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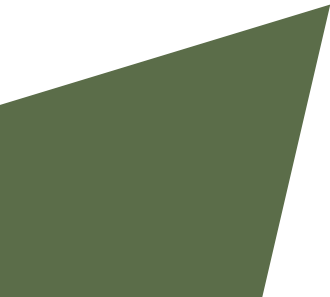
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# Marital Rape

Utkarsh Srivastava

## ABSTRACT

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*Marriage is one of the important social institutions like family in the Hindu social system. Marriage, in general, has a long history all over the world in almost all societies. The sociologist Westermarck has given a very detailed description of the marriage institution in his famous book 'The History of Human Marriage.' The marriage institution is important as it is a medium of reproduction for continuity of the human race. It fulfills the biological needs of human beings and makes them responsible for the upbringing and rearing of their children.*

*But this sacrosanct union is now violated viciously due to marital rape. Rape in marriage is an act of violence. It is an abuse of power by which a husband attempts to establish dominance and control over his wife. As it is perceived that marriage is permission for socially sanctioned sex and the notion of the wife as a property is equally fundamental to an understanding of wife rape. Not only are wives commonly viewed as the property of their husbands, but more specifically, they are seen as the sexual property of their husbands. But the viewing of wives as a husband's property is not ineluctable; it is a part of our patriarchal heritage.*

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*"Marriage is a relation of one or more men and women which is recognized by custom or law and involves certain rights and duties, both in the case of the parties entering the union and in the case of children born of it."*

-Westermarck, the History of Human Marriage, Volume I, p. 26.

## MARITAL RAPE

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He wanted to, she did not, is a scenario which may best epitomize the assumption of most of us concerning the underlying dynamics of rape in marriage. Sexual violence in a marriage has a history as long as the institution of marriage itself. But for millennia, marital rape- like other forms of sexual assault- was considered private trouble, not a public issue. Early rape laws defined the assault as a property crime against the husband or father whose wife or daughter was "defiled". Under this framework, marital rape was an oxymoron since a wife was legally a husband's sexual property. When 17th-century rape laws- from British common law to the Qing dynasty in China- sanctioned the rape, it was considered a violation of a woman's chastity; again, not possible in the context of marriage. Further, British jurist Lord Mathew Hale in 1736 addressed the issue of consent directly by declaring that "the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual consent and contract the wife had given up herself in this kind unto her husband, which she cannot retract."

This ideology of permanent, irrevocable consent pervaded legal and cultural conceptualizations of marriage and forced sex within it. And this ideology has global resonance, not because people on many continents were influenced by Lord Hale, but because control of women's bodies through marriage is foundational to patriarchy. Until 1993, rape laws across the US included a "spousal exemption" that specifically excluded husbands from rape prosecution.

What is the difference between victims of marital rape and other rape victims? "It's the difference between living with the frightening memory of having been raped, which is bad enough, and living with the rapist," said Dr. Kersti Yllo, assistant professor of sociology at Wheaton College in Massachusetts. "The effect on these women is profound."

The power relations that contextualize rape are critical, and how marital rape is currently legally condoned varies globally. In the US, for example, forced sex in marriage is illegal, yet numerous attitudinal surveys show that Americans regard the rape of a wife as far less serious than a similar



assault on an acquaintance or stranger. Further, marital rape is rarely prosecuted and almost always as an additional charge along with other violence, including murder. In India, the Supreme Court ruled in February 2015 that marital rape was not a criminal offence. A government minister then told the Parliament that marital rape could not be criminalized in India as "marriages are sacrosanct" in that country.

