

**CRIMINALIZATION OF MARITAL RAPE: A COMPARATIVE STUDY**

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**ABSTRACT**

The traditional systems of control with its notion of 'what is right and proper for women' still reigns supreme and reinforces the use of violence against women. Rape is a severe form of such violence. It is reported as the most common crime against women. Even though majority of countries around the world penalizes rape, for married women it is still a distant reality to take legal action against their spouses for rape committed within the marriage. History is the proof that since the time the institution of marriage is in existence, sexual violence has remained a part of it. But for ages, marital rape has been termed as a private affair than a public concern. Unfortunately, many countries including India still differentiate between rape and marital rape and have failed to criminalize marital rape. But nevertheless certain sections of society do condemn this act and reflect a changed attitude towards the rights of women and respect their bodily integrity. Few countries have already criminalized spousal rape, although these laws might not eradicate all forms of assault, but it may aid in creating a society wherein sexual violence is widely criticized. In this paper, the authors will be dealing with the legal position of marital rape in various countries and the objective is to determine whether criminalization of marital rape is need of the hour in India? Further the authors will submit recommendations to promote criminalization of marital rape in India in consonance with the global standards.

**INTRODUCTION**

The dream of gender equality is still miles away from becoming a reality, even today, 'the mainstream remains very much a male-stream'. The dominant tendency has always been to

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confine women and women's issues in the private domain. The traditional systems of control with its notion of 'what is right and proper for women' still reigns supreme and reinforces the use of violence against women.<sup>2</sup>

Rape is a severe form of such violence. United Nations Office on Drugs and Crime reported more than 250,000 cases of rape or attempted rape annually worldwide.<sup>3</sup> According to the National Crimes Records Bureau 2013, 24,923 rape cases were recorded annually in India in 2012. Thus, the growth of rate of crimes against women is higher than the population growth.<sup>4</sup>

Though rape is a dreadful evil, women as on date still do not have the right to take an objection against this outrageous treatment by their so called "spouses". History is the proof that since the time the institution of marriage is in existence, sexual violence has remained a part of it. But for ages, marital rape has been termed as private affair than a public concern. The legal and cultural notion about marriage has been destroyed by the belief of perpetual consent and has coerced sex in it. Moreover, due to the existence of patriarchal system throughout the world, control of women's body has become indispensable to the institution of marriage. Although, very often married women suffer the act of marital rape, still various countries around the world have been condoning it and have ignored to recognize it as a grave offence or a crime at all. The reason behind such ideology is the lack of criminalization of this act. Majority of women are not even aware that it is a wrongful act and thus refrain from complaining against it. The purpose of criminalizing marital rape is not only punishing the rapists but to safeguard women from an overall abusive relationship also.

The perception of marital rape varies through countries and cultures and there has always been a dilemma that whether it is an "unfortunate reality" or an "obligatory spousal duty"<sup>5</sup>. But nevertheless certain sections of society reflect a changed attitude towards the rights of women and respect their bodily integrity. According to UN Women, approximately 52 countries have already

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<sup>2</sup>DR NUZHAT PARVEEN KHAN, *WOMEN AND THE LAW* 248 (1<sup>st</sup> ed. 2016).

<sup>3</sup> United Nations Office on Drugs and Crime, *The Eighth United Nations Survey on Crime Trends and the Operations of Criminal Justice Systems (2001 - 2002)*, <http://www.unodc.org/unodc/en/data-and-analysis/Eighth-United-Nations-Survey-on-Crime-Trends-and-the-Operations-of-Criminal-Justice-Systems.html> (last visited Apr 7, 2018).

<sup>4</sup>DR NUZHAT PARVEEN KHAN, *WOMEN AND THE LAW* 249 (1<sup>st</sup> ed. 2016).

