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Editorial Team

Editor-in-Chief

Mr. Nikhil Kumar Chawla

Partner - LawPublicus LLP
Principal Associate Advocate – DKC & Co.

Contact: +91-9654441680
+91-9654030411

Email ID: Nikhilchawla29@gmail.com
Lawpublicusportal@gmail.com

Senior Editor

Ms. Yantakshikaa Sharma

Partner - LawPublicus LLP
Career Counsellor
Email ID: Yantakshika@gmail.com

Senior Editor (Honorary)

Mr. KS Rana

Practising Advocate
Contact: +91-9810326424
Email ID: Jyotideeprana@gmail.com

Senior Editor (Honorary)

Mr. Sandeep Sharma

Practising Advocate

Legal Consultant – Ministry of Law and Justice

Contact: +91-9899009517

Email ID: Sandeepjanmat@gmail.com

Senior Editor (Honorary)

Ms. Khushboo Malik

Research Scholar – Faculty of Law (DU)

Email ID: Malikkhushilaw@gmail.com

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Marital Rape: **The Irony of** **Concepts**

Authored By:

Ms. Anjika Verma

Designation: Fourth Year Law Student

University: GGSIPU

Co-Authored By:

Ms. Gauri Kapil Katiyan

Designation: Fourth Year Law Student

University: GGSIPU

Marital Rape: The Irony of Concepts

By: Anjika and Gauri

ABSTRACT

Living in the year that we are living in, it is truly regrettable that we still have to debate as to whether or not a married woman has rights over her own body. While the naysayers continue to defend the sanctity and piousness of the institution of marriage, it is high time that India should now replace this self-damaging (for women) view of conjugal relationship with the one that makes the mutual consent, respect and will, the true foundation of marriage relationship in India. Women being treated as objects in most marriages is not only demeaning to her but also to all of those women who are part of this mind-set. It looks like the concept of consent and will never exists.

A ten year old girl was married to a thirty year old man. Since marital rape has not been a concept, the man was charged for rape. One of the most frightening cases of marital rape was Phoolmani Dasi (also known as Maharani v/s Hari Mohan Maity). Although the autopsy report clearly indicated an injured vagina as the cause of death, the husband was later acquitted of the rape charge because law of rape excluded marital rape from the purview of law. On 9th January, 1891, the Viceroy of India presented a bill before the Council of India, called the "Age of Consent". Previously, the age of consent had been said at 10 years at 1860. After the bill was passed in 1891, the Section 376 included sex with a girl under 12 years even if the person is the wife of the perpetrator, as rape.

In this paper the authors have tried to highlight a socio legal aspect which has been suppressed in the Indian societies since forever. We have pondered upon the issue in a way which shall urge the esteemed law makers of our nation to frame laws pertaining to marital rape so that the ones facing this trauma can turn to legal remedies when in need.

Keywords – Family Law, Constitutional Law, Rights of Women, Marriage, Consent, Will, Marital Rape, Rape, Section 375, Indian Penal Code, Domestic Violence, Sexual Abuse, Sexual privacy

INTRODUCTION

As it is rightly said, marriage is where the roots are deep, the covenant is solid, life is sweet and it's sacred. In a country like India, marriage is an institution which holds great importance and is believed to be one of the most pious and sacred unions of two beings. Considering the times we are living in, the true essence of this definition seems to be lost. Respect seems to have been lost. In most marriages it has disappeared. Respect, consent and will are some aspects which should have been considered as of primary importance and since they weren't, there are many women out there, paying its price. A good and successful marriage is not when two people just profess a right to each other just because they are married to each other. Taking the debatable topic further, we would like to throw some light on the highly alarming issue of 'Marital Rape' prevalent since times immemorial. Yes, the two words coming together seem like an irony but it isn't just a word anymore, it is a reality.

According to a survey conducted by The Daily O, there are 36 countries in the world who have still not criminalized Marital Rape as an offence, "Only 36 countries in the world have still not criminalized marital rape. India really needs to get out of this list which houses, among others, Pakistan and Afghanistan." On the bill proposed by the MP, Mr. Shashi Tharoor, as to criminalize the act of raping your wife, it was said that criminalizing it would make the institution of marriage very unstable. We wonder how it is not making the institution of marriage very unstable by not criminalizing the act. It is, hence, again pointing in the direction of 'wife just being the property of her husband.' India believes that a woman gives away the autonomy of her body while marrying a person. This contention was put forth by many British colonies and later these were quashed by giving them the right name of 'male privilege'. My co-author and I wish to propose these questions in our research paper.