The Supreme Court on Monday refused to entertain a public in interest litigation (PIL) which sought framing of law for making marital rape a ground for divorce. A bench of Justices SA Bobde and BR Gavai directed the petitioner and lawyer Anuja Kapur approach the High Court with her plea. As marital rape is not a ground for divorce in the Hindu Marriage Act, the Muslim Personal Law (Shariat) Application Act and the Special Marriage Act, it cannot be used as a ground for divorce and cruelty against a husband, the petitioner said. If we specifically discuss Hindu marriage probably, no other people have endeavored to idealize the institution of marriage as the Hindus have done. Even in the patriarchal society of the Rig Vedic Hindus, marriage was considered as a sacramental union. And it continued to be so in the entire Hindu period, and even in our contemporary world, most Hindus regard their marriage as a sacrament. We find the following passage in the *Manu Smriti*<sup>1</sup>:

*"I hold your hand for saubhagya (good luck) that you may grow old with your husband, you are given to me by the just, the creator the wise and by the learned people."*<sup>2</sup>

And after reading this because of the sacrosanct nature of a Hindu marriage a wife cannot sue his husband or can seek a divorce based on marital rape. As ironically maintaining the sanctity of marriage is a whole sole burden of a wife only and there is no responsibility of the husband to maintain her purity and chastity, as marriage is a certificate to satisfy the sexual urge of the husband without the consent of the wife.

In *Independent Thought vs. Union of India*<sup>3</sup>, according to the petitioner, Section 375<sup>4</sup> of the IPC prescribes the age of consent for sexual intercourse as 18 years meaning thereby that any person

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<sup>1</sup> Manu Smriti, VIII, 227.

<sup>2</sup> Dr. Paras Diwan, Modern Hindu Law Pg. No. 63 24th Edition 2019

<sup>3</sup> 2017 10 SCC 800

<sup>4</sup> 375. Rape.—A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:—

(First) — Against her will.

(Secondly) — Without her consent.

(Thirdly) — With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

(Fourthly) — With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

having sexual intercourse with a girl child below 18 years of age would be statutorily guilty of rape even if the sexual activity was with her consent. Almost every statute in India recognizes that a girl below 18 years of age is a child and it is for this reason that the law penalizes sexual intercourse with a girl who is below 18 years of age. Unfortunately, under Exception 2 to Section 375 of the IPC, if a girl child between 15 and 18 years of age is married, her husband can have non-consensual sexual intercourse with her, without being penalized under the IPC, only because she is married to him and for no other reason. The right of such a girl child to bodily integrity and to decline to have sexual intercourse with her husband has been statutorily taken away and non-consensual sexual intercourse with her husband is not an offence under the IPC. In this case, the issue raised is only concerning the girl child and, therefore, not proper to deal with this issue which may have wider ramifications especially when the case of the girl child can be decided without dealing with the issue of privacy. Since this Court has not dealt with the wider issue of "marital rape", Exception 2 to Section 375 IPC should be read down to bring it within the four corners of law and make it consistent with the Constitution of India.

Section 375 of the IPC defines 'rape'. This section was inserted in the IPC in its present form by an amendment carried out on 3rd February 2013 and it provides that a man is said to commit rape if, broadly speaking, he has sexual intercourse with a woman under circumstances falling under any of the seven descriptions mentioned in the section. (A woman is defined under Section 10 of the IPC as a female human being of any age)<sup>5</sup>. Among the seven descriptions is sexual intercourse against the will or without the consent of the woman; clause 'Sixthly' of Section 375 makes it clear that if the woman is under 18 years of age, then sexual intercourse with her - with or without her consent - is rape. This is commonly referred to as 'statutory rape' in which the willingness or consent of a woman below the age of 18 years for having sexual intercourse is rendered irrelevant and inconsequential. However, Exception 2 to Section 375 of the IPC provides that it is not rape if a man has sexual intercourse with a girl above 15 years of age and if that girl is his wife. In other words, a husband can have sexual intercourse with his wife provided she is not below 15 years of age and this is not rape under the IPC regardless of her willingness or her consent.

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(Fifthly) — With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

(Sixthly) — With or without her consent, when she is under sixteen years of age. Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

(Exception) —Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.] STATE AMENDMENT

<sup>5</sup> Section 10- The word "man" denotes a male human being of any age the word "woman" denotes a female human being any age.