<sup>5</sup>Kersti Yllo, *Marital rape in a global context: from 17th century to today*, OUPBLOG (Apr. 4, 2018, 10:05 AM), <https://blog.oup.com/2017/11/marital-rape-global-context/>.

criminalized this heinous act.<sup>6</sup>And although these laws might not eradicate all forms of assault, but it may aid in creating a society wherein sexual violence is widely criticized. By enacting such laws the legislature is expressing a strong disapproval towards this atrocious act.

The authors believe that before examining the criminalization of spousal rape, it is feasible to understand the exact meaning of the term. It can be defined as “intercourse by a man with his wife obtained by force, threat of force, or physical violence, or when she is unable to give consent”<sup>7</sup>. There are basically three categories of marital rape – i) Battering rape: occurrence of both physical and sexual violence at the same time or one after another; ii) Force-only rape: no physical violence present, the purpose of such rape is to exert entitlement over the spouse; iii) Obsessive/Sadistic rape: rape involving torturous or perverted sexual acts causing physical injuries and violence.<sup>8</sup> Occurrence of any of these can be considered as an act of marital rape.

English common law has been a traditional source for law for several countries around the world. Matthew Hale laid the foundation of this marital rape exemption under common law. The exemption provides immunity to a man who forcibly performs sexual intercourse on his wife. He stated that “for the husband cannot be guilty of a rape committed by himself upon his lawful wife for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband which she cannot retract.”<sup>9</sup>

The above part was a brief description as to the history, definition and concept of marital rape. Through the subsequent part, the authors of the paper aim to deduce the solution to the research question that, **whether criminalization of marital rape in India is the need of the hour, in congruence with the present legal position of the other progressive countries?** To find out the solution to the said research question the authors will be dealing with the legal position of marital rape in countries like US, UK, India and Australia and will conclusively compare the laws and

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<sup>6</sup> Emily Shugerman, *The authors of the report urge these countries to pass laws criminalizing marital rape*, REVELIST (Apr. 5 2018, 10:08 AM), <http://www.revelist.com/world/countries-marital-rape-legal/7073/the-authors-of-the-report-urge-these-countries-to-pass-laws-criminalizing-marital-rape/3>.

<sup>7</sup> Priyanka Rath, *Marital Rape and the Indian legal scenario*, INDIAN LAW JOURNAL (Apr. 4, 2018, 11:40 AM), [http://www.indialawjournal.org/archives/volume2/issue\\_2/article\\_by\\_priyanka.html](http://www.indialawjournal.org/archives/volume2/issue_2/article_by_priyanka.html).

<sup>8</sup> Natasha Tracy, *Marital Rape, Spousal Rape*, HEALTHY PLACE (Apr. 5, 2018, 11:50 AM), <https://www.healthyplace.com/abuse/rape/marital-rape-spousal-rape/>

<sup>9</sup> Maria Pracher, *The Marital Rape Exemption: A Violation of a Woman's Right of Privacy*, 11 Golden Gate U. L. Rev. 717, 717(1981).

legal position of women's rights in these countries in concurrence with spousal rape. Towards the end authors would like to render a few suggestions which the Indian legislature should inculcate in order to bring Indian laws on rape in conjunction with global standards.

## **LEGAL POSITION OF VARIOUS COUNTRIES ON MARITAL RAPE**

### **UNITED STATES**

Non-consensual sexual intercourse between non-spouses has always been a crime in US but till 1975 every state was allowed a marital exemption which permitted a husband to rape his wife without worrying about the legal repercussions. But as a result of women's rights movements in 1993 all the states and DC in US passed a law against marital rape, when finally women were denied to be considered as a property of her husband.<sup>10</sup>

In the following part the authors will be dealing with laws of few states in USA punishing marital rape.