Apparently, the research doesn't even provide the data for marital rape cases in our country because Marital Rape is not even considered a crime in the country. The Indian Penal Code, 1860 does not criminalize the act of 'raping your wife' as an offence under its purview. According to Section 375 of the Indian Penal Code, 1860, it only allows punishment for 'forced sex' in marriages if the age of the wife is below 15 years. This surely raises questions on the topic in its entirety. We wish to request the Hon'ble law authorities of our country to ponder

upon the issue and to criminalize the highly disregarding and shameful act committed by a spouse in the marriage.

WHAT DO WE MEAN BY ‘MARITAL RAPE’?

Marital rape means Rape in Marriage. It is a non-criminalised act in India. The definition of rape is codified in Section 375 of Indian Penal Code, 1860 which includes all form of sexual assault including *non-consensual sexual intercourse with a woman*. However, exception to Section 375 does not take into its ambit **unwilling** sexual intercourse between a husband and wife where the wife is over 15 years of age. Thus, this exception immunizes such acts from prosecution. According to the current law prevailing in India, a wife is presumed to deliver perpetual and unending consent to have sex with her husband after entering into marital relations. As it is already discussed several times that unwilling sexual contact between a husband and a wife, regardless of their ages, is recognized in almost every country around the world but India is one of the 36 countries that has still not criminalized marital rape. According to India Today, March 12, 2016, the various High Courts along with the Supreme Court of India are currently flooded with writ petitions which challenge the constitutional validity of Exception 2 to section 375.

In the landmark judgment of **Independent Thought v/s Union of India**¹, the Supreme Court upheld the petition and criminalised unwilling sexual contact between a husband and the wife between the ages of 15 – 18 years. This judgement has in turn led to an increase in other writs challenging the constitutional validity of Exception 2 to Section 375, IPC as a whole.

When we talk about marital rape it raises a lot of questions and mindful concerns regarding a person’s body, mind and soul along with their personal liberty and dignity. The different kinds of law which have been built for different aspects of one’s life start vanishing and it seems like when a woman gets married to a man, all her rights (including basic human rights) seem to go in vain.

According to the Ancient Indian law, husbands and wives were not considered as separate and different legal entities. However, the jurisprudence in the modern era is explicitly concerned

¹ (2013) 32 SCC (2017) (India) - In this case the age limit of the concerned female was extended from 15 years to 18 years in section 375 IPC.

with the protection and equality of women. This concern can be witnessed evidently in the number of statutes which were enacted to protect the women from all sorts of violence and harassment. These include the 'Protection of Women from Domestic Violence Act, 2005' and 'Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013'. Other legislation includes excerpts of family law, constitutional law, and criminal law. According to the landmark judgement of **Govind v/s State of Madhya Pradesh**², the 'Right to Abstain from sexual intercourse is a long recognised principle of the constitutional jurisprudence of our country. "*When a stranger does it, he doesn't know me, I don't know him. He is not doing it to me as a person, personally. With your husband, it becomes personal. You say, this man knows me. He knows my feelings. He knows me intimately and then to do this to me- it is such a personal abuse.*"³

Rape laws in our country continue to work with patriarchal outlook of considering women to be the property of men post marriage with no autonomy or agency over their bodies. They deny married girls equal protection of laws guaranteed by the worthy Indian constitution. The law makers of our country fail to understand that a marriage should not be viewed as a license for a husband to forcefully have sex with his wife or to rape her⁴. A married woman has the same right to control her body as does an unmarried woman.

To sum up, Section 375 (exception) creates a classification not only between consent given by a married and unmarried woman but also between married females below the age of 15 years and above it. A well learned and lawfully sound person shall be able to make out that this classification does not pass the test of 'intelligible differentia' and is therefore in contravention to the Right to Equality and enshrined under Article 14 of Constitution of India.

WHAT IS THE PROBLEM?

