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## Urgency of Legal Reform: Criminalizing Marital Rape in India

Marriage is a contract that socially permits men and women to establish a family implying the right to sexual relations. It's an acceptable relationship for sexual intercourse between a man and a woman. Sexual relations between men and women are integral to marriage. Consent is the will to do or not to do any sexual activity which is vital for a sexual act. It can be noticed that consent is being neglected with regard to married women and sexual activity without consent amounts to rape. We observe that women's consent to sexual intercourse in marriage is immaterial as it is said to be implied in the light of marriage. This implies that men are willing to indulge in sexual activity whenever he wants to, irrespective of a woman's choice. Sexual intercourse in a marriage irrespective of consent is viewed as natural and normal in Indian society. This adversely impacts the choice of a woman regarding her own body and her independence in terms of decisions she wishes to make. It also exacerbates the gender-based inequality already existing in society and is against one's right to bodily integrity under article 21.<sup>1</sup> Marital rape is defined as an act of sexual intercourse of one spouse against the consent of the other. Under exception 2 of section 375 of the Indian penal code, it is an offence for a man to rape his wife who's under the age of 18 years. Exception 2 of section 375 (IPC) does not recognize marital rape victims of age above 18 years.<sup>2</sup> Even though marital rape is not considered an offence in India historically and culturally, it is against one's consent and right to bodily integrity and therefore, should be criminalized as it allows for further violence against women.

According to the National Family Health Survey- 5, "Every 1 in 3 Indian women from age 18-49 experience some form spousal violence and around 6% have suffered sexual

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<sup>1</sup> India Const. art. 21.

<sup>2</sup> The Indian Penal Code, 1862, §375(2).

violence”.<sup>3</sup> Here sexual violence is measured using two categories which are the “use of physical force by the husband to have sexual intercourse even when the wife did not want to” and “forcing a woman to perform sexual acts she did not want to”. “Less than 1% of sexual violence is reported to the police”.<sup>4</sup> Lack of statutory backing is conferring more power to the perpetrator. Less reporting also shows that it is acceptable in society and accepted by the victims. Also, sexual violence is a form of domestic violence which is targeted against women. Not paying attention to women’s own bodily integrity owing to historical and cultural roots is the primary reason for marital rape not being considered as an offence.

The recent split verdict by the Delhi high court on 11<sup>th</sup> May 2022 would pose a threat of further violence against women. The split verdict was given by a divisional bench consisting of two judges namely Justice Shakti Chaudhary and Justice Sanjay Kumar. Both the judges had opposing views where Justice Shakti Chaudhary was in support of criminalizing marital rape while Justice Sanjay Kumar was against it. Justice Shakti Chaudhary observed that the marital rape exception (MRE) does not fulfil the nexus test as it gives immunity to the offender based on the relationship with the victim. He also observes that it is “real rape” if done outside of marriage but when the same forced sex is within the ambit of marriage it is justified. He states that the MRE violates articles 14 and 15 as every citizen is equally protected by the law and no one can be discriminated against based on their marital status. It was further observed that it violates article 19(1)a as it erodes the right of women to protection against sexually transmitted diseases and to seek a safe environment away from sexual abuses. It also violates article 21 of the Indian constitution as it deprives one of the right to bodily autonomy. While Justice Sanjay Kumar’s opinion is that whether consensual or non-consensual if it lies within marriage, it is not said to be unconstitutional as

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<sup>3</sup> TIMESOFINDIA.COM / Updated: May 11, 2022 (2022) *Nearly 1 in 3 women have suffered spousal sexual, physical violence: Family health survey: India News - Times of India, The Times of India*. Available at: <https://timesofindia.indiatimes.com/india/nearly-1-in-3-women-have-suffered-spousal-sexual-physical-violence-family-health-survey/articleshow/91491367.cms>.

<sup>4</sup> Deosthali, P.-B., Rege, S. and Arora, S. (2022) ‘Women’s experiences of marital rape and sexual violence within marriage in India: Evidence from service records’, *Sexual and Reproductive Health Matters*, 29(2). doi:10.1080/26410397.2022.2048455.

it is an internal affair. He further states that the court cannot order the legislative to consider non-consensual sex between husband and wife unconstitutional as the legislative considers it a threat to the marital institution. He lastly denies that exception 2 of section 375 of IPC violates articles 14, 15, 19(1)a and 21 of the Indian constitution.<sup>5</sup>

This verdict is now being presented before the supreme court. But the split verdict would cause harm to the victims by the time the supreme court makes a decision. Also, in the case, of Independent Thought vs Union of India (2017) the age limit for recognizing marital rape was extended from 15 years to 18 years leaving adult women behind.<sup>6</sup> All such legal case laws would impact women through further violence and discrimination before the actual verdict is declared by the supreme court. It gives men in marriage the right to legally oppress women.

In conclusion, the criminalization of marital rape is a crucial step towards achieving gender equality and justice in India. It requires concerted efforts from lawmakers, judiciary, civil society, and the public to challenge entrenched patriarchal norms, reform outdated laws, and foster a culture of respect and consent within marital relationships. Only by holding perpetrators accountable and affirming the rights of survivors can India move closer to realizing its constitutional promise of justice, equality, and dignity for all.

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<sup>5</sup> Hasan, Z. (2022) *Delhi HC's Split Verdict on Marital Rape: Highlights of What the 2 Judges Said*, *The wire: The Wire News India, Latest News, news from India, politics, External Affairs, science, economics, gender and culture*. Available at: <https://thewire.in/law/delhi-hcs-split-verdict-on-marital-rape-highlights-of-what-the-2-judges-said>.

<sup>6</sup> Independent Thought v. Union of India, AIR 2017 SC 4904 (2016) (India).