#### **Ohio and Oklahoma**

Section 2907.02 of Ohio code defines rape as follows:

“(A)

*(1) No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies:*

*(a) For the purpose of preventing resistance, the offender substantially impairs the other person's judgment or control by administering any drug, intoxicant, or controlled substance to the other person surreptitiously or by force, threat of force, or deception.*

*(b) The other person is less than thirteen years of age, whether or not the offender knows the age of the other person.*

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<sup>10</sup>Monica Steiner, *Marital Rape Laws*, CRIMINAL DEFENSE LAWYER (Apr. 6, 2018, 10:00 AM), <https://www.criminaldefenselawyer.com/marital-rape-laws.html>.

*(c) The other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age, and the offender knows or has reasonable cause to believe that the other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age.*

*(2) No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force.*

*(B) Whoever violates this section is guilty of rape, a felony of the first degree.”<sup>11</sup>*

Ohio law on marital rape is criticized for being incapable of prosecuting cases wherein the spouse has been drugged. Same is the case with the state of Oklahoma which defines sexual intercourse as rape when the victim is unconscious provided that the victim is not a spouse.<sup>12</sup>

### **New York**

The crime of marital rape is dealt under Article 130 New York Penal Law. The crime of marital rape under New York Law can be divided into following categories:

#### **Rape of 1<sup>st</sup> Degree:**

*“A person is guilty of rape in the first degree when he or she engages  
in sexual intercourse with another person:*

*1. By forcible compulsion; or*

*2. Who is incapable of consent by reason of being physically helpless;”<sup>13</sup>*

This is a B felony and is punishable with up to 25 years imprisonment and fine.

#### **Rape of 2<sup>nd</sup> Degree:**

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<sup>11</sup>Ohio Revised Code, Crimes-Procedure, 29 U.S.C. § 2907.02 (2007).

<sup>12</sup> Samantha Allen, *Marital Rape Is Semi-Legal in 8 States*, DAILY BEAST (Apr. 6, 2018, 10:12 AM), <https://www.thedailybeast.com/marital-rape-is-semi-legal-in-8-states>.

<sup>13</sup>New York Penal Law, H U.S.C., Article 130 (2013).

*“A person is guilty of criminal sexual act in the second degree when:*

*he or she engages in oral sexual conduct or anal sexual conduct with another person who is incapable of consent by reason of being mentally disabled or mentally incapacitated.”*

It is a D felony and punishable with up to 7years of imprisonment and fine.<sup>14</sup>

Under New York law punishment for marital rape varies with the condition of the case.

### **California**

Section 262 of California Penal Code deals with spousal rape. The provision enumerates that:

*“a) Rape of a person who is the spouse of the perpetrator is an act of sexual intercourse accomplished under any of the following circumstances:*

*(1) Where it is accomplished against a person will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.*

*(2) Where a person is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance, and this condition was known, or reasonably should have been known, by the accused.*

*(3) Where a person is at the time unconscious of the nature of the act, and this is known to the accused.<sup>15</sup>*

*(4) Where the act is accomplished against the victims will by threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat.*

*(5) Where the act is accomplished against the victims will by threatening to use the authority of a public official to incarcerate, arrest, or deport the victim or another, and the victim has*

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<sup>14</sup>*Id.*

<sup>15</sup> Nature of unconsciousness is explained in detail within the provision.

*a reasonable belief that the perpetrator is a public official. The perpetrator does not actually have to be a public official.”<sup>16</sup>*

If found guilty of marital rape in the state of California, a person could be punished with 3-8 years in California state prison, registration as a sex offender, fine of no more than 10,000 dollars, therapy and compensation<sup>17</sup>

### **Washington DC**

The Marital exemption was removed in Washington from first and second degree rape in 1983 but it took further 30years to remove that exemption from third degree rape which was finally done in 2013. Chapter 9A.44 of the Revised Code of Washington deals with Rape of first, second and third degree and punishes for it whether the victim is a spouse or not.<sup>18</sup>

### **South Carolina**

Non-consensual sexual intercourse with the spouse is punishable in the State of South Carolina when the same is performed with “the threat of use of a weapon” and/or “physical violence of a high and aggravated nature”. However, such crime must be reported within 30 days of commission of such crime.<sup>19</sup>

All in all, most of the states in US penalize the crime of marital rape, however the penalties and punishments vary from state to state depending on the severity of the act. Some states also include special penalties like in state of Virginia the court may replace fine and imprisonment with a court-approved counseling program, provided that victim provides their assent for the same.<sup>20</sup> Such penalties may provide an opportunity for re-conciliation but at the same time can have negative impact too.

