



INTERNATIONAL LAW
JOURNAL

**WHITE BLACK
LEGAL LAW
JOURNAL**
**ISSN: 2581-
8503**

Peer - Reviewed & Refereed Journal

The Law Journal strives to provide a platform for discussion of International as well as National Developments in the Field of Law.

WWW.WHITEBLACKLEGAL.CO.IN

DISCLAIMER

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Editor-in-chief of White Black Legal

– The Law Journal. The Editorial Team of White Black Legal holds the copyright to all articles contributed to this publication. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Team of White Black Legal. Though all efforts are made to ensure the accuracy and correctness of the information published, White Black Legal shall not be responsible for any errors caused due to oversight or otherwise.

WHITE BLACK
LEGAL

EDITORIAL TEAM

Raju Narayana Swamy (IAS) Indian Administrative Service officer



Dr. Raju Narayana Swamy popularly known as Kerala's Anti Corruption Crusader is the All India Topper of the 1991 batch of the IAS and is currently posted as Principal Secretary to the Government of Kerala . He has earned many accolades as he hit against the political-bureaucrat corruption nexus in India. Dr Swamy holds a B.Tech in Computer Science and Engineering from the IIT Madras and a Ph. D. in Cyber Law from Gujarat National Law University . He also has an LLM (Pro) (with specialization in IPR) as well as three PG Diplomas from the National Law University, Delhi- one in Urban Environmental Management and Law, another in Environmental Law and Policy and a third one in Tourism and Environmental Law. He also holds a post-graduate diploma in IPR from the National Law School, Bengaluru and a

professional diploma in Public Procurement from the World Bank.

in Public

Dr. R. K. Upadhyay

Dr. R. K. Upadhyay is Registrar, University of Kota (Raj.), Dr Upadhyay obtained LLB , LLM degrees from Banaras Hindu University & Phd from university of Kota.He has succesfully completed UGC sponsored M.R.P for the work in the ares of the various prisoners reforms in the state of the Rajasthan.



Senior Editor

Dr. Neha Mishra



Dr. Neha Mishra is Associate Professor & Associate Dean (Scholarships) in Jindal Global Law School, OP Jindal Global University. She was awarded both her PhD degree and Associate Professor & Associate Dean M.A.; LL.B. (University of Delhi); LL.M.; Ph.D. (NLSIU, Bangalore) LLM from National Law School of India University, Bengaluru; she did her LL.B. from Faculty of Law, Delhi University as well as M.A. and B.A. from Hindu College and DCAC from DU respectively. Neha has been a Visiting Fellow, School of Social Work, Michigan State University, 2016 and invited speaker Panelist at Global Conference, Whitney R. Harris World Law Institute, Washington University in St.Louis, 2015.

Ms. Sumiti Ahuja

Ms. Sumiti Ahuja, Assistant Professor, Faculty of Law, University of Delhi, Ms. Sumiti Ahuja completed her LL.M. from the Indian Law Institute with specialization in Criminal Law and Corporate Law, and has over nine years of teaching experience. She has done her LL.B. from the Faculty of Law, University of Delhi. She is currently pursuing Ph.D. in the area of Forensics and Law. Prior to joining the teaching profession, she has worked as Research Assistant for projects funded by different agencies of Govt. of India. She has developed various audio-video teaching modules under UGC e-PG Pathshala programme in the area of Criminology, under the aegis of an MHRD Project. Her areas of interest are Criminal Law, Law of Evidence, Interpretation of Statutes, and Clinical Legal Education.



Dr. Navtika Singh

Nautiyal



Dr. Navtika Singh Nautiyal presently working as an Assistant Professor in School of law, Forensic Justice and Policy studies at National Forensic Sciences University, Gandhinagar, Gujarat. She has 9 years of Teaching and Research Experience. She has completed her Philosophy of Doctorate in 'Intercountry adoption laws from Uttranchal University, Dehradun' and LLM from Indian Law Institute, New Delhi.

Dr. Rinu Saraswat



Associate Professor at School of Law, Apex University, Jaipur,
M.A, LL.M, Ph.D,

Dr. Rinu have 5 yrs of teaching experience in renowned institutions like Jagannath University and Apex University. Participated in more than 20 national and international seminars and conferences and 5 workshops and training programmes.

