-consent-not-rape/>

<sup>13</sup>Hale, Matthew, 1 History of the Pleas of the Crown, p. 629. (1736, London Professional Books, 1972).

<sup>14</sup> Mill, J.S., The Subjection of Womened. S.M. Okin, Indianapolis, Hacket, 1988, p. 33.



As long back as in 1869, John Stuart Mill saw that marital rape is never welcome to women for it speaks to an acquiescence of nobility so outright in nature that it brings down the height of the spouse underneath that of a slave. The fundamental reason for this presumption lies in the fiction that the spouse is considered to have given her unalterable agree to sex to the husband at the hour of the marriage and subsequently the husband can't be held liable of assault, which he may submit upon his significant other.

The precepts of the marital rape exception depended on the thought of permanent inferred consent'. According to this idea, when a woman is married to a man, there is believed to be inferred agree to sex, which is unalterable in nature. The other conventional avocations for the marital exemption were the common law doctrines that a woman was the property of her better half and that the legal existence of the woman was fused and solidified into that of a husband'.<sup>15</sup>

#### ◆ MARITAL RAPE AND LAWS IN INDIA-

Marital rape is an extensive problem for a woman that has occurred for centuries all over the world. Regardless of this fact, marital rape has been mainly ignored in the rape and domestic violence literature's, this problem has received comparatively little attention from social scientists, legal practitioners, the criminal justice system, and the society as a whole but after examining the need for reforms in the legal system regarding the punishment of various crimes against women and especially married women, various countries have recognized this as a crime with severe penalties.

However we have progressed in each conceivable field, marital rape isn't reflected as an offense in India. Despite alterations, law commissions, and new enactments, one of the most embarrassing and weakening acts isn't an offense in India.

The last form of Section 375 of the Indian Penal Code, which developed after conversations in the Select Committee, is a solidified type of Clause 359 of the Macaulay's Draft Penal Code. Section 375<sup>16</sup>, the provision of rape in the Indian Penal Code (IPC), has reverberating ancient slants, referenced as its exception clause- Sexual intercourse by a man with his spouse, the spouse not being under 15 years old, isn't rape.

<sup>15</sup> To Have and to Hold-The Marital Rape Exemption and the Fourteenth Amendment, 99 HARV. L. REV. 1255, 1256 (1986) p. 442.

<sup>16</sup>Section 375 of Indian Penal Code(45 of 1860)

Section 376 of IPC gives punishment for rape. According to this section, the convict should be punished with imprisonment of either for a term which shall not be less than 7 years but may extend to life or for a term extending up to 10 years and shall also be liable to fine except if the victim is his own wife, and isn't under 12 years old, in which case, he shall be punished with imprisonment of either for a term which may extend to 2 years with fine or with both. This section in managing rape, in an exceptionally tight domain, sets out that, an offense of rape inside marital bonds stands just if the spouse is under 12 years old, in the event that she is between 12 to 15 years, an offense is submitted, notwithstanding, less serious, attracting minor punishment. Once, the age crosses 15, there is no legal protection concurred to the spouse, in direct negation of human rights regulations.

In what manner can a similar law provide for the legal age of consent for marriage with being 18 while ensuring structure sexual maltreatment, just those up to the age of 15? After the age of 15, there is no remedy the women have. The Indian Penal Code was revised in 1983 to clear a path for the criminalization of spousal assault during the time of judicial separation<sup>17</sup>.

According to the Indian Penal Code, the occurrences wherein the husband can be criminally prosecuted for an offense of marital rape are as under:

1. When the spouse is between 12 - 15 years old, offense culpable with imprisonment up to 2 years or fine, or both;<sup>18</sup>
2. When the spouse is beneath 12 years old, offense culpable with imprisonment of either depiction for a term which shall not be under 7 years yet which may extend to life or for a term extending up to 10 years and shall also liable to fine<sup>19</sup>.
3. Rape of a judicially separated spouse, offense culpable with imprisonment up to 2 years and fine;<sup>20</sup>
4. The rape of a spouse of over 15 years in age isn't punishable<sup>21</sup>.

