

INTERNATIONAL JOURNAL OF LEGAL ENFORCEMENT

ISSN: 2582 8894|UIA: AA1003/2020



Volume 1 Issue 2

|June 2021|

Website: www.internationaljournaloflegaleenforcement-ijle.com

Email: editorialboard.ijle@gmail.com

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“Dharma is to protect the Needy”

Research Article on
Marital Rape: Crime behind the closed doors.

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Abstract

“Her friends used to tell her it wasn’t rape if the man was your husband. She didn’t say anything, but inside she seethed; she wanted to take a knife to their faces”-F.H Batacan. Well, this is exactly the stance where our country has failed to protect her daughters. There is still a long way, to cover before it deludes into the minds that RAPE IS RAPE whether it is by a stranger or your legally wed husband. When it’s the stranger, the victim doesn’t have to face him in her life ever again but when it’s the husband, the victim has to live with her rapist throughout her life. In layman language, marital rape refers to the act of forcing the partner (mostly the wife) into physical intimacy where the other person’s consent remains irrelevant. This concept is nothing new in India as the statistics reveal that this is coming as an age old practice and is common to most of the households out there. The only change herein can be noticed is that the tenacity and variety of the wrong changes with respect to the class of society the victim belongs to.

The author and the co-author have tried to address this issue in every possible aspect in the research paper. Starting from the very root of the cause as to where this concept has originated, it types to the way in which this lockdown has escalated the issue. The authors have tried to cover the every class of women and the unique issues they face with regards to marital rape and domestic violence. They have also explained Exception 2 and why it should be dissolved in order to maintain a sound structure of the society! Furthermore, they went on to provide for a detailed study of this issue from the constitutional angle and how the legality of marital rape infringes our fundamental rights to a great extent. The authors have also sighted some of the landmark cases in the Indian History which throws a light in this aspect. Lastly, they have concluded by analyzing the present situation, how far it has gone to criminalize marital rape and what is the needful that needs to be done for improvising the situation for women in this aspect. It is well known that Indian laws are influenced from English law yet no such change can be noticed in the Indian law with regards to this concept as of the English Law. It is high time for the country to improvise this law and create India a safe place for women to dwell in. In this 21st century where men and women are considered as separate legal entities, prevalence of such a patriarchal law is an anomaly. Thus, Indian jurisprudence should do the needful at the earliest by bringing marital rape within the purview of rape laws of the IPC.

Keywords: Marital, Rape, Marriage, Fundamental Rights, Spouse.

Introduction

“Her friends used to tell her it wasn’t rape if the man was your husband. She didn’t say anything, but inside she seethed; she wanted to take a knife to their faces.”—F.H Batacan.

Marital Rape in its simplest sense refers to the manifestation of domestic violence which involves an act of sexual intercourse with one’s spouse without her consent.¹ Absence of consent in this type of sensible issues should in fact stand alone as a form of sexual abuse without the need or involvement of any physical violence. However the mere absence of consent is overlooked or considered as “implied consent” in cases of married women with respect to their husbands. “Do marriages really mean that the women are their husband’s property and her consent should be available 24 hours of the day and 365 days of the year? Can a sacred bond like marriage immunize a kind of such a heinous crime like rape and let the culprits move about scott free? Well, the aforementioned paradox is not mere fiction but exists as a reality as one out of five men has forced his wife or partner to have sex according to the International Men and Gender Equality Survey 2011.² In this 21st century marital rape has been impeached in more than 100 countries yet India still remains unfortunate one to be among the 36 countries where marital rape is an unjust yet not an uncommon way to disempower women. In 2013, the UN Committee on Elimination of Discrimination against Women (CEDAW) said in its recommendations that the Indian government should criminalize marital rape³. In the aftermath of the December 16, 2012 gang rape case the JS Verma Committee⁴ also recommended in its favouritism. It held that women will be safer from abusive spouses, can receive the help required to recover from the shock and in this way can also save them from domestic violence and sexual abuse. In spite of many legal amendments passed in favor of women such as **Protection of Women Against Domestic Violence Act, 2005**, **Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013**, the non-criminalization of marital rape in influential countries like India, Saudi Arabia, Pakistan and China continues to undermine the dignity and affect the human rights enjoyed by the women in their respective countries.”