### **UNITED KINGDOM**

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<sup>16</sup>California Penal Code, Crimes and Punishments, 1 U.S.C., §262 (2011).

<sup>17</sup>California Penal Code, Crimes and Punishments, 1 U.S.C., § 262 (2005).

<sup>18</sup>Washington Revised Code, Washington Criminal Code, 9A U.S.C., § 9A.44.010 (1973).

<sup>19</sup>Jessica McLaughlin, *Marital Rape in the U.S.: What Are the Laws?*, LAW STREET (Apr. 7, 2018, 11:15 AM), <https://lawstreetmedia.com/issues/law-and-politics/marital-rape-u-s-laws/>.

<sup>20</sup> STEINER, *supra* note 10.

The English common law on marital rape was largely based on Sir Matthew Hale's statement and this rule was overturned by House of Lords in 1991 in *R v. R* case, wherein it was held that M. Hale's proposition is just "a fiction and fiction is a poor basis for the criminal law", it was further held that "this is not the creation of a new offence, it is the removal of a common law fiction which has become anachronistic and offensive."<sup>21</sup>

In the 19<sup>th</sup> century many feminist movements took place and they believed that a rape is a rape whether it's outside of marriage or within.<sup>22</sup> Eventually criminalization of marital rape took place in UK, on April 30<sup>th</sup>, 2004, Sec 1 of Sexual Offences Act 1956 was repealed by Sexual Offences Act, 2003, which came into force on 1<sup>st</sup> May, 2004.<sup>23</sup>

Section 1 of the said Act states that:

*"(1) A person (A) commits an offence if -*

*(a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,*

*(b) B does not consent to the penetration, and*

*(c) A does not reasonably believe that B consents.*

*(2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.*

*(3) Sections 75 and 76 apply to an offence under this section.*

*(4) A person guilty of an offence under this section is liable, on conviction on indictment, to imprisonment for life."*

To prove the offence, the prosecution will have to prove the following: i) intentional penetration; ii) of the anus, mouth or vagina, of a male or a female; iii) by defendant's penis; iv) the

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<sup>21</sup>UKHL 12 (1991).

<sup>22</sup>Catherine Helen Palczewski, *Voltaire de Cleyre: Sexual Slavery and Sexual Pleasure in the Nineteenth Century*, 7(3), NWSA 54, 54(1995).

<sup>23</sup>CATS JOLIN, *Marital Rape – the modern law*, THE SEXUAL OFFENSES HANDBOOK (Apr. 7, 2018, 11: 30 AM), <https://thesexualoffenceshandbook.com/2014/01/07/marital-rape-the-modern-law/>.

penetration was not consented by the complainant; v) the defendant does not reasonably believed to have obtained complainant's consent.<sup>24</sup> Sec 79 of the said act provides general interpretation which mentions that "vagina"<sup>25</sup> includes vulva, the provision also mentions that "penetration is a continuing act"<sup>26</sup> hence penetration after withdrawal of consent constitutes rape. Case *R (F) v DPP*<sup>27</sup> deals with the situation wherein the consent was given by wife for penetration but not ejaculation but the husband still ejaculated, the High Court deemed it as an offence of rape and said that "he deliberately ignored the basis of her consent to penetration as a manifestation of his control over her."<sup>28</sup>

Clause 2 of Section 1 of the said Act is a matter of evidence during the trial. Life imprisonment is the maximum punishment given for sexual offences in UK, the severity of the punishment may vary according to the gravity of the case. The following chart represents the sentence given for rape in UK<sup>29</sup>

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<sup>24</sup>Sexual Offences Act, 2003, Chapter 42 (UK).

