

CRIMINALISATION OF MARITAL RAPE IN INDIA

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**BY
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**UNDER THE GUIDANCE OF
ASST. PROFESSOR MS. SARITA SINGH**



SESSION: 2020-2021

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Thanking You,
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ABSTRACT

Despite the increased acceptance of various penal laws in India, there has been an increase in the number of cases of marital rape in the last two to three decades. Marital rape is a heinous crime that persists in male-dominated orthodox Indian society and is not even recognised by lawmakers, leaving Indian married women helpless and without a remedy. The reasons for this are numerous and may be found in several Law Commission reports, Parliamentary discussions, and judicial decisions ranging from maintaining the sanctity of the marriage institution to existing legal alternatives. There is a need for a special law in India to address marital rape, which should also be consistent with international norms on the subject. The rising rate of unreported marital rape as a result of its non-criminalization is a cause for concern, as it impedes women's independence in India.

The goal of this research paper is to highlight the Indian legislature's failure to repeal the marital rape exception provision and to raise public awareness about this heinous crime. The article also examines the reasons for the exemption clause's establishment in the first place, as well as the impact of the act on women's physical, mental, and emotional health. Because of the significance of marriage in our society, the majority of victims of marital rape are unwilling to speak out against the crime. This study emphasises the necessity for reform by adopting an all-inclusive definition of rape and the needed sanctions for the same, using history, statistical data, case laws, and several other research techniques. The study seeks to explain that criminalising this problem is the first step toward removing social evils like marital rape from the Indian mentality by pulling inspiration from international statements, Indian legal precedents, and several Law Commission Reports. An examination of other countries' laws and cases demonstrates India's legislative backwardness in terms of changing and amending current laws. The study emphasises the importance of removing the exclusion clause that prevents our country from criminalising marital rape, therefore preserving women's speech, rights, and dignity regardless of their marital status. In today's world, there is no rationale or applicability for the concept of total marital exemption. The paper also intends to study the extent of marital rape in India and its legal status. It explains how

the legal limits of bodily privacy are being abused and how social conventions are obstructing a woman's rights.

While there has been a significant shift in the position of women in different fields over time, when it comes to marriage, we still see a patriarchal structure in which women play a passive role. This paper aims to draw attention to the tragedy of marital rape and the need for a solution to end it.

Keywords: marital rape, criminalization, penal laws, rights, marriage institution, amendments.

LIST OF ABBREVEATIONS

AIR	All India Reporter
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CJ	Chief Justice
Cr. L. J.	Criminal Law Journal
DEVAW	Declaration on the Elimination of Violence Against Women
etc.	Et cetera
FIR	First Information Report
HC	High Court
i.e.	Id Est
Ind. Const.	Indian Constitution
ILR	Indian Law Reports
IPC	Indian Penal Code
NFHS	National Family Health Survey
PIL	Public Interest Litigation
QB	Queen's Bench Reports
SC	Supreme Court
SCC	Supreme Court Cases
W.P.	Writ Petition

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CHAPTER 1

INTRODUCTION

1.1 OVERVIEW

One of the most prevalent types of violence against women is that which is committed by their husbands or intimate male partners around the world. One in every five ever-partnered women aged 15 to 49 witnessed intimate partner violence in the previous year.¹ Physical and sexual abuse of women is widely recognised in India, with several laws providing medical treatment for the scars left by crimes such as rape, molestation, abduction, cruelty, and so on. The noose has been tightened around these criminals, and the previous legal requirements for conviction have been lifted. The 150-year-old Indian Penal Code has been reformed, judicial advocacy has often rendered ground breaking rulings in favour of women's rights, and legislative purpose, social organisations, and the media have all played important roles in raising consciousness about these issues. But, through all of this social and legal change, a particularly heinous crime has pervaded the matrimonial structure and founded itself as a justified act. The crime of marital rape, also known as spousal rape, is shrouded in mystery.

Even in the modern era of the 21st century, women's rights remain shackled to patriarchal notions of the yesteryears. The absence of these rights force women to battle challenges on their own that threaten to strip them of their dignity and mental peace. One of these challenges is marital rape, which is not criminalised in India. In fact, India is one of the thirty-six countries in the world which have still not criminalised marital rape, despite prolonged opposition.²

Marriage is a ceremony that brings men and women together to form a family. It inspires feelings of love and confidence. It is a stable arrangement in which a man and a woman are socially allowed to have children while still having the right to sexual intercourse.³ Under customary and statutory law, the institution of marriage allows a man and a woman to live together. It is a special bond formed between two souls who

¹ UN Women, "Progress of The World's Women 2019-2020: Families in a Changing World," UN Women, 2019

² *Marital Rape in India: 36 countries where marital rape is not a crime*, India Today (Mar. 12, 2016), <https://www.indiatoday.in/education-today/gk-current-affairs/story/marital-rape-312955-2016-03-12>.

³ <http://vapsoft.org/meaning-of-indian-marriage/>

marry after agreeing to be companions for the rest of their lives. It is two souls' physical, emotional, and spiritual union.⁴ When a man marries a woman, he undertakes the responsibility of treating her with dignity.

The word "marital rape" can be used in a variety of contexts. Finkelhor and Yllo identified three types of coercion used by husbands in the act of marital rape: "social coercion, which is the pressure women feel as a result of cultural expectations or social conventions, interpersonal coercion, which occurs when a husband threatens the wife to engage in sexual activity, but the threats are not violent, and there is no threat of real physical coercion."⁵ Both mainstream and pornographic media continue to reinforce stereotypes about women and sex in our culture.