¹ “Sheri Stritof, Understanding Marital Rape, Live About (May.26,2021, 05:05 PM), <http://www.liveabout.com/what-is-marital-rape2300724>.”

² “International Center for research on women, Survey report, Last Visited (May 26, 2021, 05:09 PM) <https://www.icrw.org/publications/international-men-and-gender-equality-survey-images/>”

³ “Available at, <https://www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW-C-NOR-CO-8.pdf>”

⁴ “Available at, <https://www.prsindia.org/report-summaries/justice-verma-committee-report-summary>”

History

Initially Rape laws were enacted with the idea to protect the patriarch's property (daughters and wives) from other men rather than protecting "her" as an individual for the sake of her dignity. Early rape laws were merely concerned about defining the assault as a property crime hurled against the husband or the father whose wife or daughter was "*defiled*". Hence, rape laws felt the least urgency to include spousal rape in itself as husbands retained the right to control their property. Sexual violence in marriage has its name mentioned in the history as long as the institution of marriage prevails itself. Even formillennials, spousal rape is being regarded as an "*unfortunate reality*", or an "*unquestioned wifely duty*" and not at all a public issue that needs to be dealt with.

"Talking about the 17th century rape laws—from British common law to the Qing dynasty in China (Ng, 1987)—sanctioned rape, which was considered as violation of women's chastity which again is not considerable in case of marriage? The British Common Law viewed that the contract of marriage included the "right to sex"⁵—it signified the wife had given consent for all time by entering into the contract of marriage, under the Common Law wives were traditionally viewed as the property of their husbands with which they could do whatever they pleased. A British jurist by the name of Lord Mathew Hale⁶ in 1736 addressed this issue of consent by directly jumping into the conclusion 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 hath given up herself into this kind unto her husband that she cannot retract.*"

"Until 1993, concept of "**spousal exemption**" was included in the rape laws that specifically excluded husbands from rape prosecution. Moreover, considering the public interest of promoting peace and harmony in marital relationships further discouraged the state from interfering in the personal relationships. An 1857 case in Massachusetts was among the firsts to recognize contract justification which even granted the husbands the grounds to divorce the wife if she refused him to have sexual intimation. This defense wrong enough, however managed to be a part of the rape laws of every state and posed the greatest hurdle to rescind the marital rape exception. However, The Women's movement in the 1970's was among the first to bring a drastic change in the existing patriarchal law. The court case of **Oregon v.**

⁵" *The Economic Times*.(n.d.). *Marriage doesn't mean consent for sex: Delhi High on marital rape* Available at, <https://economictimes.indiatimes.com/news/politics-and-nation/marriage-doesnt-mean-wife-always-ready-for-sex-delhi-high-court-on-marital-rape/articleshow/65034722.cms?from=mdr>"

⁶"Lord Mathew Hale, Chief Justice, Court of England, 1736"

Rideout⁷ in 1978 was the first ever case filed in which John Rideout, the first man in the United States to be accused with the charges of raping his wife while they lived together. The following trial was the first in Oregon relating to marital rape after which the state revised its law to eliminate the concept of marital rape immunity. In the year 1976 Nebraska also became the first state to criminalize marital rape.”

“Many states after this has revised their rape laws to draw no distinction between marital and non-marital rape, some states however persist in their old status and continue distinguishing rape on the basis of marital and non-marital categories. In a totality only about half of the states have totally abolished the distinction between marital and non-marital rape. Twenty of them however have granted the immunity to a husband to have sex with his wife when she is unconscious or otherwise incapable of giving consent. The prosecution if at all, is confronted with higher level of proofs built into the laws in case of states which continues to have distinction between marital and non-marital rape.”

Types of Marital Rape

Before analyzing the term “Marital Rape” it becomes vital for us to first decode the term “Rape”. Rape has been described under Section 375⁸ of the IPC, 1860 and it says that a man is said to have committed rape when he penetrates his penis into the vagina of any women, wherein how far has it penetrated is irrelevant. Even the slightest act of penetration is enough for it to amount to rape. Marital Rape can largely be divided into two types based on the actions performed by the spouse to fulfill his intentions. This includes:

- **Force only Rape**⁹- In this category the husband need not always batter the wife, although uses as much force as the situation demands in order to have some sexual intimacy with the unwilling wife.
- **Obsessive Rape**¹⁰- This form of rape includes in itself the uses of force, for instance hurling abusive words or even beating her to such an extent that the wife becomes incompetent to even provide for her consent regarding the sexual intercourse. These kinds of perverse acts against the wife sometimes even go to such an extent that it

⁷“Oregon v. Rideout”

⁸“Sexual intercourse with a woman against her will, without her consent, by coercion, misrepresentation or fraud at a time when she has been intoxicated or duped, or is of unsound mental health and in any cases if she is under 18 years of age.”