<sup>25</sup>*Id.*

<sup>26</sup>*Supra* note 23.

<sup>27</sup>2 Cr App R 21 (2013).

<sup>28</sup>2 Cr App R 21 (2013).

<sup>29</sup>JOLIN, *supra* note 22.

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<i>Category (dictated by harm caused)</i>	<i>A: Higher culpability factors present</i>	<i>B: No higher culpability factors</i>
Category 1 – The extreme nature of one or more of the extreme impact caused by a combination of category 2 factors may elevate to category 1	<b>Starting point: 15 years</b>  <b>Category range: 13-19 years</b>	<b>Starting point: 12 years</b>  <b>Category range: 10-15 years</b>
<b>Category 2</b> <ul style="list-style-type: none"> <li>▪ severe psychological or physical harm;</li> <li>▪ pregnancy or STI as a consequence of offence;</li> <li>▪ additional degradation/humiliation;</li> <li>▪ abduction;</li> <li>▪ prolonged detention/sustained incident;</li> <li>▪ violence or threats of violence (beyond that which is inherent in the offence);</li> <li>▪ forced/uninvited entry into victim's home;</li> <li>▪ victim is particularly vulnerable due to personal circumstances</li> </ul>	<b>Starting point: 10 years</b>  <b>Category range: 9-13 years</b>	<b>Starting point: 8 years</b>  <b>Category range: 7-9 years</b>
Category 3 – Factors in categories 1 and 2 not present	<b>Starting point: 7 years</b>  <b>Category range: 6-9 years</b>	<b>Starting point: 5 years</b>  <b>Category range: 4-7 years</b>

Higher culpability factors may comprise of- a) significant degree of planning; b) abuse of trust; c) previous violence against the victim; d) recording of the offence.<sup>30</sup>

After observing the law against spousal rape and the rigorousness of punishment provided in UK for marital rape it can be said that, UK is pretty strict while dealing with crimes against women and has provided detailed and effective provision for penalizing the crime of marital rape. Though earlier common law was based on M. Hale's proposition but the country has improved

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<sup>30</sup>JOLIN, *supra* note 22.

progressively on issues like crime against women and specifically for punishing the offenders for marital rape.

## **AUSTRALIA**

Earlier the law on rape in Australia was based on English common Law. It was only since 1970's that substantial changes took place with respect to sexual offences. In 1976, the state of South Australia partially abolished the exemption with regards to spousal immunity.<sup>31</sup> The traditional Anglo-Australian rule that a husband cannot be prosecuted for rape of his own wife even if it is non-consensual intercourse was amended.<sup>32</sup> Later it was in 1981, that full criminalization of spousal rape either before or after separation, in Australia begun with the state of New South Wales and Victoria. This was later followed by other states like Queensland in 1989 and Northern Territory in 1994.<sup>33</sup>

The Criminal Law Consolidation ("CLC") Act, 1935-1975 (Principal Act) was amended by the Criminal Law Consolidation Amendment Act, 1976 which defined the offence of rape which included the marital rape.

Section 73 of the principal Act is repealed and the following section is enacted and inserted in its place:-

*"73. (1) For the purposes of this Act, sexual intercourse is sufficiently proved by proof of penetration.*

*(2) No person shall, by reason of his age, be presumed incapable of sexual intercourse.*

*(3) No person shall, by reason only of the fact that he is married to some other person, be presumed to have consented to sexual intercourse with that other person.*

*(4) No person shall, by reason only of the fact that he is married to some other person, be presumed to have consented to an indecent assault by that other person.*

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<sup>31</sup> Managing Editor, *Rape in marriage: Why was it so hard to criminalize sexual violence?*, AUSTRALIAN WOMEN'S HISTORY NETWORK, (Apr 6, 2018, 12.10 PM ), <http://www.auswhn.org.au/blog/marital-rape/>.