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<sup>17</sup>Indian Penal Code (45 of 1860),Section 376A

<sup>18</sup>Indian Penal Code(45 of 1860),Section 376(1)

<sup>19</sup>Ibid

<sup>20</sup>Supra at 17

<sup>21</sup>Indian Penal Code (45 of 1860),Exception to Section 375

In 2005, the Protection of Women from Domestic Violence Act, 2005 was passed which although did not consider marital rape as a crime, considered it a type of domestic violence<sup>22</sup>.

Under this Act, if a lady has experienced marital rape, she can go to court and get judicial separation from her spouse. This is just a piecemeal enactment and significantly more should be done by the Parliament with respect to marital rape.

Marital rape mirrors the perversity of a person. It isn't just the rape of a lady's body but the rape of her affection and trust also. Being dependent upon sexual violence by her own husband envelopes her in a sense of insecurity and dread. Her human rights are sacrificed at the special stepped area of marriage. The Indian Penal Code has managed this type of assault in an exceptionally piecemeal way. Different provisions of the IPC identifying with sexuality fortify Victorian ethical quality as well as the non-organization of women<sup>23</sup>.

#### ◆ **MARITAL RAPE: A DECRIMINALISED CRIME IN INDIA-**

India is one of the thirty-six nations that despite everything have not condemned marital rape.<sup>24</sup> The Supreme Court of India and different High Courts are as of now overflowed with writ petitions testing the lawfulness of this exemption, and in an ongoing landmark judgment where the Supreme Court condemned reluctant sexual contact with a spouse somewhere in the range of fifteen and eighteen years of age.<sup>25</sup> This judgment has thus prompted an expansion in different writs testing the legality of Exception 2 overall. Considering continuous litigation, this Article basically investigates the legality of Exception 2.

#### **1. VIOLATION OF ARTICLE 14 OF THE INDIAN CONSTITUTION-**

Article 14 of the Indian Constitution guarantees that the State won't deny any person equality under the watchful eye of the law or the equal assurance of the laws inside the territory of India<sup>26</sup>. Even however the Constitution shields value to all, Indian criminal law discriminates women who have been assaulted by their spouses.

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<sup>22</sup> The Protection of Women from Domestic Violence Act, 2005, Section 3 Explanation 1 (ii).

<sup>23</sup> Kumari, Ved, Gender Analysis of the Indian Penal Code in Engendering Law: Essays in the respect of Lotika Sarkar ( Amita Dhanda and Archana Parashar eds.) , p. 143.

<sup>24</sup> Marital Rape in India: 36 nations where marital rape is not a crime India, Today, Mar. 12, 2016.

<sup>25</sup> Independent Thought v. Association of India, (2013) 382 SCC (2017) (India).

<sup>26</sup> Indian Constitution, Article 14.

At the time the IPC was drafted during the 1860s, a married woman was not viewed as a free legal element. Or maybe, she was viewed as the asset of her husband. Accordingly, she didn't have any of the rights presently ensured to her as a free legal entity, including the option to record a protest against another under her own identity.<sup>27</sup> Exception 2, which basically excludes activities executed by spouses against their wives from being viewed as demonstrations of "rape," is to a great extent affected by and got from this previously existing precept of combining the women personality with that of her better half.

The underlying foundations of this teaching can be followed by British provincial standards in the Victorian era.<sup>28</sup> India was a British settlement during the nineteenth century. Every single Indian law authorized as of now were profoundly impacted by English laws and Victorian standards. The marital exemption to the IPC's meaning of rape was drafted based on Victorian male-centric standards that didn't perceive people as equivalents, didn't permit wedded ladies to possess property, and blended the characters of a couple under the "Tenet of Coverture."