Dr. Nitesh Saraswat

E.MBA, LL.M, Ph.D, PGDSAPM

Currently working as Assistant Professor at Law Centre II, Faculty of Law, University of Delhi. Dr. Nitesh have 14 years of Teaching, Administrative and research experience in Renowned Institutions like Amity University, Tata Institute of Social Sciences, Jai Narain Vyas University Jodhpur, Jagannath University and Nirma University.

More than 25 Publications in renowned National and International Journals and has authored a Text book on Cr.P.C and Juvenile Delinquency law.



Subhrajit Chanda



BBA. LL.B. (Hons.) (Amity University, Rajasthan); LL. M. (UPES, Dehradun) (Nottingham Trent University, UK); Ph.D. Candidate (G.D. Goenka University)

Subhrajit did his LL.M. in Sports Law, from Nottingham Trent University of United Kingdoms, with international scholarship provided by university; he has also completed another LL.M. in Energy Law from University of Petroleum and Energy Studies, India. He did his B.B.A.LL.B. (Hons.) focussing on International Trade Law.

ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

WHITE BLACK
LEGAL

MARITAL RAPE: A PERFECT LICENSE TO RAPE?

AUTHORED BY - MALAY PANDEY

“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.¹

In the times when the astronauts plan to reach from the earth to the sun it's forgotten that the rays of empowerment are yet to come; no matter that the 21st century is fighting the cyber-crimes and the ambit of law has deciphered various new fields for drafting comprehensive and effective solutions yet the quest to reform the colonial era laws has only received a solution to be viewed with a blind eye and to be heard with a negligent voice. In the progression of the 21st century we may proclaim to have been the most successful country and may dream to rule the world in various fields but it can't be denied that we have thoroughly failed to reform the laws that have a biased body with a prejudiced soul.

Capital Punishment to the rapists has been assigned by the discretion of the honorable supreme court in the case of *Mukesh & Anr. v. NCT of Delhi 2017*² popularly known as Nirbhaya case. It may be a matter of proud that our laws on rape are so stringent as the accused when proven guilty suffers with a maximum punishment of death penalty but it should also be taken into concern that the non-consensual sex between the husband and wife that undoubtedly is rape is treated as an exception to the *Section 375 of IPC*³ and the exception in itself provides a legal and licensed method to rape

¹ Quote by FH BATACAN <https://www.goodreads.com/quotes/7975878-her-friends-used-to-tell-her-it-wasn-t-rape-if>
Accessed Dated November 08, 2023

² CRIMINAL APPEAL NOS. 607-608 OF 2017

³ [375. Rape.—A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following de-scriptions:—

(First) — Against her will.

(Secondly) — Without her consent.

(Thirdly) — With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

(Fourthly) — With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be law-fully married.

(Fifthly) — With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupe-fying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

through the institution of marriage. When the IPC proudly cherishes the marital rape it's nothing but a paradox to say that we have gender neutral laws and regulations that favour and safeguard the interests of the women, it's sometimes shocking to believe that adultery is decriminalized but the legislators dare to deal with marital rape laws.

Those who advocate the presence of this section in the Indian laws take grip and firm their view through the emotional and psychological play of the thought that Marriage is a divine institution and therefore this institution should be protected no matter what the situation may be but in protecting this view these people forget that when the divinity is surpassed with enmity then the institution fails to operate and which divinity is talked upon by the advocaters of this thought when even a mere choice to make consent is curbed and prohibited. It should be noted that purity can't be ensured when it's the dirt that is dominant.

When the law over marital rape is considered, then the country that gave birth to this law has abolished it. The United Kingdom including other common law nations such as Australia have completely abolished the law. Moreover, Nepal has also abolished this discriminatory provision from their legal code of conduct.⁴ With an issue that is prominent in the country and if the 21st century India is unable to provide adequate legal support system to the victims of a cause then it's the correct time to introspect and revolutionize the law we all are regulated from. It should be understood that an exceptional clause shouldn't be so strong that it could empower the safeguarding law itself. The judicial system of India works on the fact of accused until proven guilty and therefore in any possible scenario if this law is misused then adequate legislation should also be drafted to protect the wrongly accused but ignoring to draft a suitable legislation mere on the basis that it might be misused by the people is a threat to justice in itself.