<sup>32</sup> Lea Armstrong, *Rape in Marriage- Farewell to the fiction of implied consent*, Vol 17No.2ALT LAW JL., 91, 91 (1992).

<sup>33</sup>MANAGING EDITOR, *supra* note 30.

*(5) Notwithstanding the foregoing provisions of this section, a person shall not be convicted of rape or indecent assault upon his spouse, or an attempt to commit, or assault with intent to commit, rape or indecent assault upon his spouse (except as an accessory) unless the alleged offence consisted of, was preceded or accompanied by, or was associated with-*

*(a) assault occasioning actual bodily harm, or threat of such an assault, upon the spouse;*

*(b) an act of gross indecency, or threat of such an act, against the spouse;*

*(c) an act calculated seriously and substantially to humiliate the spouse, or threat of such an act; or*

*(d) threat of the commission of a criminal act against any person.”<sup>34</sup>*

The Majority in the case of *PGA V The Queen*<sup>35</sup> held that “even by the time the CLC Act, 1935 was enacted, local statute law had removed any basis for continued acceptance of Hale’s proposition”.<sup>36</sup>

The marital rape reform i.e. criminalization of marital rape was not an easy task as it was opposed mainly on three grounds, fear of marital breakdown, the ‘vindictive wife’ and the difficulty of proof.<sup>37</sup> It is no longer a notion unlike as given by the common law that by virtue of marriage, the wife gives an irretrievable consent to intercourse with the husband. In the case of *Reg v R*<sup>38</sup>, the House of Lords had held and emphasized the fact that it was no more a rule of law that a wife is taken to have given an irrevocable consent to sexual intercourse on account of her marriage with her husband.<sup>39</sup> Further in the case of *R v L*<sup>40</sup> constitutional validity of the South Australian criminal law was challenged on the ground that s 73(3) of the CLC Act, 1935 was inconsistent with the

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<sup>34</sup> Criminal Law Consolidation Act Amendment Act, 1976, No 83 of 1976, section 73 (Dec 9, 1976).

<sup>35</sup> HCA 21(2012).

<sup>36</sup>Caroline Dobraszczyk, *Rape in Marriage*, Bar News, Winter 2012, at 38.

<sup>37</sup>MANAGING EDITOR, *supra* note 30.

<sup>38</sup>3 WSLR 767, (1991).

<sup>39</sup>LEA ARMSTRONG,*supra* note 31.

<sup>40</sup> 103 ALR 577, (1992).

Commonwealth Laws governing marriage.<sup>41</sup> The High Court of Australia ruled that exemption given for marital rape under common law was no longer part of Australian law.<sup>42</sup>

It is crystal clear that a husband is not conferred with a right to marital rape by virtue of a federal legislation. There is no inconsistency between section 114 of the Family Law Act (Cth), i.e the Commonwealth Act and the State Act i.e. CLC Act, 1935. Because the commonwealth Act does not control the behavior of the couples in the marriage and there is no inclusive definition of the rights and obligations of the parties.<sup>43</sup>

It is thus deduced from the existing law that Australia has modified its law according to the need of the hour and is a progressive nation.

## **INDIA**

Permitting marital rape indicates that a women's bodily integrity, her reproductive choice or her human dignity is less important than that of a man, which is a blatant violation of article 14, 15 and 21 of Indian Constitution.<sup>44</sup> India is a signatory to Convention on Elimination of all forms of Discrimination against women (CEDAW), which also highlights violence against women, where it states that gender based violence deters her ability to enjoy rights and freedom. One needs to understand the fact that a rape by the spouse within a marriage is even more traumatic than that by a stranger. The statement once made by Maneka Gandhi, the Minister for Women & Child Development in 2014 that "the concept as understood internationally cannot be similarly applied in the Indian Context due to several factors like level of education, illiteracy, poverty, myriad social customs & values, religious beliefs, mindset of the society to treat the marriage as a sacrament etc"<sup>45</sup> does not hold true in today's time. It has been brought about by a UN report that the possibilities of a woman being raped by her spouse are 40% more than a stranger.<sup>46</sup> In a book titled 'Talking of Justice, People's Rights in Modern India' by Justice Leila Seth, she expressed that,

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<sup>41</sup>LEA ARMSTRONG,*supra* note 31.