Be that as it may, circumstances are different. Indian law currently manages married couples discrete and independent legal identities, and many statutes in the cutting edge period is expressly worried about the security of women. This concern is evident in the plenty of rules expected to shield a woman from inhumanity and provocation that have been passed since the turn of the century, including The Protection of Women from Domestic Violence Act and the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act.<sup>29</sup>

Exception 2 disregards the privilege to correspondence revered in Article 14 to the extent that it oppresses married women by denying them equivalent assurance from rape and sexual harassment. The Exception makes two classes of women dependent on their marital status and immunizes activities executed by men against their spouses. In doing as such, the Exception makes conceivable the exploitation of married women for reasons unknown other than their marital status while shielding unmarried women from those equivalent demonstrations.

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<sup>27</sup> To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment, 99(6) Harv. L. Rev. 1255, 1256 (1986).

<sup>28</sup> Jill Elain Hasday, Consent and Contest: A Legal History of Marital Rape, 88 Calif. L. Rev. 1373 (2000).

<sup>29</sup> Protection of Women from Domestic Violence Act, 2005, No. 43, Acts of Parliament, 2005 (India); Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, No. 14, Acts of Parliament, 2013 (India).

Exception 2's differentiation among married and unmarried women additionally disregards Article 14 to the extent that the classification has made no sane connection to the basic reason for the statute. In *Budhan Choudhary v. State of Bihar*<sup>30</sup> in addition to *State of West Bengal v. Anwar Ali Sarkar*<sup>31</sup>, the Supreme Court said that: "any ordering under Article 14 of the Indian Constitution is reliant upon a responsiveness test that can be passed just if the order has some normal nexus to the target that the demonstration looks to accomplish". In any case, Exception 2 baffles the motivation behind Section 375: 'to ensure women and rebuff the individuals who take part in the heartless action of rape.' Absolving spouses from discipline is altogether conflicting to that objective. Set forth plainly, the results of rape are similar to whether a woman is married or unmarried. Additionally, married women may really think that it's progressively hard to get away from harsh conditions at home since they are lawfully and monetarily attached to their spouses. As a general rule, Exception 2 urges spouses to mightily go into sex with their wives, as they realize that their demonstrations are not disheartened or punished by law. Since no discerning nexus can be deciphered between the order made by the Exception and the fundamental objective of the Act, it doesn't fulfil the trial of sensibility, and in this way disregards Article 14 of the Indian Constitution.

## **2. VIOLATION OF ARTICLE 21 OF THE INDIAN CONSTITUTION-**

Exception 2 is additionally an infringement of Article 21 of the Indian Constitution.<sup>32</sup> Article 21 expresses that "no individual will be precluded from claiming his life and individual freedom with the exception of as per the strategy built up by law." The Supreme Court has deciphered this provision in different decisions to reach out past the absolutely strict assurance to life and freedom. Rather, it has held that 'the rights cherished in Article 21 incorporate the rights to well-being, security, respect, safe day to day environments, and a sheltered domain, among others'.

As of late, courts have started to recognize a right to abstain from sexual intercourse and to be liberated from undesirable sexual movement cherished in this more extensive right to life and personal liberty. In *The State of Karnataka v. Krishnappa*, the Supreme Court said that "sexual violence parted from being a desensitising protest is an unlawful disruption of the right to

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<sup>30</sup> *Budhan v. State of Bihar*, AIR (1955) SC 191 (India).

<sup>31</sup> *State of West Bengal v. Anwar Ali Sarkar*, AIR (1952) SC 75 (India).

<sup>32</sup> India Const. Art. 21.



security and sacredness of a woman."<sup>33</sup> In a similar judgment, it held that "non-consensual sex adds up to physical and sexual brutality". Afterward, in *Suchita Srivastava v. Chandigarh Administration*, the Supreme Court compared the option to settle on decisions identified with sexual activity with rights to individual freedom, security, nobility, and substantial honesty under Article 21 of the Constitution.<sup>34</sup> Most recently, the Supreme Court has unequivocally perceived in Article 21 an option to settle on decisions in regards to intimate relations. In *Justice K.S. Puttuswamy (Retd.) v. Union of India*, the Supreme Court perceived the privilege to protection as a central right everything being equal and held that the privilege to security incorporates "decisional protection reflected by a capacity to settle on cosy choices principally comprising of one's sexual or procreative nature and choices in regard of private relations."<sup>35</sup> Forced sexual dwelling together is an infringement of the fundamental right. The above decisions don't recognize the privileges of married women and unmarried women and there is no opposite decision expressing that the person's entitlement to protection is lost by marital affiliation. Thus, the Supreme Court has perceived the option to go without sexual activity for all women, irrespective of their marital status, as a fundamental right conferred by Article 21 of the Constitution.