Not only men and society, but also women, refuse to name this non-consensual form of sexual intercourse and refuse to recognise it as a violation of women's individuality. It has largely gone unnoticed in the country's legal literature on rape and sexual abuse. Sexual relations between a husband and wife have become an embarrassingly intimate subject as a result of social norms. Despite women's progress in India compared to previous decades since independence, men still regard women as their chattel, and wives allow themselves to be crushed by this social mindset.

The question now is whether marriage gives the husband the right to forcefully have sex with his wife, or whether marriage takes away a woman's right to refuse to have sex with her husband. In the current situation in India, it is a contentious problem. Marriage gives the wife hope that her husband will protect her and respect her integrity, but when he engages in unwanted/forceful intercourse with her, this confidence is shattered, and the wife's trust is betrayed. What is the point of granting protection to the husband from committing rape on his own wife in such circumstances?

"You are espousing a personal cause and not a public cause...This is an individual case."⁶ This is what Judge R Banumathi and Judge AR Dave said, refusing to hear a woman's plea, which had been a victim of marital rape.

⁴ <http://weddings.iloveindia.com/features/what-is-marriage.html>

⁵ David Finkelhor and Kersti Yllo (1985). *License to Rape : Sexual Abuse of Wives*, The Free Press, New York

⁶ Bhadra Sinha, "SC rejects plea to make marital rape a criminal offence", HT, February 18, 2015.

In the last few years, the rate of marital rape has risen. The emotional anguish of being assaulted, the trauma of being victimised by her own husband, and the helplessness of being still and silent are all major elements of marital rape.

These events have left indelible scars. People in India are protected from crimes committed on the streets, but women are vulnerable to crimes committed inside their own homes, which go unnoticed. "More than one in every seven women who have been married has been raped in their marriage," according to Indiana University Press in 1990.

According to the Population Fund of the United Nations, More than two-thirds of married women in India aged 15 to 50 have been subjected to forced sex, beaten, abused, and a dowry demand.⁷

According to estimates, marital rape is a crime in at least 100 countries, but India is not one of them. There have been numerous laws and enactments concerning dowry, abuse, domestic violence, and female infanticide Assaults on women are considered to be a form of violence.

The Verma Committee, which recommended changes to India's sexual harassment legislation, proposed criminalising marital rape. The Protection of Women from Domestic Violence Act of 2005 provided a good solution for a variety of victims, but it did not criminalise marital rape.

The law ignored a serious breach of the fundamental right of liberty of married women, their right to their bodies or to protect them against abuse. Different juridical structures and views were further analysed on the Marital Rape. The study focuses on why marital rape was not criminalised in India.

Despite the revolutionary legal changes that have resulted in many privileges being given to women and wives in particular over the last century and a half, the law and lawmakers have curiously remained silent on the question of overturning the marital rape exemption for husbands.

⁷ Population Fund United Nations Report 2013
http://apps.who.int/iris/bitstream/handle/10665/85239/9789241564625_eng.pdf

The marriage contract between a man and a woman falls under the category of "private economical ties," according to Blackstone, a well-known 18th-century British jurist.⁸

The word "rape" comes from the Latin phrase "rapio," which means "to seize." As a result, rape is described as the forcible seizure or ravishment of a woman without her consent, whether by coercion, fear, or deception. It entails coercive, non-consensual sexual contact with a female. Rape is an act of abuse against a woman that is by all accounts an outrage. It is the greatest breach of a woman's self-esteem.

According to Oxford dictionary, "marital rape is sexual intercourse forced on a woman by her husband, knowingly against her will". When foreign bodies violate a woman's bodily integrity, she has the right to fight for safety; but, when the perpetrator of her bodily integrity is her own spouse, whom she married with all the glitz and glamour, lawmakers take away that protection. With this in mind, the idea of a woman (wife) having sex with her husband against her will, consent, health, or any other consideration is unacceptably immoral in a civilised society. As a result, the concept of marital exemption has no basis or applicability in today's world.

True, the problem will not be over by simply criminalising marital rape in India, but it is an important step to change the experience of women with sexual violence during marriage. The concept of rape has to be recognised by law and strictly enforced regardless of the relationship between the victim and the perpetrator. Nearly 52 nations have criminalised marital rape⁹, clearly indicating that it is now seen as a human rights violation.

Marital rape (or spouse rape, coercive sex in marriage or sexual violence in the intimate partner) was one of the movement's most significant product-related issues. After 2010, many arcane journalists, academics and feminists voiced their serious concern about the issue and the position of the government there. This unrivalled outcome is the result of three ideals coming together.

Firstly, the woman's honour was distinguished from the family by this protest; it was emphasised that "rape" is regarded as a crime and not an incident or blot on a child's

⁸ American & English Encyclopedia of Law ; (1765) *William Blackstone Commentaries* Clarendon Press; Oxford

⁹ www.business-standard.com

family. This individualisation destroyed the notion of a woman as the 'owner' of her father and husband, and as a crime committed by a 'outsider' and no one in the family. This created a space for discussion of marital rape. The Justice Verma Committee report recommendations were the biggest catalyst for the question of spousal rape. On 23 January the Justice Verma (led by the late Justice JS Verma, the former Chief Justice of the Supreme Court with two other members Justice Leila Seth, former High Court Judge and former Indian Solicitor General Gopal Subramaniam) presented its recommendations on amendments to the penal Law as the most effective move the Government has taken after the movement. The Committee recommended that the exception to marital rape be removed, but the government did not accept it. Interestingly, there was a parliamentary emergency meeting to discuss this issue and to remove it as a threat to the Indian family system.