The exception lays down that sexual intercourse by a man with his wife, the wife being not under fifteen years of age, is not rape. In *R v. R (Rape: Marital Exemption)*<sup>6</sup> the House of Lords widened the scope of criminal liability by declaring that a husband could be charged as the principal offender in the rape of his wife. This decision seems to have obliterated the protection of the husband from such prosecution under the doctrine of marital exemption. This exemption was based upon the belief under the doctrine of marital exemption. This exemption was based upon the belief under which the wife was regarded as the husband's chattel. She was supposed to have given general consent to her husband as a natural implication of the marriage. This has now become an outmoded view of marriage.

If we critically analyze the concept of marriage, it is a sacrosanct relationship between two souls and bodies. The wife is also *ardhangini* (half of man). According to the *Satpatha Brahmana*. "The wife is verily half of the husband<sup>7</sup>. Man is only half, not complete until he marries." From this notion of the unity of personality of husband and the wife, mutual fidelity of husband and wife is the highest dharma. Manu further said that once a man and a woman are united in marriage, they must see that there are no differences between them and that they remain faithful to each other.<sup>8</sup> Apart from this concept of mutual fidelity and faith the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual consent and contract the wife had given up her in this kind unto her husband, which she cannot retract. As at some extent there is no importance of consent in establishing a sexual relationship with wife. The word 'consent' has only of rapacious importance. Marriage gives the certificate to husbands to satisfy their sexual urge and the consent which is necessary before any sexual act is assumed to be in positive on the part of the wife. And after taking reference with Clause (1) and (2) of Section 375 of Indian Penal Code i.e. against her will and without her consent respectively. Any sexual act in the absence of these two components will fall in the parameter of rape. In the case of marital rape, there is presumed consent on the part of wife which is equivalent to the absence of consent.

Further, exception 2 to Section 375 IPC in so far as it relates to a girl child below 18 years is liable to be struck down on the following grounds:— (i) it is arbitrary, capricious, whimsical and violates of the rights of the girl child and not fair, just and reasonable and, therefore, violates of Article 14,

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<sup>6</sup> *R v R (Rape: Marital Exemption)*, (1991) 4 All ER 481 (HL).

<sup>7</sup> *Satpatha Brahmana* V. 16, 10.

<sup>8</sup> *Manu*, IX, 101-102

15 and 21 of the Constitution of India; (ii) it is discriminatory and violates of Article 14 of the Constitution of India and therefore, Exception 2 to Section 375 IPC is read down as follows:

"Sexual intercourse or sexual acts by a man with his wife, the wife not being 18 years, is not rape". It is, however, made clear that this judgment will have prospective effect.

Now if we scrutinize the exception 2 of Section 375 by removing the factor of age and consider it as sexual intercourse with your legally wedded wife without her consent apart from the fact that she is of whatsoever age, it is whimsical, arbitrary, capricious and violates of women's rights as well and not fair, unjust and unreasonable, therefore, violates of Article 14, 15 and 21 of the Constitution of India. Article 15 declares that 'the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India'. Thus Article 14 uses two expressions "equality before the law" and "equal protection of the law". The phrase "equality before the law" finds a place in almost all written Constitutions that guarantees fundamental rights. Both these expressions have, however, been used in the Universal Declaration of Human Rights.<sup>9</sup> One the dominant idea common to both expressions "equality before the law" and "equal protection of the law" is that of equal justice. The words 'any person' in Article 14 of the Constitution denotes that the guarantee of the equal protection of laws is available to any person which includes any company or association or body of individuals. Article 15 provides for a particular application of the general principle embodied in Article 14. When a law comes within the prohibition of Article 15 it cannot be validated by recourse to Article 14 by applying the principle of reasonable classification. It is when the discrimination is based upon one of the grounds mentioned in Article 15, the reasonableness of the classification will be tested under article 14. Specifically, Article 15(3) is one of the two exceptions to the general rule laid down in clauses (1) and (2) of Article 15. It says that nothing in Article 15 shall prevent the State from making any special provision for woman and children. Women and children require special treatment on account of their very nature. Article 15(3) empowers the State to make special provisions for them. The reason is that "woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence and her physical well-being becomes an object of public interest and care to preserve the strength and vigour of the race". Article 21 of the Constitution says that "no person shall be deprived of his life or personal liberty except according to the procedure established by law". Article 21 protects the right to life and personal liberty of