⁹Supra Note1.

¹⁰Ibid

invites health related issues such as sexual diseases or even miscarriages during pregnancy, caused by forced penetration.

Marital Rape: How Coronavirus-led Lockdown made it Worse.

“In our motherland, a man raping his wife is immunized by the law. The aforementioned statement is enough to send shivers down the spine of any woman or in fact any individual out there who possesses some kind of humanity in himself. The United Nations Secretary, General Antonio Guterres¹¹, cited a *“horrificing surge in domestic violence”* amid global coronavirus lockdowns, called upon governments to address the issue as a key part of their coordinated response towards the pandemic.¹² Indeed it was noted that countries most affected by the virus led lockdown, such as France, witnessed an exponential rise in sexual attacks against women, Paris, and in just one week viewed a thirty six percent surge in violent sexual as well as domestic abuse cases in just one week”¹³ Guterres even went on to appeal in his statement *“for peace at home-and in homes-around the world”*.

As per a study by the UN Population Fund¹⁴, it can be derived that more than two-thirds of married woman in India between the ages of 15 to 49, have been beaten, forced to provide sex or even raped. *“Domestic abuses have gone up by 33 percent in the urban areas and about 20 percent in the rural areas during the nationwide lockdown. But this is a skeletal assessment based on what we hear through distress calls and emails. I am sure this number would be very high considering the large number of women in rural areas, who have no access to internet and no money to recharge their phones,”* said Anuradha Kapoor, the founder and director of Swayam¹⁵. This statement can be more effectively derived from the fact that different types and levels of sexual and domestic abuse, ranging from psychological torture to violent penetrative sex is common in the class of women migrants who work as street vendors, cooks, housemaids and maximum of the cases go unreported.

¹¹Antonio Guterres.

¹²“Coronavirus lockdown: UN chief urges end to domestic violence, citing global surge.”

¹³“**Domestic violence cases jump 30% during lockdown in France**, in: Euro news, 28 March 2020, last accessed 20 April 2021”

¹⁴“United Nation Population Fund, Available at: <https://www.unfpa.org/gender-based-violence> (Last accessed June 9,2021)”

¹⁵Anuradha Kapoor, Founder of Swayam and Director , Swayam Available at <https://swayam.info/in-media/> Last Accessed 20 May 2021

“As per the report published by the National Commission for Women’s(NCW)¹⁶, there is a dramatical rise in the number of incidents of domestic violence, followed by sexual abuse in many incidents. It has been a very common affair for us to see these types of cases appearing in the newspapers on a daily basis especially from the states like Punjab, Haryana, Uttar Pradesh and Bihar which has recorded a large spike in instances of domestic violence even amounting to spousal rape during the lockdown. The lockdown event has been successful enough in planting the virus in the households as spending time with the family has resulted in testing even strong relationships and has been a death sentence for the fraternities. Small arguments over smaller causes, gets blown up and in some scenarios leads to domestic violence thus helping in increasing the number of cases. In some cases however, the abuse might be subtle but it should be kept in mind that it is still verbally demeaning and equally dangerous.”

Paradoxical enough, but still the lockdown is being the cause for pushing some women to rethink about their abusive relationships and probably opt to give it a second chance instead of walking away with their heads high from the toxicity. The sudden imposition of lockdown and the difficulty in accessing help is in fact providing the perpetrators of violence a confidence to carry on with their wrongdoings as the National Crime Records Bureau reflects, one women gets raped every twenty minutes, and the onset of corona crisis has precipitated further rise in marital rape, domestic violence and sexual assault on upper and lower class women alike¹⁷.