In safeguarding the interests of the people of the nation we must not forget what Martin Luther King Jr. said: Threat to Justice Anywhere Is Injustice Everywhere.

(Sixthly) — With or without her consent, when she is under sixteen years of age. Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. **(Exception) —Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.]**

⁴ In Britain, A Move to Make Marital Rape a Crime, New York Times Accessed Dated: November 09, 2023 <https://www.nytimes.com/1990/12/28/news/in-britain-a-move-to-make-marital-rape-a-crime.html>

Marital Rape In India

When the subject matter of marital rape is considered in a country like India the scenario that can be witnessed has a two-fold objective, usually when a situation has a two fold objective then what a reasonable conclusion can be deciphered is that the one side of the situation may be favorable and other side maybe unfavorable but when this issue is dealt with, both sides of the coin themselves proclaim that the situation is disastrous for the fate of a married women, as a prudential opinion on such an issue leads to a conclusion that the woman surrenders her sexual privacy, sexual rights and her consent over physical intercourse with her husband to the man she is married to at his joy and desire.

The major objective behind entering into a marital obligation as per any Religion is for the emotional interdependence, continuance of the family, procreation of children and for the realization of rights and duties in regards to each other. However when the subject of Marital Rape is taken into consideration then what we need to analyze is that when the subject of spousal rape is measured on the above-mentioned scales then it is clearly evident that such a concept doesn't even provide for an approval of anyone of the objectives of marriage thus leading to failure of the institution itself and when the institution in itself is failed then what could be the reasonable answer of treating Marital Rape as an exception to the heinous offence of Rape.

There are primarily three reasons that such an offence exists in a progressive country like India which is firstly lack of amendment to the archaic and colonial era law, secondly lack of awareness among women of rural India & lastly the conservative approach of the government.

To better comprehend the three reasons, we need an analysis of such reasons so that the same can be duly proved. As far as the Indian Penal Code is considered it is an established fact that it was drafted back in the year 1860 and when the situations of the colonial era were not in a perfect sync with the Independent & Modern India then how can it be relevant in the Post-Modern Era to which we all are part of, it is clearly hereby observed that the legislature has duly failed in recognizing the validity of such a provision in today's time.

Drafting of Law is one factor behind eradicating the issues but the knowledge of that law and

application of that law is another and important factor behind the removal of the roots of such an issue, even after our country has multiple laws on various subjects that safeguard the interests of women but whether the women are aware of laws and the methodology of their application is a matter of great concern, the environment in which they live simply confines their freedom to their marital family & the will and desire of their husband. Though the law provides for the Section 13, of the Hindu Marriage Act that governs the subject of cruelty and marital rape as offence comes under such a wide subject of cruelty yet the applicability is never realized in regards to the offence of Marital Rape.

It is known to us all that Law is the will of the legislator as it is the approach of the government in power that defines which, what and how the law is made what can be clearly analyzed that the approach of the government regarding the issue inspite of being progressive with the effect of time has remained conservative and the government has repeatedly advocated the validity of this exception or has silently drifted apart from opening up over the issue, which has magnified the victims of the situation and has given the offenders a welcome offer to misuse their wives' suppressed freedom.

Effect Of Marital Rape

She always waited for the love and the companionship in her marital life, respected the choice of her parents and married the Man of their choice but who knew that she is married to a monster who completely shattered her marital dreams and would sexually abuse her at her first night after marriage, ask her to mimic pornographic videos, insert flash-lights and candles to her vagina but just because he is her husband he has exclusive rights to her body. When she complains to her family they suggest to adjust, when she complains to the police officer he remarks that you`re glad that your husband doesn't goes to a brothel & when she voices her opinion to the Supreme Court the court remarks that it's a person-specific issue and law can never be changed for one woman.⁵

The above statement is the remark of the victim of the Marital Rape, who survived physical and sexual violence but her voice was curbed, because she was in a divine institution of marriage. When such a statement is witnessed it is most clearly known to every prudential (wo)man that what would be the quantum of suffering of such a victim.