1.2 LITERATURE REVIEW

Nancy Kaymar Stafford [2008]. The long-awaited domestic violence act was passed by the Ghanaian Parliament on 22 February 2007. Marital rape is a breach of the human rights of women. In Ghanaian custom and law, approval of marriage is equivalent to approval of sex. The expression of Marital Rape is a throwback to the common law of Britain.

Sumati Dhingra [2015]. The urgent need is for the Indian Penal Code to make marital rape a crime. The true goal of criminalising marital rape will only be accomplished if culture confronts the prevalent fallacy. Marital rape must be considered sexual assault, and Indian society cannot continue to promote social harmony by empowering women.

Shivani Garg [2012]. Marital rape is a heinous crime in the United States, but it is not a criminal offence in India. Compensation is the only means of redress. This is not a reason to pursue a divorce order. In India, there has been widespread protest to include marital rape in penal laws.

P.K. Pandey [2013]. Men and women, the two foundations of society, play equal roles in the development of humanity. In today's culture, women are inevitably subjected to a

variety of humiliations. As far as sexual abuse goes, the list of crimes against women is infinite. Marital rape is very important because it is still not recognised as a crime.

Marital rape is the same as regular rape, with the exception that the involved and affecting parties may be husband and wife. Marital rape is when one of the partners forces the other to have a sexual relationship. Marital rape is a form of rape that includes domestic violence and sexual assault as well as partner rape. **(Rashed Ahmed and Nusrat Jahan Shaba, 2016).**

Marital rape is not criminalised, and there is no constructive attitude among couples that both husband and wife should refrain from having sex until they both consent. **(Atul Ratna, 2017)**

Md. Zishan Khan (2018), “(Marital) Rape and Consent: Analysing Marital Rape in India” The many petitions submitted in the Delhi High Court with a request to remove the Exception (2) clause from Section 375 of the IPC are examined, as well as the various points of view for both ‘for’ and ‘against’ the removal of the Exception (2) clause from Section 375 of the IPC.

Anjali Shrivastava, Devanshu Jain and Ayan Hazra (2013), “Marital Rape: A Legalised Sin”¹⁰, is a comparative study of the history, evolution, and impact of marital rape in India and other nations. It also focuses on demonstrating the patriarchal society's two-facedness by not criminalising marital rape. The research also looks at the Indian understanding of consent and the psychological ramifications of a marital rape victim. The study concludes that the omission of marital rape from the definition of a crime is unconstitutional and unethical.

Marital rape infringes on a woman's fundamental human rights, including her right to life, freedom from torture, liberty, and security of individual. Equality in the family, equal treatment under the law **(Melanie Randall and Vasanthi Venkatesh, 2015)**

¹⁰ Anjali Shrivastava, Devanshu Jain and Ayan Hazra, Marital Rape: A Legalised Sin, Indian Journal of Applied Research, 3(12): 249-251 (2013)

1.3 RESEARCH QUESTION

1. Whether to marry a man equivalent to consenting to sexual intercourse?
2. Whether decriminalising marital rape in violation of Article 14 of the Constitution, as well as the privacy and personal liberty of women as covered under Article 21 of the Constitution, affected by the Marital Rape?
3. Whether reluctance to criminalise marital rape harm the inherent justice principle enshrined in the constitutional preamble?

1.4 STATEMENT OF PROBLEM

Violation of a human being's personal space without their consent is, prima facie, a crime. All has an inherent right to be free and unenslaved by others. According to Indian history, marriage is for dharma, praja, and rati, where praja refers to progeny or childbirth and rati refers to sexual pleasures.¹¹ The fact that sexual activity is considered a compulsion after marriage is the root of the crime of marital rape. Except during sexual intercourse, the union of two souls and the vow to love and remain together are forgotten.

1.5 RESEARCH OBJECTIVE

- To study the magnitude of marital rape in India.
- To examine the legal framework and different perceptions on marital rape in India.
- How de-criminalization of marital rape is in violation of Fundamental Rights.
- To examine national and international legislation on marital rape.
- To suggest measures and remedies to strengthen the existing sociological, psychological & legal mechanisms.

¹¹Shauni, Hindu Marriage: Aims, Ideals and Types, available at: <http://www.yourarticlelibrary.com/marriage/hindu-marriage-aims-ideals-and-types/47617> last accessed on 7th May,2020

1.6 HYPOTHESIS

Rape is a criminal offence whether within the confines of marriage or outside marriage, but no legal penalty for marital rape exists in India. A model for criminalising marital rape is therefore required to safeguard women's rights.

1.7 SCOPE OF RESEARCH

This study intends to investigate the issue of marital rape in India. The researcher is conducting a comprehensive study of the problem of marital rape by relating marital rape to basic fundamental rights of women. The study will look at rape in the context of married women who are not protected under the IPC, i.e. women over the age of 18 who are not protected under section 376B¹² of the IPC. The researcher also hopes to contribute to changing the legal system to criminalise marital rape in order to uplift and empower women in India.

1.8 RESEARCH METHODOLOGY

A Research work cannot be accomplished without adopting a proper method of methodology. Analytical and doctrinal research methods are used in this research paper. Analytical method is followed in terms of analysing and scrutinizing the present scenario. A variety of statutes, journals, seminar papers, newspapers, news outlets, magazines and webpages have been collected for the data of this work. A conclusion has been established by analysing the secondary data.

