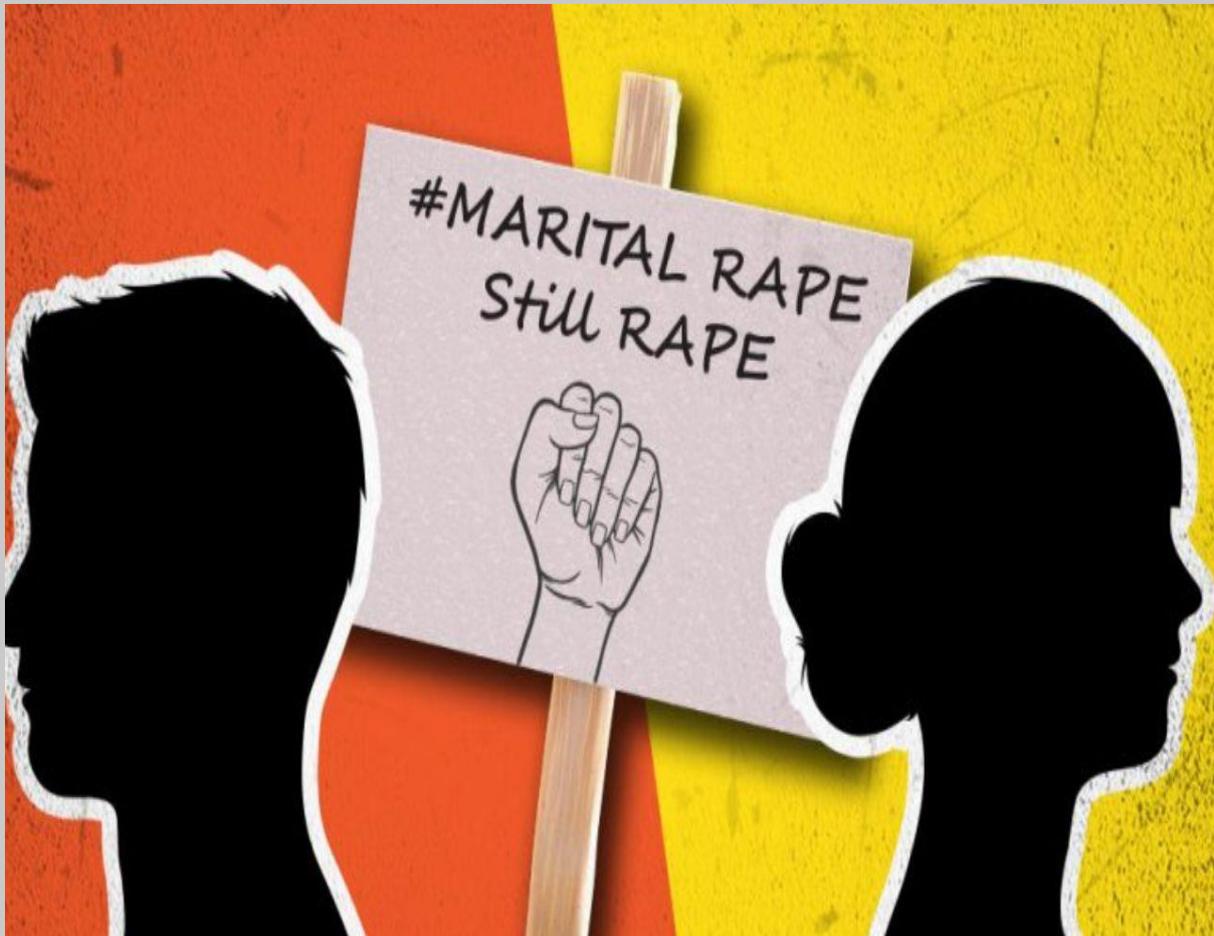


MARITAL RAPE: A CONCEPTUAL AND LEGAL ANALYSIS



“Marital rape is not a husband’s privilege, but rather a violent act and an injustice that must be criminalized.”

India, a country which is considered as the ‘motherland’ of its citizens, isn’t it an irony that when it comes to equality, the mothers of our country are not safe. Defining two terms simultaneously, Marriage is defined as the legal union of a couple as spouses, whereas on the other hand, Rape is defined as a sexual assault usually involving sexual intercourse or other forms of penetration that has taken place against a person’s will- while the former represents the sanctity of consensual relationship the latter is a brutal contradiction and in the patriarchal society of India, the concept of marital rape is never a consideration for the society as it is considered to disrupt the sacrosanct of a pious institution like marriage. While Section 375 of

the Indian Penal Code gives a definition of rape under it, the same provides an exception under it stating that rape committed against his own wife, unless she is of 15 years or above, shall not be considered as rape.

Marital rape refers to intercourse by the husband with his wife without her consent, by using threat of force, or physical violence. It is a non-consensual violent act violent by a husband against the wife where she is physically and sexually abused. The concept of Marital Rape not only does not hold any position as a criminal offence but also is considered as a myth and is beyond the consideration of the Indian society, which has been trying hard to keep intact its traditions and cultures.