Our penal laws which were handed over to Indians by the British have remained untouched even after 73 years of independence but English laws have been amended several times since then. Marital rape was criminalised way back in 1991. Rape is rape, it was rape and it will

² AIR 1975 SC 1378 (India)

³ Quoted by Anirudh Pratap Singh, *The Indian Express* (15th may,2021)

⁴ Marital rape: Husband having sex with his wife forcibly.

always be rape. The punishment for unwilling sexual intercourse between a man and a woman shall not depend on the identity of the perpetrator or the age of the survivor. When a woman is raped by a stranger she lives with the memory of a horrible attack. When a woman is raped by her husband she lives with a rapist and goes through mental trauma every day.

A study done by the UN Population Fund depicts that more than two thirds of married women in India ranging between the age group of 15 – 49 years have been beaten, raped or forced to provide sex. One in five men has forced his wife or partner to have sexual intercourse.⁵ Over 104 countries across the world have criminalized marital rape. India, along with Saudi Arabia, Pakistan and China have still not criminalized marital rape. To decode the statistics in India it is legal to rape a woman as long as you are married to her. In India the law makers have drafted the rape laws in such a way that will either let the perpetrators of such heinous crime roam free and even if in case it punishes them, it is their only weapon and the judgement is delivered years after the crime has taken place⁶.

Marriages in India are a way to get access to the notion of implied consent of a woman. Since she is now your wife, her consent is applicable 24 hours of the day and 365 days of the year. Isn't it true?

In a survey conducted by Scoop Woop Unscripted a few years ago, men were seen talking about marital rape as if it never existed. Let's look at some comments made by these men, **“when you get married through a religious ceremony, you get a license to have sex”**; **“How can it be termed rape? He is your husband, he has full rights over you”**; **“How is this rape? If he cannot have sex with his wife where does he go?”**; **“if she wishes to have sex, she will lie down on the bed and if not she will not lie down.**

‘Rape is Rape’ and ‘No means No’ and these shall be the ends of these sentences. The age, gender, and marital status of the victim do not matter. India as a country has inherited some of the most absurd penal laws by the British Raj and it is beyond saddening and gut wrenching to know that they have remained untouched since then. It shall not matter if your wife says a no or somebody else says it, both the men and the legal system of India needs to stop at that.

⁵ International Men and Gender Equality Survey 2011.

⁶ Delhi Gang rape case 2012

As it is well known that the case of a man accused of raping a woman on the false pretext of marriage, the Supreme Court bench headed by Former Chief Justice of India S.A. Bobde observed, “If a couple is living together as husband and wife, the husband may be a brutal man but can you call the act of sexual intercourse between them as rape?”. The Court on this contention granted eight weeks of protection from arrest to the accused. It is high time we question these hard hitting contentions made by the lawmakers of our country and ask them to respectfully return the entitlement that they took away from a woman by making such remarks.

CONSENT V/S WILL

“Her friends used to tell her it wasn’t rape if the man was your husband. She didn’t say anything, she wanted to strike a knife to their faces”⁷.

Patriarchal framework which administers Indian families has constantly considered women as an unimportant property of her significant other or guardian. Since time immemorial this belief system has impacted our legislature by shielding the husband for his heinous act of raping his wife. It isn’t right to trust the fact that sex with spouse is husband’s privilege given to him by marriage. It has been demonstrated that marital rape is more traumatic with long lasting results such as physical and mental trauma.

For a forced sexual activity between two people to become rape or marital rape it shall fulfil the following criteria:

1. Against her WILL
2. Without her CONSENT
3. With her consent, where consent is obtained by FORCE
4. When she is UNABLE TO COMMUNICATE her consent
5. With or without her consent when she is UNDER 18 YEARS OF AGE
6. With her consent when she is UNABLE TO UNDERSTAND the nature of the act due to UNSOUNDNESS AND INTOXICATION

⁷ F.H. Batacan

The term 'consent' is defined under Section 2 of Indian Penal Code as an unequivocal and voluntary agreement when the woman, by words, gesture or any form of verbal or nonverbal communication communicates her willingness to participate in the specific sexual act. By this we can conclude that the consent of the women (in any way as mentioned above) is a major factor which counts for her willingness but the son of the patriarchal society dominates the women and this practice has not stopped since time immemorial.

The will of the woman means her wish, her own desire to participate in the sexual activity without being pressurized, without a heavy heart. This word determines the reasoning power of a person's mind as to whether they want to commit to the sexual activity at that moment or not.