<sup>42</sup>Nikita, *Marital Rape: Legal Issues and the Need to Criminalize It*, Volume 3 Issue 6, JCIL.1, 5 (2017).

<sup>43</sup>LEA ARMSTRONG,*supra* note 31.

<sup>44</sup>Samparna Tripathy, *Marital Rape, and Not Its Criminalization, Debases Society*, THE WIRE (Apr 4, 2018), <https://thewire.in/law/marital-rape-and-not-its-criminalisation-debases-society>.

<sup>45</sup>Sonal Sing, *Dear Supreme Court, Here's Why Marital Rape Should be Criminalised*, THE BETTER INDIA (Apr 4, 2018, 3:45 PM), <https://www.thebetterindia.com/123017/supreme-court-criminalise-marital-rape-laws-india/>.

<sup>46</sup>*Id.*

with passage of time, the independence of woman and her bodily integrity has grown, thereby making rape an offence unless and until there is true consent.

The position with respect to marital rape in India is still very sympathetic. The only recourse which a woman today has is under Indian Penal Code and the Domestic Violence Act, 2005, which are discussed as follows:

### Indian Penal Code

The legal provision of IPC is as follows:

*“Section 375 of Indian Penal Code defines the Offense of Rape stating that a man is said to commit “rape” if he —*

- 1. penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her do so with him or any other person; or*
- 2. inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her do so with him or any other person; or*
- 3. manipulates any part of the body of a woman to cause penetration into the vagina, urethra, anus or any part of the body of such woman or makes her do so with him or any other person; or*
- 4. applies his mouth to the vagina, anus, urethra of a woman or makes her do so with him or any other person, under the circumstances falling under any of the seven descriptions mentioned under the act.”<sup>47</sup>*

This provision is followed by two explanations and two exceptions, wherein as far as the present issue is concerned the following is important —

*“Sexual intercourse or sexual acts by a man with his wife, the wife not being under fifteen years of age, is not rape.”*

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<sup>47</sup>Soumya Singh Chauhan, *Section 375: Analysis of Provisions Relating to Rape*, LAWCTOPUS (Apr 5, 2018, 8.00 PM), <https://www.lawctopus.com/academike/section-375-analysis-of-provisions-relating-to-rape/>.

This means that by virtue of the exception a husband can have a non-consensual sexual intercourse with his wife who is above 15 years of age. The Hon'ble Supreme Court in a recent judgment on 11<sup>th</sup> October, 2017, *Independent Thought vs. Union of India*<sup>48</sup> construed exception 2 to section 375, where the age was read as 18 years instead of 15 years.<sup>49</sup> Exemption of marital rape also violates a woman's right to privacy under article 21 of Indian Constitution, wherein she is compelled to have a sexual relation. The other recourse a woman has is under Indian Penal Code, under section 498-A which provides for Cruelty. Cruelty is also available as a ground of divorce under the Indian matrimonial law.

#### Protection of Women from Domestic Violence Act, 2005

Protection of Women from Domestic Violence Act, 2005 provides civil remedies for crimes against women which includes marital rape as well. Marital rape is merely considered as a form of domestic violence. It is a sad state that for a heinous crime like marital rape, it is civil remedy which is available and not a criminal remedy.