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<sup>9</sup> Article 7 of the Universal Declaration of Human Rights says: "All are equal before the law and are entitled without any discrimination to equal protection of the law."

citizen not only from the Executive action but from the Legislative action also. A person can only be deprived of his life and personal liberty if two conditions have complied firstly, there must be a law and secondly, there must be a procedure prescribed by that law, provided that the procedure is just, fair and reasonable. The Court gave a new dimension to Article 21. It has been held that the right to 'live' is not merely confined to physical existence but it includes within ambit the right to live with human dignity. The right to live is not restricted to a mere animal existence. It means something more than just physical survival. The right to 'live' is not confined to the protection of any faculty or limb through which life is enjoyed or the soul communicates with the outside world but it also includes "the right to live with human dignity", and all that goes along with it, namely, the bare necessities of life such as, adequate nutrition, clothing and shelter and facilities for reading, writing and expressing ourselves in diverse forms, freely moving about and mixing and commingling with fellow human being. The Supreme Court has expressly held the "right to privacy" or the right to be let alone is guaranteed by Article 21 of the Constitution. A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, childbearing and education among other matters<sup>10</sup>.

Exception 2 to Section 375 of IPC, 1860 creates an unnecessary and artificial distinction between a married girl child and an unmarried girl child and has no rational nexus with any unclear objective sought to be achieved. The artificial distinction is arbitrary and discriminatory and is not in the best interest of the girl child. Such distinction is contrary to the philosophy and ethos of Article 15(3) of the Constitution and our commitments to international Conventions.

Article 14 has used the expression "person". Article 15 has used the expression "citizen" and "sex", so also Article 16. Article 21 has used the expression "person". These expressions are "gender-neutral" evidently refer to "human beings". A wife is a human being apart from being a female, and in an abusive relationship suffering mental and physical torture daily which is violating her three major fundamental rights i.e. Article 14, Article 15(3) and Article 21 which is somewhere contradictory to Constitution of India. The court must raise a presumption in favour of impugned law if it violates fundamental rights of citizens, the law is arbitrary, or is discriminatory. The Court can hold law either totally unconstitutional or strike down law or Court may read down the law in such manner that law when read does not violate the Constitution. In case of marital rape, the law

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<sup>10</sup> J. N Pandey Constitutional Law of India 55th Edition 2018

which is present in the form of Exception 2 of Section 375 is incomplete and discriminatory with a large number of women who don't have any remedy available against it.

A Women's right to privacy, dignity, bodily integrity and right to reproductive choices should be respected.

In *Suchita Srivastava vs. Chandigarh Administration*<sup>11</sup>, according to Section 3 and 5 of Medical Termination of Pregnancy Act, 1971 (MTP Act) the act makes invisible the plight of married women who are forced to conceive and carry a pregnancy to term against their will. This is because the marital rape of women older than 15 years is not legally recognised as rape. The state can, of course, place limitations on fundamental rights, but these limitations must pass tests outlined in constitutional jurisprudence. Since privacy claims can be grounded in any of our fundamental rights, the bench affirmed that any limitation on privacy will be tested according to the fundamental rights which it infringes and the established jurisprudence on those rights. The bench separately highlighted Article 21, which guarantees the fundamental right to life and personal liberty, and entails a "just, reasonable, and fair" test, that is, any law restricting Article 21 must be "just, reasonable, and fair" to remain constitutionally valid. Justice Chandrachud described this test as comprising of three prongs: the privacy restriction should exist as a valid law; there must be a "legitimate state interest" behind it, and the restriction should be "proportional" to its aim. The judgment potentially leaves open two standards of scrutiny for the last "proportionality" prong of the test. Either the SC uses a lower standard of "rationality," where the state must prove that there is a rational nexus between the object of the privacy limitation and the means adopted, or the SC uses a stricter standard, where the state must prove that there are no other less restrictive means which would achieve the same object. If these provisions are challenged, the state, at the very least, would have to show that there is a rational nexus between its interests (in protecting women's health and potential human life). Further, since privacy judgment has also bolstered calls to criminalize marital rape, future judgments may expand recourses available to married women.