Dishaa Desai, an outreach associate at Mpower Centre in Mumbai went on to say that in some scenarios the husbands are justifying their verbal outbursts and sexual aggression as a cause of their financial tension, pay cuts, loss of jobs and the worry about the future implication of the outbreak of COVID-19. The women are in fact deluding themselves to believe such a show cause. There are also instances where women of low and middle income groups are getting abandoned by their spouses because they take the pandemic as an excuse to shrug off their responsibilities towards them. As per the helplines that adheres to the cause of women in domestic distress the number of calls and approaches has increased by 50 per cent¹⁸ Post

¹⁶“Research Study on Violence against Dalit Women in Different States of India by studying the Sources of Materials that are Available and Conducting Interview of the Perpetrators, Victims and Witnesses ; Centre for Alternative Dalit Media (CADAM) New Delhi ; Published by : National Commission for Women Available at : <http://ncw.nic.in/content/research-study-violence-against-dalit-women-different-states-india-studying-sources>”

¹⁷**RuchikaTulshyan, Rape Every 20 Minutes for the World’s Largest Democracy?** , in: Forbes Woman, 2 January 2013, and last accessed 20 April 2021.

¹⁸**Coronavirus lockdown. Govt. helpline receives 92,000 calls on child abuse and violence in days**, in: Press Trust of India, 8 April 2020, last accessed 20 April 2021.

lockdown, apart from the police patrols and child protection units, an exceptional rise in cases of domestic violence has been reported alone.

“One of the illustrations of such a heinous activity of marital rape against an urban migrant women, has been illustrated hereby. Putul is a long term interlocutor of a slum in West Bengal, she is a newly married young bride, during the days of lockdown she was beaten and raped by her husband almost every night. It even increased in tenacity when he came home intoxicated and totally out of his senses. *“The repeated bouts of violent sexual intercourse are making me semi-paralyzed, and after such assaults it's even getting difficult for me to barely walk”* was her words when talking to me about her miseries. Like her many slum women caught in cases of conjugal violence, get their life back when their husbands are away working for long wee hours as low-paid laborers. The external work life of migrant men or the socializing period of women provides them with the cycles of encountering and escaping domestic violence, which now is even disrupted by the never-ending phases of lockdown. Women, hailing from urban and rural areas alike who have been through such harrowing experiences are either afraid to approach the police, who are already under-resourced and stretched due to corona crackdown.”

“According to the leader of National Commission for Women in India, *“Women are not approaching the police because they think if they take their husbands away, her in-laws will torture her. And will in turn torture her more when he gets out of the police station. Earlier, women could go to their parents but now they are unable to reach them”*. Ample number of the semi-literate or illiterate women are afraid of the police (who often end up oppressing the urban poor), are unfamiliar with NGOs and other helpline services. They continue to rely on friends, kin networks, and other female acquaintances in their migration environment for mental support. The United Nations Women Executive Director PhumzileMlambo-Ngcuka referred to the violence hurled against women and girls as *“shadow pandemic”*,¹⁹ in which confinement is fostering spousal clashes generated by insecurities regarding financial strains, poor health facilities etcetera. Although a number of high-level organizations are coming forward in the form of international pressure groups world-wide with the motive to influence the governments to approach the pandemic crisis with feministic view and concerns regarding gendered human rights. However, implementing these pro-woman policies and

¹⁹**Violence against women and girl: the shadow pandemic**, statement by PhumzileMlambo-Ngcuka, Executive Director of UN Women, in: UN Women, 6 April 2020, and last accessed 20 April 2021.

seeing that it reaches the women at the lowest rung of the society is a slow and difficult process to continue with.”

Modern View

Tremendous variations can be observed cross-culturally over the issue whether to consider rape by a legally wed husband as criminal violation or otherwise, the ways in which it is currently legally condoned varies globally. For instance, in US although forced sex marriage is illegal, numerous attitudinal surveys reveal that Americans refer the rape of a wife as far less severe than a similar assault from an acquaintance or stranger. Further, marital rape in most of the cases either goes without prosecution or winds up as an additional charge complimenting other kinds of violence mostly murder. In India, a Supreme Court ruling in 2015 stated that marital rape is not a criminal offense. A government minister further added up that marital rape could not be criminalized in India as “*marriages are sacrosanct*” in the country.