¹² Section 376B of IPC states “Whoever has sexual intercourse with his own wife, who is living separately, whether under a decree of separation or otherwise, without her consent, shall be punished with imprisonment of either description for a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine”

CHAPTER 2

HISTORICAL BACKGROUND

In India, as a patriarchal society, men have always been valued more than women, and women have always been subjugated to men. Women were not permitted to have a say or engage in decision-making, regardless of whether or not the decision affected them.

Marriage is regarded as a sacred institution in Indian culture; it is the bedrock of a stable family and a civilised society. Such an institution, however, veils over acts like sexual cruelty and other forms of domestic brutality. One such atrocity is marital rape.

“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.”

-Matthew Hale, in *Pleas of the Crown*.¹³

This cryptic declaration provided the basis for a common law exemption from marital rape by lawyer Matthew Hale from the 17th century.¹⁴ It is very surprising to note that Lord Hale offered his claim no argument, jurisprudence or legal basis. According to Hale, marriage between a woman and her husband triggered a legal assumption of consent to sex, a concept that formed the basis of common law exemptions for marital rape. Such a notion of “irrevocable consent” was based on the sentiment that marriage creates sacred, permanent and indissoluble nature of relationship between husband and wife.

The marital exemption stems from a long-outdated concept of marriage which considered women nothing more than their husbands' property. Under the common law covering, at marriage, a woman was considered consenting to a relationship with her husband at her own discretion. John Stuart Mill observed in 1869 that marital rape is never acceptable to women because it is such a dignified surrender in nature as to diminish women's stature below that of a slave.

¹³ Matthew Hale, *History of the Pleas of the Crown* 629 (In the Savoy, Printed by E. and R. Nutt, and R. Gosling for F. Gyles, 1736).

¹⁴ Comment, *The Marital Exception to Rape: Past, Present and Future*, 13 *Det. C. L. Rev.* paras. 261, 262 (1978).

The values of the marital rape exemption were founded on “irrevocable implied consent”. In accordance with this notion, once a woman is married to a man, implied consent is thought to be irrevocable in nature to the sexual intercourse.

The common law teaches that a woman was a husband's property and that a woman's legal existence was "incorporated and consolidated to that of the husband" were other traditional justifications for the marital exemption.¹⁵

Husbands have been given the right from ancient times to force their wives to have sex with them. Rape means having sexual intercourse without consent with a woman other than the wife. It thus provides full protection to husbands, even though they compel their wives to engage in sexual activity.

Once the decision to marry was made, the notion that marriage involved a wife's unwavering consent to sex was not acceptable, and at any point in the marriage she did not recognise the possible divergence between this decision and her actual state of mind.

A married woman was not considered an autonomous legal body in India when the IPC was drafted in 1860. Rather, she was considered to be an object of her husband.¹⁶ She was therefore unable to file a complaint against another with her own identity. The rights of her independent legal entity were therefore not guaranteed. The doctrine of combining the identity of women with her husband paved the way for the exemption from marital rape. The stark reality in India is that marital rape continues unabated, with no clear attempts to make it illegal. One of the main reasons for this is that legislators are concerned that criminalising marital rape would potentially destroy the institution of marriage and weaken the family structure.

In Indian culture, marriage is regarded as a sacred rite, despite the fact that the country is still beset by illiteracy and poverty. The government believes that criminalising marital rape would lead to the collapse of this institution in this situation. It may also be used to make men more vulnerable to their wives' harassment. These arguments, however, are insufficient to justify allowing the oppressive act of marital rape to occur without legal repercussions, given its terrifying consequences.

¹⁵ “To Have and to Hold- The Marital Rape Exemption and the Fourteenth Amendment”, 99 HARV. L. REV. 1255, 1256 (1986) p. 442.

¹⁶ *To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99(6) Harv. L. Rev. 1255, 1256 (1986).

CHAPTER 3

CONCEPT

The issue of spousal immunity from criminal prosecution for rape ultimately boils down to two questions: First, how do we view rape - Is rape a violation of bodily integrity or sexual autonomy of an individual; or is it a violation of someone else's property. Second, how do we view marriage – Is marriage a contract between two individuals wherein there is irrevocable consent to sexual intercourse while marriage continues or is it a partnership between equals.

3.1 MARRIAGE

To understand the concept of marital rape, it is important to understand what marriage in India is all about. Marriage is regarded as a sacred institution in Indian culture; it is the bedrock of a stable family and a civilised society.¹⁷ Marriages exist in India in many forms; they are seen as sacraments in the Hindu marriage system and they are contractual in the Muslim marriage system. The wife and the husband have a decisive role in their functioning. Marriage is described as something that a Hindu man or woman must do according to the Hindu Marriage Act of 1955. It notes that once a marriage relationship is formed, even death will not be able to sever it. It is widely held that in a civilised society, the institution of marriage is formed to provide men and women with the strength and spirit to form a strong social bond. Every society formulated such mandatory consequences to give legitimacy to the institution of marriage, which has been practised in every progressive society since the dawn of civilization. The aim of Hindu marriage is to control or allow the spouses to engage in religious activities. It makes no mention of the need for permission to marry. It is possible to say that the laws are entirely religious in nature. Muslim personal law, on the other hand, describes marriage as a matrimonial partnership in order to legalise sexual practises. The one major distinction between Hindu and Muslim marriage is that Muslim marriage requires consent prior to marriage, while Hindu law does not. According to ancient Hindu scriptures a man can perform no religious rite with perfection without his wife's participation. In every religious ritual the presence of the

¹⁷ Prof Kusum, *Family Law I*,3 Published by Lexis Nexis (3rd 2003).

wife is important. As a result, partners are simply referred to as Ardhangani. Women are expected to be granted not only a significant but equitable role with men.¹⁸

3.2 VIOLENCE AND SEXUAL VIOLENCE

Violence is a coercive mechanism to assert one's will over another, in order to prove or feel a sense of power. To put it plainly, "violence" is the intentional infliction of destruction, misery, or death for the purpose of achieving a political goal.¹⁹ "Any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life"²⁰ is defined as violence against women according to UN General Assembly.

