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With this thought, we hereby present to you

MARITAL RAPE: JUDICIAL ANALYSIS OF REMEDIES PROVIDED BY THE INDIAN LEGAL SYSTEM COMPARED TO OTHER COUNTRIES

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ABSTRACT

This research paper focuses on Marital Rape and the legal remedies which are provided by the Indian legal system. Marital Rape, as an offence is not recognised in the Bharatiya Nyaya Sanhita and was also not previously recognised in the Indian Penal Code, 1860. This topic particularly has raised a lot of discussions in the Indian Legislature, and remains a controversy for judges to analyse as well. To define Marital Rape, is when the wife to have sexual relations with husband without her consent. It is basically when a male uses the sacramental union between a man and a woman as an exemption to have sexual intercourse with the women without consent. The Indian Legal System fails to recognise this as an offence under the law, but the remedies available for a married women when she is compelled to have sexual relations with her spouse is not recognised under the legal system.

This Research paper focuses on analysing the concept of Marital Rape, and its scope for criminalisation in India. Even though there is a question of legitimacy with the offence of Marital Rape, since both the husband and wife are a sacramental union and the relationship is entirely sensitive and private. There is scope for legal remedies for Marital Rape, as there are many other countries which has recognised it as an offence in the legal system. Therefore, this research paper focuses on the legal remedies which can be imposed in the Indian legal System to make sure that even married women have legal remedies for the same.

Keywords: Marital Rape; Bharatiya Nyaya Sanhita, 2023 Indian Penal Code, 1860; Criminalisation of Marital Rape.

INTRODUCTION

Marital Rape to be put forth in layman terms basically means when two individuals that is a man and a woman, under a sacramental union or marriage, where the wife is forced to have sexual intercourse with the husband. Marital Rape is a very controversial and critical concept, as the basis of evidence to Marital Rape is nearly impossible to determine. As the concept of marriage is itself a sacred private matter, it is very complicated to determine the allegation of Marital Rape, as there is a lot of possibilities for it to be misused.¹ But at the same time, it cannot be ignored, as it is a matter of safety of women even after their marriage. Under *Section 63 of Bharatiya Nyaya Sanhita* it is specifically stated that under Exception 2 : *Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape.*² This legislation is contradict's with the safety of women even after the time of their marriage. It is often implied that women have consented to sexual intercourse if they are getting themselves into a sacramental union with a man.³ This assumption has to be struck down by the Indian legal system as a women has to right of consent and that should be respected, the fact that they are married should be considered irrelevant in this case. The Indian Legal system should at the least consider the rarest of rare cases which comes under the ambit of Marital Rape.⁴ There are various countries which legalised the offence of Marital Rape. Likewise, the Indian Legal System should hold it as an exemption, since it is a matter of forceful sexual Intercourse by the husband just because they are married together.⁵ This cycle of abuse married women go through should be abolished by enacting strict legal provisions.⁶

CRIMINALISATION OF MARITAL RAPE

In India criminalization of Marital Rape as been a great challenge. Under Section 375 of the Indian Penal Code, the offence of Rape has been defined. Under the Indian Penal Code, Exception 2 it states that sexual intercourse or sexual acts by a man with his own wife, the wife

¹ Maitreyi Srivastava & Parishkar Shresth, *Sexual Violence in Private Space: Marital Rape in India* (SSRN, Amity Univ. 2023)

² The Bharatiya Nyaya Sanhita, 2023 (Act No. 45 of 2023)

³ Nandini Agarwal, Salma M. Abdalla & Gregory H. Cohen, *Marital Rape and Its Impact on the Mental Health of Women in India: A Systematic Review*, 2 PLOS Global Public Health (2022).

⁴ Sneha Kadyan & N. Prabha Unnithan, *The Continuing Non-Criminalization of Marital Rape in India: A Critical Analysis*, Women & Criminal Justice 1 (2023).

⁵ Vidhik Kumar, *Marriage or License to Rape? A Socio-Legal Analysis of Marital Rape in India*, 6 Dignity: A Journal of Analysis of Exploitation and Violence (2021).