However, attitudes and thought processes of people are changing globally in all cultures. In this 21st century the change in attitudes of people towards marital rape is basically led by three significant trends. Firstly, to begin with, women’s rights are now considered as human rights so, it cannot be considered as a fringe perspective to do away with anymore. International human rights organizations are now coming forward to address the abuses hurled in the private sphere as rights violations. In fact sexual violence in marriage has been successfully deployed in places like US and Canada for the purpose of seeking asylum.

The second pillar to support the forthcoming issue is the global HIV/AIDS pandemic. Researches reveal that a large number of women in sub-Saharan Africa to be precise were infected by their spouses. Probable reasons were lack of ability to deny sex, or ask for protection while having it, and most probably the absence of the much needed law to interdict the crime. Public health policy and practice are also becoming increasingly concerned day by day regarding the irreparable damage hurled by spousal rape.

The third trend hints towards the most needed change in people’s way of thinking about marital rape, thus considering marriage as an institution rather than taking it as a mere contract between families and women as the baby producing machines like previous times. The traditional concept of marriage is finally paving way for the concept of companionate marriages based on intimacy- albeit unevenly and despite resistance. The idea that marriage is a relationship shared by two individuals with romanticism and love as its base validates the consideration of women

as an individual with a bodily integrity and presence of emotions. This massive change in mentality is enough to portray the slow but steady tectonic shift towards heterosexual relations.

Marital Rape- From constitutional and Legal Rights overview.

Doctrine of Coverture- It was a legal doctrine of common law which signified that upon marriage a woman's legal identity and other obligations gets subsumed by those of her spouse. Accordingly, the concept of non- criminalization of marital rape was derived from this doctrine. Thus, considering her nothing but a mere property which is always at his disposal.

“Indian Penal Code- When IPC was drafted in the 1860s a married woman was not even considered as a legal entity. **Section 375 of the IPC** criminalizes rape, However Exception 2 thereto sets the man guilt free who rapes his wife if she not under fifteen years of age. This colonial era provision thus stands in stark contrast with other provisions of the IPC and progressive legislations that have followed since. For instance section 354 of the IPC talks about molestation, wherein the concept of husband and wife is irrelevant with regards to the crime when the wife is between the ages of fifteen to eighteen. **The Protection of Child from Sexual Offences Act, 2012** criminalizes sexual intercourse with any child (aged below eighteen years) and leaves no exception with respect to marriage. This contrast however leads to anomaly since section 42A²⁰ POSCO provides that in case of any inconsistency, the provisions of POCSO will have an upper hand in the situation.”

“When Exception 2 of the IPC was challenged in its entirety, the court answered in its affirmative. However the scope of the issue was quiet on the part of the women aged above eighteen years. The court answered whether the sexual intercourse between a man and his wife aged between fifteen to eighteen years amounts to rape. Further, the Court’s decision on this issue was backed by two crucial reasons. Firstly, Exception 2 is valid to that extent that it applies to children, basically tries to defy the spirit of several enactments that creates impediment towards child marriage. Secondly, by distinguishing the criminalization of rape based on the age limit and the artificial and arbitrary difference in the laws for married and unmarried women was an unreasonable classification which fails to pass the test of **“intelligible differentia”** and is therefore prima facie in contravention to the right to equality, non- discrimination and right to live with dignity. In 2017, a PIL was filed by Independent Thought, an NGO, challenging this unintelligible classification claiming that married women

²⁰S. 42A , Prevention of sexual offences against Children,2012.

above fifteen years of age should also be awarded this protection. The Supreme Court however managed to concur with these averments and replied by increasing the age further from fifteen to eighteen years for a married woman.”

Violates Right To Equality²¹-It states that “*The State shall not deny to any person equality before the law and equal protection of the laws within the territory of India*”. Thus, the exception 2 of Section 355 violates this fundamental right as it creates two classes of women based on their marital status, thus immunizing the crime done by men against their wives. In doing so, it victimizes the married woman for nothing but their marital status while protecting unmarried women from the same acts. However, this should not be the case as in a country like India, where everyone is equal in the eyes of law and law is considered blind, mere variations in law on the basis of marital status or age for the commoners fails in doing enough justice to the current law and order of the country.

Violates Right to Life and Personal Liberty²²-Accordingly, “*Protection of Life and Personal Liberty: No person should be deprived of his life and personal liberty except according to the procedure established by law.*” Further, by the interpretation of the apex court, it was derived that this right subsumes in itself the right to health, privacy, dignity, safe environment and living conditions etcetera. Though Exception clause 2 of IPC again frustrates this fundamental right, in recent years the courts have been successful in abstaining from unwanted sexual activities as explained under this broader explanation of rights to life and personal liberty.