Violence is a coercive tactic used to assert one's right to demonstrate or experience dominance over another individual. In the social system, violence is a means of demonstrating strength, authority, or supremacy. In essence, violence is the use or threat of using force or coercion to maintain dominance, and it may occur on a personal level, between classes/communities, or at the state level.²¹

In a male-dominated society, sexual violence is the most dangerous and active mode of power. Sexual violence in a masculine, dominated society represents one of the most extreme and effective forms of control, damaging and constraining the lives of women and promoting individual and collective resistance among women, maintaining the status of gender inequality, women's subjugation and controls. WHO defines sexual violence as "any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed, against a person's sexuality using coercion, by any person regardless of their relationship to the victim, in any setting, including but not limited to home and work". Sexual violence can be described as any

¹⁸ Dr. (Ms.) Rekha Singh, Status of Women in Indian Society, available at: <https://www.bu.edu/wcp/Papers/Huma/HumaSing.html>

¹⁹ Sexual Violence Against Women-Penal Law and Human Rights Perspectives, 3 (2009). Lexis Nexis Butterworths Wadhwa Publishers, Delhi

²⁰ United Nations Declaration on The Elimination of Violence Against Women (1993), art. 1.

²¹ Brinda Karat and Indu Agnihotri, "Violence Against Women." Paper 53 in UGC Refresher Courses on Women's Studies (1998: Calcutta). Organised by School of Women's Studies and Centre for Women's Development Studies, Jadavpur University, Feb. 3-25, 1998 CD-635.3 available at: <http://www.cwds.ac.in/wp-content/uploads/2016/09/3.-women-and-communalism.pdf>.

type of physical or psychological violence perpetrated against a person's sexuality. Physical and psychological assaults on a person's sexual characteristics are classified as sexual harassment. Threats, embarrassment, and coercion are all examples of sexual assault that do not include direct physical interaction between the perpetrator and the victim.

The family has long been known as a paradise, a personal paradise where people can find comfort and security, a haven where peace and prosperity coexist. Sexual abuse is ubiquitous and expresses itself in a variety of ways in all aspects of life, including the family, which is the most fundamental unit of human society. When violence happens within the family, it has the greatest effect and repercussions because it is perpetrated by someone that the victim trusts and with whom he or she has a loving and affectionate relationship. Particularly in India the husband is called the protector of his wife and great sanctity is attached to the marriage. When the same individual commits sexual abuse against a woman and society and the legal system refuse to recognise the existence of such violence, the victims' suffering and condition remain unfathomable.

3.3 RAPE AND MARITAL RAPE

According to section 375 of the IPC, a man is said to commit “rape” if he –

- a) *penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or*
- b) *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 to do so with him or any other person; or*
- c) *manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or*
- d) *applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances following under the seven description*

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 lawfully 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 stupefying or unwholesome Substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.—With or without her consent, when she is under eighteen years of age.

Seventhly.—When she is unable to communicate consent.

Explanation 1.—For the purposes of this section, "vagina" shall also include labia majora.

Explanation 2.—Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1.—A medical procedure or intervention shall not constitute rape.

Exception 2.—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape”²²

The word, ‘rape’ is derived from the Latin term *rapio*, means ‘to seize’. Rape literally means a forcible seizure. It means the ravishment of women against her will or without her consent or with her consent obtained by force, fear or fraud or the carnal knowledge of a women by force against her will.²³ Rape must be recognised as the most severe form of sexual violence against women – an extreme manifestation of a spectrum of sexual violence that fully negates women's human rights. Rape is born of sexist values and beliefs, and it's not just a matter for women. It's a social and political problem that stems from power imbalances between men and women. Rape is a form of aggression and violence in which the victim's right to self-determination is taken away from her.

²² Indian penal code, 1860, section 375

²³ Bhupinder Sharma V. State of Himachal Pradesh AIR 2003 SC 4684, (2003) 8 SCC 551

Exception 2 to section 375 states that if a man engages in sexual intercourse with his wife who is not below 15 years then it is not rape. The age has been increased to 18 years through the case of *Independent Thought vs. Union of India*²⁴. According to this exception, a man cannot be liable for rape if he indulges in sexual intercourse with his wife even without her consent if she is above 18 years of age. This exception has granted immunity to the husbands from rape committed by them on their wives. If Rape is the genus, the marital rape is one of its species. Marital rape means rape when the victim's spouse is the perpetrator.