LAW REGARDING 'AGAINST THE WILL' AND 'WITHOUT CONSENT'

If a woman, who has not consented for sexual intercourse with the married man, has a right to say no. Marriage doesn't mean that the wife has consented for physical force⁸. Delhi High Court said that both men and women have the right to say no in the physical relation. But the irony of the situation is that the same Delhi High Court quoted that marital rape cannot be a ground for divorce. Law fails to see and combat the situation of married women, those who on a daily basis, become the target of their man and thus they get added to the list of victims of marital rape.

After all that we have gone through there still remains an argument as to whether marital rape should be criminalised. Many arguments say that there is no need to criminalise the offence because married women are already protected by several acts like the Protection of Women from Domestic Violence Act. There are several international agreements like CEDAW⁹, National level committees which have recommended removing marital rape exception from Section 375 of IPC that defines rape. The 2018 survey by the national family health survey declared that 31% of women in India experience brutal physical, emotional and sexual trauma

⁸ Said by Delhi High court sitting bench of Chief justice Geeta Mittal and C.Hari Shankar in a plea of marital rape.

⁹Convention on the Elimination of All Forms of Discrimination Against Women

at the hands of their husbands. 83% of married women within the age group of 15 – 49 years have claimed to experience sexual assault by their present husbands and against her will¹⁰.

IS MARRIAGE A CONSENT?

It is high time for us to answer this big question. If someone believes concept of marriage to include socially sanctioned sexual slavery, then the person does not understand either marriage or consent. Consent simply means granting permission for something to happen, will on the other hand, means the desire shown by someone by words or gestures to participate in a certain act. Women in marriages are pressurized to submit to sex whether they want it or not in that moment. A marriage is a social contract but that does not amount to blanket permission to sex because the husband does not own the women's body. The government concentrates on a husband's right over his wife's sexuality which completely dismisses the whole conversation about consent and will. This barbaric act done by the husband can never be justified by any institution of piety.

THE LEGAL ARGUMENTS

CONSTITUTIONAL VALIDITY

As we already know that upholding the legality of marital rape dates back to the Victorian era but in today's time it is still sometimes contrasted with some of the more forward – thinking statements made by the judiciary independently. There are numerous facts, logic along with a plethora of precedents to compel the state to do good, but until the mind set of those in charge change to give importance to a different set of arguments, very little will change.

The Indian constitution was drafted and time fully amended by well-read and learned members of the parliament. It was hoped that they possessed sound knowledge of law and its application not only for that time but also for the dynamic changes that the society will go through. There are certain provisions in the Indian constitution which serve as a backbone for the people of its nation.

¹⁰ National family health survey report 2018.

Although under Article 14¹¹, the constitution of India guarantees equality but the marital law exception¹² discriminates against females who have been raped by their own husband by denying them equal protection from rape, sexual assault and cruelty. The Exception 2 to Section 375 under IPC, 1860 gives rise to two categories of women on the basis of their marital status and it provides unmarried women from rape and sexual assault. The question arises as to how the marital status of the woman decreases the gravitas of the crime committed by her husband? The answer lies in the fact that this is a direct contradiction of every Indian citizen who is guaranteed the right to quality and equal protection of law.

The same as written above (Exception 2 to Section 375) also violates Article 21¹³ of Indian constitution. The Supreme Court has often interpreted Article 21 to extend beyond the basic and literal guarantee of life and liberty and to also include the right to health, privacy, dignity, safe living conditions and safe environment. Further it also quoted that the right to make choices about sexual activity (whether or how much to participate) is very much under the ambit of scope of rights to personal liberty, privacy, dignity and bodily integrity¹⁴.

- **Right to Sexual Privacy**

The judiciary through a lot of judgments has made it clear that spouse rape shall always be perceived as infringement of human rights. Despite the fact that there have been a lot of enactments in India to curb the brutality against women, marital rape has neglected to pick up acknowledgment by the esteemed law makers of our country.

As we are well aware that right to privacy is not mentioned in the Indian constitution but in a series of cases, the Supreme Court has perceived that right to privacy is ensured under Article 21. The Article incorporates the right to be allowed to sit unbothered and not aggravated.¹⁵In another landmark judgement the Apex Court held that every woman is entitled to her sexual

¹¹ 14. Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

¹² Exception 2 to Section 375

¹³ 21. Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law.