“In the case of The case of Karnataka v. Krishnappa, the Supreme Court held that “[s]exual violence apart from being a dehumanizing act is an unlawful intrusion of the right to privacy and sanctity of the female.”²³, in the same judgment it was also held that non-consensual sexual intimation amounts to sexual and physical violence. Further, in the case of SuchitaSrivastava v. Chandigarh Administration, The Supreme Court equated the right to make choices regarding sexual activity with rights to privacy, dignity, liberty and bodily integrity enshrined under Article 21 of the Indian Constitution²⁴.”

In Justice K.S Puttaswamy (Retd.) v. Union of India the supreme court explicitly recognized in Article 21, the right to make choices regarding intimate relations, it held that right to privacy

²¹Article 14, The Constitution of India,1949

²²Article 21, The Constitution of India,1949

²³The State of Karnataka v. Krishnappa, (2000)4 SCC75 (India)

²⁴SuchitaSrivastava v. Chandigarh Administration, (2008)14 SCR 989 (India)

subsumes in itself “*decisional privacy reflected by an ability to make intimate decisions primarily consisting of one’s sexual or procreative nature and decisions in respect of intimate relations.*”²⁵ Forced sexual cohabitation is a violation of fundamental right²⁶. The above rulings do not differentiate between the rights of married and unmarried women and even no presence of ruling can be observed in any part of the constitution which states that a woman’s right to privacy can be tampered with when she enters into a marital association. Hereby, from the aforementioned paradox we can hence decipher that the Supreme Court has recognized the right to abstain from sexual activity for women if she wishes to, irrespective of their marital status, age or any sort of variations which may try to distinguish them in the eyes of the law.

Similarly, Exception 2 of section 395 also violates Article 21’s right to live a healthy and dignified life. It is already well established that the “right to life” enshrined under article 21 includes in itself many other rights to provide a person with a healthy environment to live in. The courts in various judgments have repeatedly cited that “right to life” includes in itself the right to live with human dignity.²⁷ Yet again, the existence of Exception 2, decriminalizes the crime made by husbands by compelling their wives to enter into sexual contact, thereby adversely affecting the psychological state and physical health of women thus undermining their ability to live with dignity

Degrades the purpose of Section 375 of IPC- Lastly, Exception 2 by its presence even degrades the motive of the particular section in which it is included. From Section 375 itself, we can derive that its sole purpose is to protect women and penalize those who commit or even try to engage in some kind of sexual activity with women which may seem untoward or uncomfortable to be dealt with for her. However, exempting husbands from punishments contradicts the law in totality. While this should be just the opposite because married women may actually find it tad more difficult to escape such abusive situations at home as they are legally and in many of the cases even financially tied to their husbands. Thus, if not more, at least equal protection from law should be provided to married and unmarried women alike.

Conclusion

²⁵Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) AIR 2017 SC 4161 (India)

²⁶As “Right to abstain from sexual intercourse is a long recognized principle of Indian constitutional jurisprudence. *Govind v. State of M.P.*, AIR(1975) SC 1378 (India); *KharakSingh v. State of U.P.*, (1963) AIR SC 1295 (India).

²⁷C.E.S.C Ltd. v. *Subhash Chandra*, (1992)1 SCC 441 (India).

Although English Laws have underwent a change way back and criminalized marital rape in 1991, Indian Laws influenced from it still remains unaltered. Thus, it is high time for us to consider the gravity of the scenario and do the needful changes in the constitution to offer the women of our country a better life. Rape should always be considered rape irrespective of the age of the victim and identity of the perpetrator. In fact in a way if a woman is raped by her husband, it becomes much tougher on her part to get raped knowingly and do nothing but live with her rapist for the rest of her life. In this 21st century, where men and women are considered as separate legal entities, existence of any law on considering women as the men's property is impractical. Moreover, it is worthier to note that marital rape is finally coming out as a public issue breaking all its shackles. So, now it is high time for the Indian jurisprudence to understand the inhumane nature of Exception 2 and strike it down, thus bringing marital rape within the purview of the rape laws of IPC.