⁶ Paromita Pain, *License to Rape: Examining Digital Activism around Marital Rape in India*, Feminist Media Studies 1 (2024).

not being under fifteen years age is not rape.⁷ Here in the case of Indian Penal Code, a man having sex with his wife unless she is under the age of fifteen years of age is not rape. Here, the legal provisions of IPC protects married women who are below the age of fifteen years from Marital Rape.⁸ But the Indian Legal System doesn't provide legal remedies for married who are fifteen years of age and above. After the enactment of Bharatiya Nyaya Sanhita, 2023 the minimum age limit has been amended from the age of fifteen to the age of eighteen.⁹

But, even here, only the age bar is lifted, under Exception 2 of Section 63 of Bharatiya Nyaya Samhita, 2023. There is still a requirement of a specific legislation which has to be enacted for the offence of Marital Rape as there are a huge amount women going through sexual abuse under the name of marriage.¹⁰ There are various challenges faced by the legislation as well as the Judiciary in determining the essentials towards it. The major challenge faced was the classification of Marriage as an institution of union where the relationship between is considered to be very sacred and devotional. This concept of marriage followed in the Indian society is the very reason why the Legislature and the Judiciary are finding it hard to draw out a legal legislation for the offence of Marital Rape.¹¹

This particular discussion was interpreted by the Ministry of Home Affairs during the year of 2015, where a bill in the Parliament was passed by a member, to criminalise the offence of Marital Rape for which the Ministry of Home Affairs stating that the ideology of Marital Rape is different on an International aspect and its different in India. In India, marriage is a relationship which is considered to be divine. And criminalising Marital Rape would result in a lot of difficulties for the Legislature and the Judiciary to draw conclusions for the same.

THE SCOPE OF LEGAL REMEDIES FOR MARITAL RAPE:

In the 21st Century, women not only gained independent rights as equal to men, but also have excelled in various fields. This change brought in the Indian Society has changed and shaped the minds of the Indian Society. The status of women at one point of time was that they were termed to be property of the husband after marriage, the total landscape of ideology of women

⁷ Raveena Rao Kallakuru & Pradyumna Soni, *Criminalisation of Marital Rape in India: Understanding Its Constitutional, Cultural and Legal Impact*, 11 NUJS L. Rev. 1 (2018).

⁸ Krishna M. Yadav & Santosh K. Tripathi, *Constitutionality of Section 375, Exception 2, the IPC and Effect of Marital Rape on Family*, 3 DME J.L. 8 (2022).

⁹ Krina Patel, *The Gap in Marital Rape Law in India: Advocating for Criminalization and Social Change*, 42 *Fordham Int'l L.J.* 1519 (2019).

¹⁰ Raveena Rao Kallakuru & Pradyumna Soni, *Criminalisation of Marital Rape in India: Understanding Its Constitutional, Cultural and Legal Impact*, 11 *NUJS L. Rev.* 122 (2018).

¹¹ Pratibha Sahu, *Marital Rape: An Impediment on Women's Right in India*, *International Journal of Law and Social Sciences* 64 (2024).

have completely changed. India has modernised into an equalised civilisation, and India, today has great scope in enacting legal provisions for the offence of Marital Rape.¹² But at the same time, it is very challenging for the Legislative and the Judiciary to form the essentials by which one can categorise the offence to be Marital Rape. The ideology of marriage still remains a sacrament as it is something very personal and private between two individuals.¹³

The Bharatiya Nyaya Sanhita, 2023 has raised the Exception age bar from 15 years of age to 18 years of age. The landmark case of Independent Thought V. Union of India and Other on the year of 2017. This case is responsible for the raising of age in the Exception 2 of Section 63 of the Bharatiya Nyaya Sanhita, 2023. To brief the facts of the case, Independent Thought was a Non-Governmental Organisation, and they filed a Public interest Litigation, to safeguard children from early marriage which leads to Marital Rape.¹⁴ Section 375 of the Indian Penal Code, 1908, Exception 2 will not apply to children between the ages of fifteen to seventeen. The Court held that the Exception 2 of Section 375 of the Indian Penal Code, 1908 draws a discriminatory line between a girl child being married and a girl child not being married. The line of discrimination was compared with the principles of Constitution of India. The Protection of Human rights Act, 1993 was also showcased in the judgement of the case. The Supreme Court recognized a women's right for integrity for her body, and her right to privacy.¹⁵