#### **CONCLUSION**

Rape, in itself is an atrocious act but when it is committed within the four walls of matrimonial home, it violates a woman's self-respect, dignity and diminishes her into an object to meet one's sexual desire. Herein, the irony is that when the bodily integrity is violated by a stranger, he/she can be penalized but all the protection is withdrawn by the legislature if the same is violated by the spouse. The only purpose of such withdrawal is to preserve the institution of marriage.

During earlier times, wife was treated as a mere property of the husband which is deemed to be the reason behind Hale's exemption. The husband was believed to have an irrevocable or perpetual consent of the wife from the moment they enter into the wedlock. However, this ideology has become obsolete in the present scenario and in light of this, the belief of having sexual intercourse with the wife despite her will, consent and health is unquestionably absurd.

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<sup>48</sup>W.P.No 382 of 2013.

<sup>49</sup>Livelaw News Network, *Sex with Minor Wife is Rape, SC Reads Down Exception-2 to S 375 IPC*, LIVE LAW IN., (Apr 8, 2018, 12.05 PM), <http://www.livelaw.in/breaking-sex-minor-wife-rape-police-can-register-case-wifes-complaint-sc-reads-exception-2-s-375-ipc/>.

In this research, the authors have focused on major common law countries across the world and their laws on marital rape. All these countries have followed M. Hales' proposition of irrevocable consent, which he had conveyed without any argument, reasoning or any legal basis. But, over the years with changing circumstances, countries like US, UK, Australia etc. have penalized the act of rape within the marriage. At present, several countries have either criminalized marital rape or have eliminated the marital rape exemption, the crucial point is that these countries do not differentiate between rape and marital rape.

Although the act of marital rape prevails in India, it's concealed behind the sacrament of marriage. India has legislations for cruelty, domestic violence and few provisions under Constitution, Indian Penal Code, International Conventions etc. Since all of these falls under the category of piecemeal legislations, there is much yet to be done by our legislature and judiciary.

Comparing the laws of India with the other countries, Australia punishes non-consensual sexual intercourse and indecent assault on wife if accompanied by bodily harm, gross indecency, humiliation, threat etc. In UK, the law does not distinguish between rape and marital rape, as long as the same is non-consensual penetration of vagina, anus or mouth of a male or female, it is punished. Further, the law in UK classifies rape into 3 categories and the sentences and penalties are levied accordingly.

In US all 50 states penalizes spousal rape and again do not differentiate it from ordinary rape, however, the degree of punishment varies according to the circumstances of the victim, such as victim under forcible compulsion or threat or under the influence of drug or intoxicating substances, mental and physical impairment, unawareness or sleep etc.

India however, only punishes marital rape on wife below 15 years of age and is still stuck to M. Hale's proposition for the rest. Myriad social customs, religious beliefs, mindset of the society, lack of education and treating of marriage as sacrament are few of the rationales holding back the criminalization of marital rape in India. India is still segregating the act as 'good rape' and 'bad rape' and accords different statuses to the rapists.

Addressing the objective of this paper, the authors would like to convey that, yes, India does need to criminalize marital rape and thus authors have rendered few recommendations for such penalization, which are:

- i) Removal of exception under Sec 375 of IPC and introducing a separate provision punishing marital rape;
- ii) Specific circumstances of the victim should be taken into consideration while punishing for marital rape, like in US forcible compulsion or threat, intoxication, awareness, physical and mental stability etc. are catalysts for the degree of punishment;
- iii) The idea can also be borrowed from UK wherein the degrees of punishment varies according to the categories of harm inflicted on the victim;
- iv) Marriage shall not be considered as a factor for toning down the degree of sentence to be inflicted on the culprit;
- v) Provision like, 'consent of previous act or any particular act shall not be impliedly construed as the consent for future or a different act', shall be incorporated;
- vi) In order to eliminate the risk of misuse, absence of consent should be the principal factor for determining the offence of marital rape.

Apart from the aforementioned legal recommendations, the authors would like to conclude that the plight of women in India will remain stagnant unless there is change in the mindset of society and overall empowerment of women.