According to Oxford dictionary, Sexual intercourse induced on a woman against her will by her husband is known as marital rape. The definition of rape is identical when there is lack of consent, i.e. sexual intercourse or sexual intercourse. It literally refers to the husband's real or threatened use of force against the wife in order to force her into sexual intercourse.²⁵ This is also known as wife rape or conjugal rape.²⁶ It is a form of rape that is concealed under the guise of marital privacy, which allows both the husband and wife the right to defend private actions that they both consent to: it is not a shield to conceal violent acts. Rape is an offence against a woman that violates her integrity and self-respect, and when it happens within the confines of a matrimonial home, it reduces the woman to the status of a sexual object.

The dynamic, intimate nature of marital relationships makes it difficult for the victim to even recognise herself as a victim, let alone report the offending act to the police, which is why Marital Rape is one of the most under-reported violent crimes. The majority of legal systems recognise that rape does not go beyond the boundaries of a patriarchal value structure, and that it represents old conceptions of chastity, purity, and marital relations, as well as the fear of female sexuality. In most nations, the legal definition of rape is restricted to non-consensual or involuntary sexual penetrations and it exempts a specific group of men – husbands, who cannot be charged with raping their own spouses.

One of the peculiar consequences of the narrow and limited concept of rape is that it cannot be committed against a specific group of women – for example, a married woman cannot be raped by her own husband. Furthermore, this loophole implies that

²⁴ *Independent Thought v. Union of India*, SCC Online SC 1222

²⁵ *Marital Rape And The Indian Legal Scenario*, Priyanka Rath, Indian Law Journal, 1

²⁶ *Sex Crimes: Perpetrators, Predators, Prostitutes And Victims*, Ronald B. Flowers, Charles C. Thomas Publisher, 2006, 38.

aggressive and unwanted sex is not actually rape, but rather unlawful sex, i.e., sexual harassment by a man who has no legal rights over the woman. To put it another way, aggression in a lawful sexual intercourse is acceptable in the eyes of the law, but sexual relations with a woman who is not one's property are not.

3.4 CONSENT

Consent as defined under Explanation 2 of Section 375 of Indian Penal Code, 1860. The relevant portion is extracted below-

“Explanation 2.- Consent means an unequivocal voluntary agreement when the woman by words, gesture or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity”.

It provides for a consenting procedure for engaging in sexual conduct where a man can proceed only after woman communicates her willingness to participate. This is clearly opposite to the implied consent theory.

De facto it involves freedom to say 'yes' or 'no' to a sexual encounter. There seems to be a distinction between a person's consent to the liberal state as an individual and his consent to the different social relationships he shares as a member of his family. Over the years, consent theorists have neglected to give due credit or provide a forum for discussions on consent in the various relationships that citizens share. The most intimate relationship between a woman and her husband must be controlled by consent. Consent must be established at every level, from the point where she agrees to marry the man to the point where she agrees to engage in sexual intercourse with him. Since patriarchal supremacy has dominated history and societal studies, women are always expected to consent.

The existence of women has never got an independent identity and therefore decisions related to women have always been taken by the men in her life. If ever a women

resorts to explicit non consent, it is regarded as insignificant or as a minor form of resistance that can be transformed and reinterpreted as consent.²⁷

It is wrong to assume that just because rights have been granted to women in several “progressive” countries, the issue of consent will be a thing of the past.²⁸ The initial versions of the consent theories in the 17th century were very crystal clear about the importance of individualism in the relationship of men and women. The initial consent theories focused on the aspect of human beings, irrespective of their genders, being ‘naturally free’ or born free and equal and therefore consent from both ends was naturally given importance. Thus, if a human being is born naturally free, it raises the most fundamental question then, and about whether another human can impose his/her will on others. However, as was justified by Hobbes in his conception of ‘state of nature’, humans have to come together and sacrifice some of their basic freedoms for peaceful co-existence in the society. If, we don’t allow that, the society will fall into chaos and this will be detrimental to the existence of the civilization in general. Thus, the existence of some well defined authority is necessary for the basic lawfulness in the society. However, if the freedom and individual identity of a citizen has to be preserved, such authority must receive explicit consent to conduct its activities. Consent theory, thus focusses on this explicit consent given by every individual in the society voluntarily, without any external pressure as a part of its several societal relationships.²⁹

The cases where submission happens with consent, unless resistance can be proved, has a problematic historical origins. The difficulty in this case is to prove whether the acts have been performed "against the will" of the women, and similar acts which were performed "without her consent." This distinction is important to understand, especially to deal with cases where consent is achieved through cheating, deceit, fraud, dishonesty or through cunning trickery. Thus, since this distinction is very difficult to justify, most of the legal debates right since the starting of the 19th century have focused on the cases where intercourse is conducted and consent is achieved by fraud.³⁰

²⁷ Klopper and Human, *If God is Male, then male is God*, Pretoria University Law Press, 2007, p.no-3

²⁸ U.N. , Progress of the World_s Women,(2011-2012), p.no-33

²⁹ Burton B, e. a. (2002). Justice, Change, and Human Rights. *International Research and Responses to Domestic Violence* , 22.

³⁰ Harris, L. R. (1975). Towards a Consent Standard in the Law of Rape. *University of Chicago Law Review* , 43 , pp. 632.