Even though, this landmark decision held by the Judiciary and the amendments made by the Legislature protects the plight of 15 to 17 years of age female children, the Indian legal system has to do something to protect the women above the age of 18 years of age who are forced into sexual intercourse by their husband with no legal recourse.¹⁶ Even there are legislations protecting the rights of women, there is less legal provisions protecting the rights of Married women especially under the offence of Rape by their own husband.¹⁷

There are various legislations protecting the rights of Married Women such as Domestic

¹² Hemant Singh, Vinod Kumar & Radha Naruka, *Criminalization of Spousal Rape in India: An Interference into the Marital Sphere of Spouse, Culture, and Social Structure of the Indian Society*, 10 **Evergreen** 1261 (2023).

¹³ Sreeparna Chattopadhyay, *The Responses of Health Systems to Marital Sexual Violence – A Perspective from Southern India*, 28 *Journal of Aggression, Maltreatment & Trauma* 47 (2018).

¹⁴ Kavya Agrawal & Harshita Gupta, *Beyond Sacred Vows: The Case for Criminalising Marital Rape*, 6 *Indian J. L. & Legal Rsch.* 7205 (2023).

¹⁵ Krina Patel, *The Gap in Marital Rape Law in India: Advocating for Criminalization and Social Change*, 42 *FORDHAM INT'L L.J.* 1519 (2019).

¹⁶ Saptarshi Mandal, *The Impossibility of Marital Rape*, 29 *Australian Feminist Studies* 255 (2014).

¹⁷ Amrita Singh, *Marital Rape: An Unaddressed Stigma*, SSRN (2022).

Violence Act, 2005; the Bharatiya Nyaya Sanhita, 2023 (previously known as Indian Penal Code before repeal), and Hindu Marriage Act. But legal provisions under Domestic Violence Act, 2005 and Hindu Marriage Act only provide civil remedies for women who undergo Domestic Violence.¹⁸ Those civil remedies include compensation, separation from husband by passing Court decree. The Bharatiya Nyaya Sanhita, 2023 contains criminal liabilities for women who undergo cruelty by her husband or her relatives.¹⁹

Even though there is a lot of legal remedies available for married women, the only disadvantage is those all provide civil remedies. This showcases that, these legal remedies will provide them with the chance to escape the situation, but the offender won't be held and punished for his immoral actions.²⁰ The Indian legal System has to come up with unique legal provisions to determine the offence of Marital Rape, as it is important to enact legal provisions with criminal liabilities to protect married women. It will be challenging to determine and frame the offence of Marital Rape, the sacrament of marriage is itself a questionable fact when the wife is getting raped by her husband without her consent.²¹

INTERNATIONAL REMEDIES FOR MARITAL RAPE BY OTHER COUNTRIES:

There are various countries which legalized the offence of Marital Rape in the country is England. England basically had the same ideology as India, wherein when a woman agrees to get married to a woman, that woman is considered to have given implied consent for sexual intercourse with her husband.²² And it was understood in the society as when two individuals, that is a Male and a Female get married, the female is termed to be the property of the husband. This ideology completely changed when the case of R v. R during the year of 1991, the judicial decision which completely changed the ideology of Marital Rape.²³ In the United States, it was the same case as England, but Nebraska being the first State in the United State to legalise the Offence of Marital rape, in the landmark judicial decision of People V. Liberta, it was stated that the concept of Marriage license is not that the husband has the right to rape his wife

¹⁸ Samyak Godha, *Legal Scenario of Marital Rape in India: A Critical Analysis*, 24 *Supremo Amicus* 1 (2021).