Furthermore, Exception 2 violates Article 21's entitlement to carry on with a solid and stately life. As referenced above, it is all around settled that the "right to life" conceived in Article 21 isn't only an option to exist. For instance, there can be no debate that each resident of India has the privilege to get medicinal services or that the state is required to accommodate the strength of its constituents.<sup>36</sup> In this vein, the courts have more than once held that the "right to life" includes an option to live with human dignity.<sup>37</sup> Yet the very presence of Exception 2, which neglects to discourage spouses from participating in demonstrations of constrained sexual contact with their wives, antagonistically influences the physical and emotional wellness of women and sabotages their capacity to live with nobility.

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<sup>33</sup> *The State of Karnataka v. Krishnappa*, (2000) 4 SCC 75 (India).

<sup>34</sup> *Suchita Srivastava v. Chandigarh Administration*, (2008) 14 SCR 989 (India)

<sup>35</sup> *Justice K.S. Puttuswamy (Retd.) v. Union of India*, (2017) AIR 2017 SC 4161 (India).

<sup>36</sup> *Regional Director ESI Corpn. v. Francis de Costa*, 1993 Supp (4) SCC 100; 5 D.D. Basu, *Commentary on the Constitution of India*, 4711 (LexisNexis 2015).

<sup>37</sup> *C.E.S.C. Ltd. v. Subhash Chandra*, (1992) 1 SCC 441 (India).



The above conclusion clearly reflects that Exception 2 to Section 375 of the IPC is an encroachment of Articles 14 and 21 of the Constitution. It is time that Indian law comprehends the cold hearted idea of this provision of law and strikes it down.

#### ◆ 42nd LAW COMMISSION REPORT-

The Law Commission of India in its 42nd report set forward the need of barring marital rape from the ambit of Section 375. In their words normally the prosecution for this offence is extremely uncommon. We figure it is desirable to complain through and throughout of the ambit of segment 375 and not call it rape even in a specialized sense. The punishment for this offense may likewise be given in a different Section. Numerous women organizations and the National Commission for Women have been requesting the cancellation of the special case condition in Section 375 of the Indian Penal Code which expresses that sex by a man with his own spouse, the spouse not being under fifteen years old, isn't rape.

Nonetheless, the Task Force on Women and Children set up by the Woman and Child Department of the Government of India took the view that there ought to be more extensive discussion on this issue. The command of the Task Force was to review all existing legislation and plans relating to ladies. Of the four suggestions made by the Task Force vis-À - Vis assault under the Indian Penal Code is the most significant to the meaning of rape.

It took the position that the meaning of rape should be widened to incorporate all types of sexual maltreatment. According to the suggestion, the Law Commission's proposed meaning of rape could be adopted instead of the current meaning of rape in Section 375 IPC as it is wide, comprehensive, and adequate. However, similar to the Law Commission, the Task Force additionally avoided suggesting the incorporation of marital rape in the new definition.

#### ◆ 172nd LAW COMMISSION REPORT-

Indeed, even the 172nd Law Commission<sup>38</sup> which was passed in March 2000 had made the accompanying proposals for considerable change in the law as to rape.

1. Rape ought to be replaced by the term sexual assault.

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<sup>38</sup> 172nd report of Law Commission of India on Review of Rape Laws, March 2000, para 3.1.2.1.