¹⁴ Suchita Srivastav V/s Chandigarh administration on 28th august, 2009 via bench headed by K.G. Balakrishnan

¹⁵ Kharak Singh v/s state of UP, Govind vs state of MP, Neera Mathur v/s LIC

privacy and it is not open to and for any and every person out there to violate her privacy as and whenever he wished.¹⁶

Forced sexual intercourse and cohabitation is a violation of the right to privacy as a fundamental right. In the landmark case of **Justice K.S. Puttaswamy (Retd.) v/s Union of India**¹⁷, it was held that the decisional privacy is reflected by an ability to make intimate decisions as it primarily consists of one's sexual and procreative nature. Thankfully this ruling does not differentiate between married and unmarried women. There has never been any explicit ruling which says that women lose their fundamental right to privacy upon marriage; all women have the fundamental right to be able to consent and to be able to say no.

- **Right to Live with Human Dignity**

In the landmark judgment of the **Chairman, Railway board v/s Chandrima Das**¹⁸, the Court held that rape is to a lesser degree a sexual offence than a demonstration of hostility gone for corrupting and mortifying the ladies. In this manner the marital exception principle is violative of the wife's entitlement to live with human dignity. Any law which damages women's entitlement to live with dignity and gives husband an appropriate right to drive wife to have sexual intercourse without her will is along these lines unlawfully.

- **Right to Bodily Self Determination**

In **Sree Kumar v/s Pearly Karun**¹⁹, the Kerala High Court held that the offence under Section 376 A IPC won't be pulled in as the spouse is not living independently from her husband under a declaration of partition, regardless of the possibility that she is liable to have sex with her better half without wanting to or without her assent. For this situation the spouse was subjected to sex without her will by her husband. This happened when she went to live with her husband for two days as a result of settlement of separation procedures which were going on between the two parties. Subsequently the spouse was not held liable of raping his wife, however in reality he had raped his wife.

¹⁶ State of Maharashtra v/s Madhkar Narayan

¹⁷ 26 September 2018

¹⁸ 28th January, 2000

¹⁹ 1999 (2) ALT Cri 77, II (1999) DMC 174

“Marriage does not mean that the women is all time ready, willing and consenting to sex. The man will have to prove that she was a consenting party”

A pro tip from Delhi high court for all the Indian law makers who need help figuring out how a codified marital rape in our laws should sound like!

REALITY V/S NOTIONS

It is 2021 and India remains one of the 36 countries where it is not a crime to rape a women - **as long as they are married** to the one who committed rape on them. Most countries in the world have recognised that rape is rape and no matter what the conditions prevail, it shall always be considered as a heinous criminal offence. We clearly don't know what is holding back a super power like India. There are several factors which point to this cause: a typically outdated IPC which takes us back to the Victorian era; a rigidly patriarchal society, a culture where marriage and family still hold utmost significance as the building blocks of the society. To continue the argument further, the most stubborn obstacle in the way of criminalizing marital rape in India is the misogyny, misconception and patriarchy. There are certain reasons which require a critical glance because Government has continued to protect men who rape their wives by citing the same few reasons repeatedly.

POINT ONE: IT IS AGAINST INDIAN CULTURE

In August 2019, the former Chief Justice of India Mr. Deepak Mishra said that marital rape should not be made a crime in India²⁰. It was reported, “Because it will create absolute anarchy in families and our country is sustaining itself because of its family platform which upholds family values²¹.”

Let's translate for all of us to understand it better. The government is arguing that since a majority of people in India are illiterate, uneducated, poor, conservative and religious (unlike in America), they believe that a husband cannot rape his wife because a good Indian wife will dutifully consent to his husband forever. The government argues that if in such circumstances

²⁰ Times of India

²¹ Deccan Herald

they criminalise marital rape, a majority of marriages will fall apart because women will stand up to their rapist husbands who will become criminals in the eyes of law.

ANSWER TO POINT ONE: THIS IS NOT CULTURE

Marriages always hold utmost significance in lives of families; especially those of girl child. Since a girl child is born, her parents and other family members start to accumulate funds for her marriage, not for her education, but her marriage! Giving her education is an event which takes place before her marriage but the kind of pressure that is put on her for becoming a good wife cannot be compared with anything else. The reasons written above such as illiteracy is only because of lack of proper awareness regarding self-worth and financial independence. So, women are not able to understand their self-worth and their rights root back to the rigid patriarchy which nurtures her heavily. It is therefore to be noted that illiteracy and conservative thinking cannot be the answer for not criminalizing marital rape in India. Sons should be taught that they are not symbolic of God and shall learn to live without their wives worshipping them.