¹⁹ K Mayukha Chihnitha, *Judicial Interpretation of "Consent" in Rape Cases in Indian Courts and Application in Marital Rape Cases*, 37 VNU Journal of Science: Legal Studies (2021).

²⁰ Smitarani Patro, *Shashi Deshpande's The Dark Holds No Terrors: A Unique Case of Misguided Feminism*, 1 *Int'l J. Mgmt. & Human.* 8 (2015).

²¹ Flavia Agnes, Section 498A, Marital Rape and Adverse Propaganda, 50 *ECON. & POL. WKLY.* 12 (2015).

²² Aneesh Gupta & Aashita Mehta, *Nuptial Rape: Rape Within Marriage*, 3 *Indian Journal of Social Science and Literature* 6 (2023).

²³ Loveena Sehra, *Gender and Violence in a Domestic Space During COVID-19 in India: Insights from Anthropology*, 16-2 *Antrocom J. Anthro.* 231 (2020).

whenever he wants. Thus the concept of Marital Rape was upheld.²⁴

Even in the case of Meera Dhungana on behalf of FWLD v. HMG, in the country of Nepal, in the year of 2002, the Apex Court instructed the Parliament to criminalise the offense of Marital Rape.²⁵ There are over 52 countries until today such as Denmark, Sweden and various other countries which has criminalised the offense of Marital Rape, and there are other countries which are in the process of legalizing the offence of Marital Rape, as it is something which has affected the female gender on a huge scale.²⁶

India should also be one of the countries which has criminalised the offence of Marital Rape. Even though it is a very difficult challenge for both the Legislature and the Executive to frame the provisions for the offence of Marital Rape, but it would protect a lot of married women from Sexual harassment and abuse.²⁷

CONCLUSION:

Criminalizing the offence of Marital Rape is nearly impossible in India, with all the challenges that it holds. But the same challenges would have been faced by the other countries as well. The Indian Legal system has to come up with legal provisions which protect married women above the age of eighteen as well.²⁸ Women excelling in various fields and holding top positions in various fields has proved that women should also be treated equally and provided with equal rights. It is not fair for her when she gets married, she is being considered as a wife of a man and not as a woman in the first place.²⁹ A woman cannot get married and have her fundamental right under the Constitution of India being taken away from her. Women whether married or not should have the right to consent as it is their body and it should be their decision.³⁰ The Indian Legal system has to consider the position of married women and pass legislations which will benefit them in the Indian Society.³¹

²⁴ Rithika Panicker & Parav Patel, *A Study of Marital Rape Laws in Different Countries*, 1 *Int'l J. Legal Dev. & Allied Issues* 232 (2015)

²⁵ Skylab Sahu, *Rape, Deterrence and Rehabilitation: A Need to Relook the Policy Discourse*, J. Soc. & Econ. Dev. (2017).

²⁶ UN Women, *Progress of the World's Women 2011-2012: In Pursuit of Justice – Executive Summary*, (2011)

²⁷ Shraddha Chaudhary, *The Value of Feminist Legal Methods in Adjudicating Women's Issues: A Critical Comparison of Two Judicial Approaches from India*, 8 *Indian Law Review* 66 (2024).

²⁸ Anupriya Dhonchak, *Standard of Consent in Rape Law in India: Towards an Affirmative Standard*, 34 *BERKELEY J. GENDER L. & JUST.* 29 (2019).

²⁹ Hanif Qureshi et al., *Rape Myth Acceptance Among College Students in India: Prevalence and Predictors in a Changing Context*, 42 *Deviant Behavior* 1043 (2020).

³⁰ Sushma Suri & Sanjeeda Khan, *An Analytical Study of Rape Victims in Delhi*, 2 *Int'l J. Educ. & Psychol. Rsch.* 60 (2013).

³¹ Rashid Manzoor Bhat, *Women's Social Evolution in Early Medieval Northern India: A Historical Study*, 1 *Hist. Rsch. J. Hist. & Archaeology* 17 (2023).