⁵ Night After Night The Torture Grew, A Survivor Speaks Up, DAILY OPINION, Accessed November 11, 2023

When various studies were conducted on this issue the medical experts and the psychiatrists have clearly expressed that Marital Rape affects the woman more adversely than Rape, the mental trauma the woman attains on being raped by her own husband with whom she has vowed to live for not just years to come but for seven consecutive lives' is in itself traumatic and frightening. It is a psychological fact that a person gets the most depressed when his basic expectations are disregarded, herein the only requisite that a married woman demands is love and companionship and when the result that arises out of such expectation is physical abuse and sexual violence then the result involves a break of emotions, trust and strained mental health. A research study by *Research Journal of Justice Studies and Forensic Science* clearly advocates about victims of marital rape that *Women experience post-traumatic stress disorder (PTSD), depression, higher levels of anger, fear, and guilt, and begin to hate their bodies, therefore causing their self-esteem to drop. Despite the argument that women who are raped by their husbands suffer less because they have already consented to having sexual relations, it is the opposite. Marital rape victims suffer more severe psychological consequences and for a longer period than those who were raped or assaulted by a stranger.*⁶

The International Scenario

The International aspect behind the issue is a matter of utmost relevance, as the laws of the Indian Subcontinent have taken birth from laws of the various foreign nations the most common of which includes the illegitimate rulers of the Britain. The Indian Penal Code that deals with the offence of Rape was formulated in the year 1860 under the chairmanship of Lord Macaulay. The socialistic conditions behind the formulation of laws at the time period when compared with their relevance in the Post-Modern Era may prove to be contradictory and thus the comparison of the pre-independence laws that exist till date should be made with the laws of the other nations that deal with the same subject and the same issue. After all, if a relevance is made to Article 253⁷ of the Constitution of India which acts as the grundnorm of all laws it can be concluded that Parliament should make laws in adherence to international treaties and laws. When the subject of Marital Rape is viewed with a lens of understanding the International Perspective behind the situation the first theory that comes into the

⁶ The Effects of Marital Rape on a Woman's Mental Health, Themis: Research Journal of Justice Studies and Forensic Science, Volume II Issue II, 2023 <https://scholarworks.sjsu.edu/themis/> Accessed Dated November 11, 2023

⁷ 253. Legislation for giving effect to international agreements

Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.

vigilance is The Theory of Implied Consent by Sir Hale which clearly enmarks that the matrimonial alliance between the husband and the wife is in itself a consent for the sexual intimacy between the two and thus a wife can never be raped by her husband. Such a theory was formulated in the year 1736 and still the nations which advocate the non-criminalization of marital rape keep in regard this theory as the most vital reason behind treatment of the offence as a mere exception and not a rule thereby disregarding the rights of the wife and treating her as a slave the master of whom is her husband. The change of the status of an unmarried woman of being a feme sole to a married woman of being feme covert clearly determines the status of the woman in the patriarchal societies of the Early 19th Century. The offence of Marital rape was not considered to be a crime until the 20th century before the passing of the judgement in the case of R v. R wherein for the first time it was held that ***“Nowadays it cannot seriously be maintained that by marriage a wife submits herself irrevocably to sexual intercourse in all circumstances.”***⁸ When the question arises as to the fact that which country was the first in criminalizing the offence, then it was Poland in the year 1932. However the first common law country to do this was Australia that criminalized marital rape in the year 1976 after a systematic reforms were made during the second wave of feminism. Along with such nations USA in the year 1984, Nepal in the year 2002 criminalized the offence of Marital Rape by covering the issue under the ambit of Right To Equality Before Law, Right To Life of an individual and Right To Sexual Privacy.

An understanding of the International Principle formulated by the United Nations in dealing with the subject is also a matter of vital consideration. Under the UN Committee on Elimination of Discrimination Against Women (CEDAW) formulated in the year 2013 it was clearly suggested that India should end marital impunity. Though India has not signed the optional protocol of the CEDAW yet it still remains the duty of the Indian Parliament to foster the regulation of the recognition of International Principles to which the most of the nations have agreed, acted and resolved the generational disparity faced by women in being raped by their husbands. In the countries of Liechtenstein, Mongolia, Rwanda the convict is punished for lifetime imprisonment if the victim dies. In the territorial lands of Guatemala, the Philippines, Serbia, Grenada marital rape can be punished for up to 30-50 years.