2. Sexual intercourse as contained in segment 375 of IPC ought to incorporate all forms of penetration, for example, penile/vaginal, penile/oral, finger/vaginal, finger/anal, and object/vaginal.
3. In the light of *Sakshi v. Union of India and Others*<sup>39</sup>, sexual assault on any part of the body ought to be considered as rape.
4. Rape laws should be made sexually unbiased as the custodial assault of young boys has been neglected by law.
5. A new offense, specifically section 376E with the title 'unlawful sexual direct' ought to be made
6. Section 509 of the IPC was additionally looked to be altered, giving higher punishment where the offense set out in the said section is submitted with sexual intent.
7. Marital rape: clarification (2) of section 375 of IPC should be deleted. Forced sex by a spouse with his wife ought to be dealt with similarly as an offense similarly as any physical violence by a husband against the wife is treated as an offense. On similar thinking, section 376 A was to be deleted.
8. In the Indian Evidence Act (IEA), when suspected that a victim consented to the sexual act and it is denied, the court will assume it to be so.

Despite the 172nd Report of the Law Commission of India submitted more than nine years prior to the Government of India asking that Parliament should replace the current definition of rape under Section 376 IPC with a more extensive meaning of sexual assault, which is both age and gender-neutral, nothing has been done till date.

### **Constitution of India Viz-A-Viz Conjugal Exception to Rape:**

The Constitution of a nation is the content that reflects the spirit of the country. The Indian Constitution organizes and controls power, guarantees human rights, balances the contending

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<sup>39</sup> *Sakshi v. Union of India and others*, 2004 (5) SCC 518

cases of social and individual interests, reflects the way of life and encounters of the nation, and operates as a vehicle for national advancement and unity<sup>40</sup>.

According to the Indian constitution, each law that is passed in the nation must be in compliance with the standards and thoughts enshrined in the Constitution of India. Any law that fails to fulfill this standard is considered as ultra vires and is liable to be struck down by the Courts and proclaimed unconstitutional.

#### ◆ JUDICIAL STAND-

Succeeding the historical framework of judicial decisions on the infliction of grave injury by the spouse on the wife the court in Queen Empress versus Haree Mythee<sup>41</sup>, observed that in case of married women, the law of rape doesn't apply between a couple after the age of 15; regardless of whether the spouse is beyond 15 years old, the husband has no right to dismiss her physical safety, for example, if the conditions are to such an extent that intercourse is probably going to cause death.

In the current case, the spouse was convicted under section 338, Indian Penal Code, for rupturing the vagina of his eleven-year-old wife, causing hemorrhage leading to her death. In Emperor Vs Shahu Mehrab<sup>42</sup>, the husband was sentenced under section 304A Indian Penal Code for causing the death of his child-wife by rash or negligent act of sexual intercourse with her.

In Saretha versus T. Venkata Subbaih<sup>43</sup>, the Andhra Pradesh High Court held: "There can be no doubt that decree of compensation of marital rights hence enforced offends the sacredness of the body and mind subjected to the decree and offends the trustworthiness of such an individual and invades the conjugal privacy and domestic affections of an individual."

In State of Maharashtra v. Madhukar Narayan Mandikar<sup>44</sup>, the Supreme Court has referred to the right to privacy over one's body. In this case, it was decided that 'a prostitute had the privilege to reject sexual intercourse'. What is sad to know is that every stranger rape has been criminalized

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<sup>40</sup> Roy, Sudhanshu and Jain, Iti, Criminalizing Marital Rape in India: A Constitutional Perspective, Criminal Law Journal, Apr 2008, p. 81-92.

<sup>41</sup> Queen Empress versus Haree Mythee, [(1891) ILR 18 Cal. 49].

<sup>42</sup> Emperor Vs. Shahu Mehrab, AIR 1917 Sind 42.

<sup>43</sup> Saretha versus T. Venkata Subbaih, AIR 1983 AP 356

<sup>44</sup> State of Maharashtra v. Madhukar Narayan Mandikar, AIR 1991 SC 207.

and all females, other than wives, have been given the right of privacy over their bodies envisaging the right to withhold consent and refuse for sexual intercourse.