It is really unfair to discriminate women just on the basis of their marital status, which is a clear violation of the Fundamental rights incorporated in the Part III of the Indian Constitution. Right to Equality is one of the basic rights which form the core of Fundamental Rights. Right to Equality under Article 14 of the Constitution provides all the citizens equal protection against laws and equality before law, without discriminating any citizen based on caste, class, creed, age, sex, religion or place of birth. Exception under Article 375 of the Indian Penal Code violates Right to Equality. Right against Discrimination gives all citizens a right to move to Court if any citizen has been subjected to discrimination based on their class, caste, creed, age, sex, religion or place of birth. This Fundamental Right acts as a shield against discrimination of the citizens and thus strives to remove any subject of inequality and keep harmony amongst the citizens. However, married women above the age of 15 years do not have the right to file a case against sexual assault committed by her husband on her, violating her Right against Discrimination not only on the basis of her sex, but also age and matrimonial status. Right to life under Article 21 of the Constitution is the basic right provided to people irrespective of the nationality. Marital Rape majorly violates right to life of married women above the age of 15 years as it deprives her of her life, personal liberty and her security.

The U.N. has consistently declared that violence against women impairs or nullifies women's human rights and their exercise of fundamental freedoms whether this violence occurs in public or in private life. The CEDAW Committee has specifically identified these rights as being impaired or entirely nullified by gender violence. These rights are protected in the core human rights treaties that have been rectified by most countries. The core international treaties protecting human rights include the ICCPR, ICESCR, the Convention against Torture (or —Torture Convention), and the CEDAW. Human rights treaties impose obligations on the state to regulate the actions of private actors. As with all other specific human rights violations, marital rape is not explicitly mentioned in the instruments. As shown in the earlier section,

treaty bodies like the CEDAW Committee have interpreted these rights to include the prohibition of marital rape. By ratifying these conventions, states accept the jurisdiction of the treaty bodies to monitor state compliance and to provide the substantive content for the rights and the nature of obligations through general comments and recommendations. The analysis turns next to the specific and most fundamental human rights which are breached by marital rape.

In India marital rape exists de facto but not de jure. While in other countries either the law-makers has criminalized marital rape or the judiciary has played important role in recognizing it as is offence, in India however, the judiciary seems to be operating at cross-purposes. In *Bodhisattwa Gautam v. Subhra Chakraborty* 2015 SCC 490 the Supreme Court held that —rape is a crime against basic human rights and a violation of the victim's most cherished of basic human rights, namely, the right to life enshrined in Article 21 of the Constitution. Yet it negates this very pronouncement by not recognizing marital rape. Women World Health Organization experience and need to challenge sexual violence from their husbands are currently denied State protection as the Indian law in Section 375 of the Indian penal code, 1860 has a general matrimonial rape exemption.

Many women's organizations and therefore the National Commission for girls are difficult in deletion of the exception clause in Section 375 of the Indian legal code that states that —sexual intercourse by a person along with his own partner, the wife not being under fifteen years of age, is not rape. However, the Task Force on women and set up by the woman and child Department of the government of India took the view that there should be wider debate on this issue. The mandate of the Task Force was to review all existing legislation and schemes bearing on ladies. Of the four recommendations created by the Task Force vis-à-vis rape below the Indian legal code, the most significant pertains to the definition of rape. It took the position that the definition of rape has to be compelled to be broadened to incorporate all styles of statutory offence. As per the advice, the Law Commission's proposed definition of sexual assault could be adopted in place of the existing definition of rape in Section 375 IPC as it is wide, comprehensive and acceptable. However, like the Law Commission, the Task Force also stopped short of recommending the inclusion of marital rape in the new definition.

As of now, the law in Asian country is all inadequate in providing supporting mechanisms for girls to exercise bodily.

REFORMS TO BE MADE

In view of the above discussion, the following are suggested:

- Marital rape should be perceived by Parliament as an offense under the Indian Penal Code.
- Marital rape shall be kept on the same footing as rape under Section 376 of the Indian Penal Code.
- The subject shall be treated as crucial as other offences and shall not be considered lightly.
- The protests of the spouse like that of shouting or yelling or opposing mightily shall not be considered as a barrier to the charge.
- Demand for separation might be a possibility for the spouse, yet on the off chance that the wife does not have any desire to fall back on separation and needs to precede with the marriage then the marriage ought to be permitted to proceed.

It is surrendered that changing the law on sexual offenses is a considerable and touchy undertaking, and all the more in this way, in a nation like India, where there is a contemporaneous nearness of a fluctuated and separated arrangement of individual and religious laws that may collide with the new alterations in the statutory criminal law. Further, however, there is requirement for generous changes in the law on sexual offenses, for example, making them impartial and wiping out the imbalances, a radical updating of the structure of sexual offenses isn't prudent. The prompt need is criminalization of marital rape under the Indian Penal Code.

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