POINT TWO: MARRIAGE MEANS PERPETUAL CONSENT

Indian laws date back to 1700s, when Matthew Hale of England declared that ‘the husband cannot be guilty of rape committed by himself upon his lawful wife by the mutual matrimonial consent and the contract into which the wife has entered with her husband from which she cannot retract’. Another justification by William Blackstone in 1753 stated that by marriage, the husband and wife are one person in law, the very being or legal existence of the women is suspended during the marriage.²²

ANSWER TO POINT TWO: CHANGE IS THE ONLY CONSTANT

Even the British common law moved forward in England in 1991 when Lord Keith stated on behalf of the Court that modern marriage still holds the same significance but does not treat women as a slave of her husband. He further quoted that modern marriage is the partnership of equals and the wife is no longer considered the chattel of the husband. Indian laws still remain the same when we talk about marital rape. The Gujarat High Court clearly stated that the law must uphold the bodily autonomy of all women irrespective of their marital status.²³ There

²² English common law

²³ Nimish Bhai Bharat Bhai Desai v/s State of Gujarat (2nd April 2018) by a bench headed by J.B.Pardiwala

shall remain no concept of implied consent when it comes to punishing the accused husband with the offence of marital rape.

POINT THREE: WOMEN WILL MISUSE ANY LAW AGAINST MARITAL RAPE

The above said has been used time and time again for various laws enacted to protect women in India. Some of these are Protection of Women from Domestic Violence Act²⁴, Dowry Prohibition Act²⁵, and Section 498A of IPC²⁶ which criminalizes physical and mental cruelty done by the husband and his family against the women.

ANSWER TO POINT THREE: CONSIDER FACTS NOT MERE SAYINGS

Till now there has never been any empirical evidence for the misuse of law, except for the low rate of conviction in dowry and cruelty cases. The reality hits us hard when we come to know that two out of every five women in India are victims of physical, sexual or emotional violence. When we choose the number of these convictions as the parameter to test the reality of the ongoing situation it leads us nowhere. This is due to poor investigations, evidence collected improperly or no evidence, omission of witnesses in their statements.

This argument is also boneless as it ignores how the disadvantaged women are to use the marital rape law even when it exists. The lack of resources and access to legal help along with the stigma attached, all provide resistance to women actually achieving justice under these laws. If women are not educated enough to properly use the law it is evident enough that they would just be as unable to misuse the law.

CONCLUSION

Marital Rape openly breathes in the world. It's not picky about the strata of society, women's education, her employment capabilities and her upbringing. This takes place more in a livelihood surrounded by women rather than ones surrounded by men. Since this is rooted in the woman's upbringing that she is the homemaker and will bear and sacrifice everything she has for that family to remain intact. When we talk about marital rape, we are talking about violation of a human's body, trust, and emotions. Unfortunately, marital rape exists in most

²⁴ 2005

²⁵ 1961

²⁶ 1860

upper class societies. It's not something happening in a dark alley. It's the husband, a woman's own partner. Some brush off marital rape as an unpleasant part of a woman's marital duties; others categorize marital rape as attention and affection from the husband towards his wife. In this research paper, we have highlighted the problem, the solution, the reality and the notions attached to it. The constitutional validity of not making marital rape a heinous crime is also discussed. It clearly shows that when a husband commits marital rape on his wife, it infringes the women's basic human rights as well as fundamental rights. We have strongly debated the issue of consent versus will and in order to put an end to this, we reached a conclusion that 'will' is what matters more than consent. The law makers need to keep in mind the concept of will and work less calculatedly and more emotionally but judiciously while making this law. They should be able to put themselves in the shoes of the woman who has been struggling with marital rape. Last but not the least, misconceptions such as "our culture", "conservative thinking", "and sanctity of marriage" have also been highlighted and addressed. We hope this research works to initiate the conversation where it is really needed. It is an effort in the direction which shall urge the esteemed law makers of our country to frame the law relating to curb the issue of marital rape.

This case study is for information purpose only. Nothing contained herein shall be deemed or interpreted as providing legal or investment advice.