⁸ A Guide To Marital Rape, Noble Solicitors, [https://www.noblesolicitors.co.uk/about/a-guide-to-marital-rape.html#:~:text=The%20case%20of%20R%20vs%20R%20\(1991\)&text=The%20Lord%20Justice%2DGeneral%2C%20Lord,sexual%20intercourse%20in%20all%20circumstances.%22](https://www.noblesolicitors.co.uk/about/a-guide-to-marital-rape.html#:~:text=The%20case%20of%20R%20vs%20R%20(1991)&text=The%20Lord%20Justice%2DGeneral%2C%20Lord,sexual%20intercourse%20in%20all%20circumstances.%22) Accessed Dated February 24, 2024

Marital Rape & The Voice of Men

When the concept of Marital Rape is taken into reference it would turn out to be a biased approach if the reason why the offence is not criminalized in many of the countries is not comprehensively studied. Though the Doctrine of Coverture and the Implied Consent Theory by Sir Hale is one of the most propounding factors behind the non-criminalization of the offence and the existence of patriarchal society is yet another, however what may also be inferred is that the principle of law revolves around the idea that *1000 culprits can escape but one innocent should not be shall punished*⁹ therefore with the understanding of this principle, the subject matter in discussion, understanding the societal change through the post-modernism & other relevant reasons the shadowed part of the issue deserves a ray of light so that in protecting the woman the laws framed should not be proved to be partial for men.

With the onset of the recognition of the rights of the women, development of laws and their systematic progression with the help of adequate policies it is a fact that since independence the status of women has been protected with adequate laws and policies have been developed so as to help them profess under different fields. The presence of Article 15 (3), Domestic Violence Act 2005 and many other laws have helped in somehow compensating the age-long discrimination to the women and thereby further providing the assurance that the women are protected and they've been provided with adequate means to progress in the sub-continent.

When the subject of the Research Paper revolves on the subject that Whether Marital Rape is A Perfect License To Rape then the legislation as and when prepared should not be such that Marital Rape becomes a Perfect License To Leading A Man Behind The Bars. As the context was provided in the introductory part of the head one of the reasons why an adequate law is not drafted in this respect is that criminalizing the offence of Marital Rape will lead to a superior position for women to drag her husband to the court for any of the reason for which she may be dis-satisfied with her husband. The court will by the reason of fact however have a difficulty in determining that whether a sexual intercourse between a husband and a wife was through a consent or without a consent and

⁹

<https://supremetoday.ai/issue/1000-culprits-can-escape-but-one-innocent-should-not-be-shall-punished#:~:text=By%20prioritizing%20the%20protection%20of,guilty%20do%20not%20evade%20punishment.>

Accessed Dated February 24, 2024

therefore till the time the matter may be prevalent in the court of law the husband would be behind the bars thus conclusively it can be deciphered that in creating a framework on this issue the position of man shall be in the hands of the woman which in itself is violative of the Equality Principle as the matrimonial alliance between two people should be so as to respect individual rights and liberty and not to subsume the rights, dignity and status of each other.

It is seen that the court under various cases has remarked that the how the Domestic Violence Act, Dowry Prohibition Act and many other laws that were created for safeguarding the status of women have delivered justice but the court has also continuously remarked that how such acts have also discriminated man and pushed innocent men behind the bars.

Conclusion

The law serves the purpose of discriminating of what is white and what is black on an issue but there may be instances wherein there maybe situation of neither white or black but of black and grey. The issue of Marital Rape is one of such issues over which a rigid opinion cannot be expressively framed, when one side of the coin is looked upon; it clearly outlines the issues faced by women who surrender their destiny to the hands of their husbands and the other side of the coin clearly demarcates that how a law if framed on this particular issue can prove to be discriminatory for the men and at the same time can prove as an end to the dispute redressal mechanism.

Thus, it can be conclusively suggested that Marital Rape can be formulated as a ground for Divorce under the Indian Laws as whenever an offence is committed that in itself harms the trust and bond of the marriage by a non-consensual intercourse the alliance in itself loses the essence and the body remains without soul which ultimately signifies that the alliance in itself is dead. It is indeed a high time to criminalize the offence of Marital Rape but undoubtedly with immense care and caution so that the purpose of law to serve justice is abided and the three golden rules of natural justice are sufficiently satisfied.