In *Sree Kumar Vs Pearly Karun*<sup>45</sup>, the Kerala High Court saw that in light of the fact that because the wife was not living separately from her husband under a decree of separation or under any custom or usage, regardless of whether she is dependent upon sexual intercourse by her husband against her will and without her consent, an offense under Section 376A, IPC won't be attracted. In this case, there was a continuous question on the separation between the couple. From that point, a settlement was reached between the couple and parties consented to keep on dwelling together. The wife remained with the husband for two days during which she alleged that she was dependent upon sexual intercourse by her husband against her will and consent. Subsequently, the husband was held not guilty of raping his wife however he was truly liable of having done as such.

The judiciary seems to have totally consigned to its benefit the possibility that rape within marriage is not possible or that the shame of rape of a woman can be rescued by getting her married to the rapist. The difficulty is that it has been acknowledged that a marital relationship is for all intents and purposes hallowed. As opposed to, making the wives worship the husband's impulses, particularly sexual, it should flourish, mutual respect, and trust. It is considerably more horrible being a victim of rape by somebody known, a relative, and more awful to need to live together with him. In what manner can the law overlook such an enormous infringement of fundamental rights of any married woman, the right to her body, to protect her from any abuse?

#### ◆ SUGGESTIONS & CONCLUSION-

It is contended that marital rape should be criminalized in India, as this can be accomplished by applying an individual rights approach to violence against women. Indian women's associations have succeeded to accomplish public awareness and to pass enactment on domestic violence, yet marital rape has not been completely criminalized by nullifying the differentiation between marital rape and more peculiar rape. However, marital rape will neither be criminalized nor punished, till lawmakers and the society recognize women's individual rights within the marriage. Thoughts regarding women's sexuality, and along with these lines thoughts regarding

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<sup>45</sup> *Sree Kumar Vs Pearly Karun*, 1999(2)ALT Cri 77, II(1999)DMC 174.

non-marital and marital rape in Indian culture, start in the idea of sex, disgrace, and family respect, as opposed to women's rights and individual self-sufficiency. In the event that the reformers consider rape to be wrongdoing against a woman and her individual and bodily integrity and humanity, at that point marital rape and its punishment would be a lawful chance.

To get a change in the current policy, we may utilize an individual rights logical methodology in moving in the direction of criminalizing marital rape in India, on the grounds that marital rape won't be a State worry until the society and officials comprehend women to include individual rights within marriage. In western nations, activists have worked inside the individual rights structure in trying to challenge social suppositions about marital relationships. The individual rights worldview may have a similar role in India, where social presumptions prevent communities and even women's organizations from discussing the evil of marital rape. As previously mentioned, marital rape isn't completely criminalized in India. It is unmistakably a clear form of brutality against women and deserving of open and State consideration. The studies to date show that women who are raped by their husbands are likely to encounter multiple assaults and frequently suffer long - term physical and emotional consequences.

In this unique situation, marital rape might be significantly more traumatic than rape by a stranger on the grounds that a wife lives with her aggressor and she may live in consistent fear of another ambush whether she is wakeful or snoozing. Given the serious impacts, there is obviously an urgent need for the criminalization of the offense of marital rape. India is moving toward positive legitimate change for women in general, yet further advances are important to guarantee both lawful and social change, which would come full circle in criminalizing marital rape and changing the basic social assumptions about women in marriage. Although most Indian women feel protected under the Protection of Women from Domestic Violence Act, there are numerous loopholes in it, as the Act doesn't openly criticize marital rape. Notwithstanding, the enactment of particular legislation against domestic violence has opened the door for an enactment criminalizing marital rape since it would flag a move in the State's methodology of non-intervention in family life.

But will a state enter the domain of the house?The response to this question is yes. It has just done as such, in the instances of domestic violence, cruelty, and demand for dowry, then why to leave the most brutal and appalling wrongdoing outside the ambit of the state and laws.

The women have and still keep on being deceived by men and society. There is a need to recognize her as a human being, away from the antiquated idea of her being a simple property, and give her respect and the dignity she deserves. A prostitute has a right to say no if she isn't prepared to have sexual intercourse with an individual or if explicitly said a stranger, but why this right isn't given to a married woman?

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