To give a straight example, in a married relationship, if the woman has given her 'consent' to her husband, but the husband has impersonated, or pretended to be another person or has resorted to fraud and trickery to achieve her consent and which the wife finds out eventually, then it is very difficult to prove that the intercourse was against her will and was indeed rape, especially if physical force is not involved in achieving consent.³¹

However, there is still no legal clarity between the basic difference between 'submission' and 'voluntary consent' as they are completely different states of mind altogether. Also, the definitions of 'force' and 'threat' have also not been clearly defined. The Sexual Offences Act 1956 (UK) tries to tackle these complications but has been only partially successful.³²

Consent cannot be proven according to the Indian scenario if there is no injury. As per Supreme Court in case of *Tukaram vs State of Maharashtra*³³ SC revised the decision of Bombay High Court and held the accused not guilty. One of the reasons being under section 375 IPC, the fear of death or hurt can only vitiate consent for sexual intercourse. Without any recording, it will be considered habituated to sexual intercourse. Another case which also highlighted the vulnerability of females was the *State of Maharashtra vs Madhukar Narayan Mardikar*³⁴ where it was postulated that a prostitute too has a 'right to privacy'. The court exhibited that even a "easy virtue" woman has the right to privacy and when she likes no one can invade her privacy. The women working in brothels too are equally entitled to protection of the law. Thus, extending it further, even women too, have their rights intact, even after marriage and can claim protection of their rights based on the above mentioned arguments.

Thus, Consent must always be given in a relationship, especially in a married life, it is always women who should give consent to the man. The "naturally" superior, active, and sexually aggressive male, on the other hand, takes the initiative or offers a contract, to which a "naturally" subordinate, passive woman "consents." This can't be the foundation of an equitable sexual relationship; it can't be based on such a simplified definition of "consent." The failure to establish a shared context, language, or discourse

³¹ Koh, K. L. (1968). Consent and Responsibility in Sexual Offences. *The Criminal Law Review*, pp. 81-97 and 150-162

³² Scutt, J. A. (1976). The Standard of Consent in Rape November. *New Zealand Law Journal*, p. 64-65.

³³ (1979) 2 SCC 143; 1979 SCC (Cri) 381

³⁴ (1991) 1 SCC 57; 1991 SCC (Cri) I

from which we can look at personal relationships where two individuals can form a lifelong association based on mutual interest, consideration, and respect for human rights is perhaps the most fundamental issue.

The common unreasonable assumption that guides the society is that marriage is a license to rape and when a woman enters into the bond of matrimony she wilfully consented to be violated sexually for life. In India, non-consensual sex inside marriage is not acknowledged. It is a traditionally sanctioned method of female subjugation. Rape is rape, whether it happens in the bedroom or in a public location, and laws and policies must recognise this. Blanket consent in marriage is an unreasonable and barbaric term. A man-woman relationship is not a licence to rape. Furthermore, just because rape occurs within the four walls of a home does not mean it is a less violent conduct.

CHAPTER 4

CULTURE/SOCIETY OF INDIA

The concept of a patiparmeshwar (literally, "husband god") expresses itself in inequitable ways in the dynamic between a husband and his wife in India, which is possibly the only country where husbands enjoy the status of a god. Since they are a part of this Indian society, women embrace and tolerate their husbands' abusive acts with a terrible resignation. People's ability to comprehend the idea of marital rape is influenced by stereotypical notions of woman sexuality, sex, and rape, and as a result, many of them reject its existence. There is a distinction to be made between sex and rape. Sex can be about different things biologically, but it is construed differently socially. As viewed from a social perspective³⁵, sex is primarily about mutual gratification and intimacy, which is acceptable; rape, on the other hand, is primarily about control, dominance, and violation.³⁶

While it is a common occurrence, marital rape is not recognised as a sin in our culture. The age-old principle of marriage sanctity refuses to consider fact, for the simple reason that marriage is seen as a conjugal contract with sex as an integral part of it. There's an old aphorism that goes something like this: "a man's house is his castle". Unfortunately, the 'men' of this country have taken this too literally, believing that their home is their castle and that they own everything inside. And whether they buy furniture or marry a fellow human being would make no difference to them. They are free to handle them in the same manner.

³⁵ If for the time being we leave its biological function – procreation. See Katharine K. Baker, What Rape Is and What It Ought Not to Be, Vol. 39, No. 3 JURIMETRICS 236 (1999).

³⁶ Id.

CHAPTER 5

THEORIES OF MARITAL RAPE

Over time, several authors have developed various theories about the occurrence of marital rape in society:

5.1 THE FEMINIST THEORY:

According to this theory, marital rape is a weapon in the hands of patriarchal culture to exert power over women. They believe that the exception granted in cases of marital rape is a holdover from earlier laws about women, which considered them to be the husband's property³⁷. Feminists believe that marital rape is the product of a power struggle between the male and female spouses in the union³⁸. Radical feminists have gone so far as to argue that any type of heterosexual intercourse is primarily motivated by a man's desire and is therefore a form of violence toward women. The marriage permit, according to Finkelhor and Yllo, is a permit to strike, in which men dominate and rule their wives by constrained sex without fear of consequences due to the recorded setting of marriage. The feminist theory is widely accepted by many, but it is not viewed positively by a significant portion of the general population.

5.2 THE SOCIAL CONSTRUCTIONISM THEORY:

Believers of the social constructionism theory claim that men have governed society in terms of law making and politics since ancient times. As a result, laws arose as a representation of men's interests. As a result of these rules, women were considered to be their husband's property after marriage, and marital rape was considered a lesser crime than rape. Rape in a marriage was also deemed not to be rape in some jurisdictions. Marital rape, according to social constructionists, is a way for men to assert themselves over their wives in order to keep their long-acquired control over their lands.