In light of the privacy judgment, a two-judge SC bench recently read down the exception for marital rape and held that forced sex with all minor wives, and not just wives under the age of 15, would constitute rape. The larger exception for marital rape is also expected to be debated further.

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<sup>11</sup> 2009 9 SCC 1

## CONCLUSION

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If murdering someone at random is a crime, so is murdering a member of one's family, even if the sociology of Khap Panchayat begs to differ. By the same token, it hardly stretches one's imagination to conclude that if raping a woman at random is a crime, so should raping one's wife be.

In any civilized nation, there hardly needs to be any further argument on the subject. It is little surprise that even the Supreme Court has echoed similar views. When the government representatives say the sociology or social reality of the country makes it difficult to make marital rape a crime, perhaps what they mean is that sociology or social reality of the country make it difficult to enforce the law of making marital rape a crime, just as dowry law remains difficult to enforce, because sociologically dowry demand remains rampant and acceptable. But this can only mean that sociologically, marital rape remains rampant and acceptable certainly not to women though in the country and hence the challenge in implementing the law. Is the irony of the situation lost on the government?

If the difficulty of implementing law and justice is to be the basis for promulgating laws, in a country like ours where it is virtually impossible to enforce delivery of justice on any matter in one's lifetime, or even filing of an FIR as a matter of routine, we can probably dispense with all laws. A law is recognition of the fact that even if a lot of folks get away with murder, murder is wrong. It is the same with rape or marital rape. Not declaring a category of rape as a crime implies that when that act is committed, no wrong has been done to any party. Can one say no wrong is being done to the wife when she is raped by the husband?

True. Frivolous accusations cannot be ruled out; true the police stations could be flooded with FIRs; true the waiting time for delivery of justice would be further elongated to two lifetimes. But let it not be said that no wrong has been committed when a wife is raped by the husband. That is the idea underlying declaring marital rapes as wrong.

And yet, it cannot be the intent of the right-thinking people to merely declare marital rape as wrong, and then go about their lives without worrying about the implementation of the law simply because it will be extremely difficult to enforce, or because a large portion of our population is still illiterate not that marital rape is exclusive preserve of the illiterate.

It is the job of functioning governments to raise their populace above the mire of illiteracy. There is no case for the political leadership to keep the country illiterate even 65 years after Independence and then have half the population of women to continue living in the dark ages as the chattel of men. It is the job of the governments to ensure that school education addresses these issues and moulds children's thinking. It is the job of the governments to raise the bar for social thinking and conduct, rather than reduce every issue down to whether or not it garners them more or fewer votes. It is the job of governments to ensure that the justice system delivers; and that the quality of policing improves.

It may be that without the force of effective justice delivery system, even if a marital crime is declared as a crime, the actual incidences of marital crime will not be seriously contained, leaving the real state of marital rapes largely unchanged. So, what is the best way forward?

Perhaps what we need are multi-pronged measures. We could start with making basic civil behaviour an integrated part of the curriculum, with such aspects of behavior as following traffic rules, doing the fair thing by others, demands of good citizenry, empathy towards animals and the weak and the voiceless; work ethics, punctuality, cleanliness and so forth. The higher grades in school could include lessons on the meaning of marriage as an institution, family life, gender equality, respect for women, social evils, superstition, key teachings of various religions, and such. In parallel, we need to start working on our judicial and police reforms. Also, in parallel, we could work closely with self-help groups, both men and women, to improve the sensitivities against the atrocities against women. There could be national adverts in the media, behind the buses and in films during intervals to sensitize the society to this malevolent exercise of the power of men over their wives. In the meanwhile, we could start with three-year punishment for marital rape as being suggested in some quarters of the government, but with a clear declaration that in five years, marital rape will be treated at par with any rape. True, it all looks Herculean. But if we don't begin ever, how will we ever change for the better as a society.