³⁷ Feminist Perspectives on Rape, Stanford Encyclopedia of Philosophy, available at <http://plato.stanford.edu/entries/feminism-rape/>

³⁸ Marital Rape In India: A Radical Feminist Perspective, Tamanna Khosla, Mainstream Weekly, Vol. III, 2

5.3 THE SEX-ROLE SOCIALIZATION THEORY:

These theories claim that the gender roles of the partners in a marriage guide the sexual relations between them. Women are taught to be calm and passive, submissive in marriage, while men are taught to be dominant and violent.³⁹ Women are praised for their nurturing and caring. Men, on the other hand, are the primary perpetrators of violent sexual entertainment.⁴⁰ Sex role socialists are of the view that marital rape is nothing but an expression of the traditional perceptions of sex roles⁴¹.

5.4 PROPERTY THEORY

The probability that a spouse asserted his better half as property was another customary law root that was a structure barrier in the establishment of the marital rape exclusion. A spouse was no longer prepared to assault her better half because he could now take what he had previously claimed. Since women were seen as property, the custom-based law regarded attack as a violation of a man's property interest rather than a wrongdoing toward women. This hypothesis affects the rights of ladies by preventing them from moving toward the court to seek compensation for the harm they have suffered. This hypothesis expressly rejects women's rights to equity.

5.5 THE IMPLIED CONSENT THEORY

It expresses that marriage is comprised by an agreement, and thus all of the wedded ladies' choices are chosen by her significant other through suggested assent. This implies that a couple has inferred assent and agreement. The provisions of this agreement express that a woman's irreversible agreement to have sex with her better half at any time he desires is expressed. Conjugal assault can never occur because all sexual contact within a marriage is assumed to be consensual. When a woman marries, she forms an agreement with her husband, whether it is suggested or communicated. As a result, the spouse has the right to have sex with her significant other. In this case, the spouse's assent is irrelevant because the marriage itself demonstrates inferred assent.

³⁹ Proximate And Ultimate Explanations Are Required for a Comprehensive Understanding of Partner Rape, Aaron T. Goetz, *Aggression and Violent Behaviour*, Elsevier, 2

⁴⁰ Social Perspectives on Violence, Thomas W Blume, *Michigan Family Review*, Vol. II, 3.

⁴¹ A Review of Marital Rape. *Aggression and Violent Behavior*, Martin, E. K., Taft, C. T., & Resick, P. A. (2007). 12, 329.

5.6 THE UNITIES THEORY

It means that the spouse's personality converges in the presence of her better half after marriage. This is known as the Marital Unity Doctrine. As a result, the statute deprives the married lady of all autonomy, relying solely on her better half. As a result, it demonstrates that women were regarded as an asset to their husbands, implying that women had no rights in the marriage. In such a case, it seems that the husband was regarded as the wife's specialist, and he revelled in all rights over his better half.

This theory has its own shortcomings as it fails to take account of how husband could be convicted of assault, battery, cruelty etc. when they are considered to be one. Similarly the position assigned to woman by ancient Indian scriptures was a state of dependence and she did not have right to hold property.⁴² Today a woman does not lose her separate identity upon marrying and can own property, enter into legally binding contract, sue or be sued,⁴³ thus the unification theory has become less plausible in the present time.

5.7 CONCLUSION

These theories were later displaced by “separate spheres ideology” which no longer treated women as inferiors but naturally different.⁴⁴ Accordingly it created a structure of social relations wherein men dwelled in public realm and women dwelled in private realm of family.⁴⁵ This ideology is the modern justification for marital rape exemption clause. It divides the world of women into two separate worlds of “public” and “private”.⁴⁶ It considers "public" as "political" and the "private" as "cultural".⁴⁷ Sexual abuse within marriage is generally not discussed in open as it is fall into “private sphere” and legal intrusion upon women's sphere constitutes an illegitimate public invasion of the private sphere.⁴⁸ The dichotomous perspective has fundamental and profound consequences for women in general. Separate spheres of approach make

⁴² “A wife, a son and a slave, they three are declared to have no property: the wealth which they earn is (acquired) for him to whom they belong”, Manu IX: 416.

⁴³ State v. Smith 85 N.J. 193, 426 A.2d 38 (1981); Warren v. State 255 Ga. 151, 336 S.E.2d 221 (1985).

⁴⁴ To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment 99 Harvard Law Review 1256 (1986) at 1256

⁴⁵ Id.

⁴⁶ Gayle Binion, Human Rights: A Feminist Perspective, Vol. 17, No. 3 HUMAN RIGHTS QUARTERLY 516 (1995).

⁴⁷ Nancy Kim, Toward a Feminist Theory of Human Rights: Straddling the Fence between Western Imperialism and Uncritical Absolutism, 25 HUMAN RIGHTS LAW REVIEW 49, 66-74 (1993).

⁴⁸ To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment 99 Harvard Law Review 1256 (1986) at 257

women under the control of patriarchal family governments – fathers, brothers and husbands – understanding that family issues are "private," thus beyond the scope and scope of governmental authority and their intervention. This is one of the important reasons that sexual abuse of wives by their husbands has faced little formal challenge within the two spheres of understanding of the social order.⁴⁹ Marital rape occurs within the four walls of home which fall in the category “private”. This is the reason that rape within the realm of family, specifically marital rape still remains unregulated.

⁴⁹ JALNA HANMER & CATHERINE ITZIN, HOME TRUTHS ABOUT DOMESTIC VIOLENCE: FEMINIST INFLUENCES ON POLICY AND PRACTICE – A READER 60 (2001)

CHAPTER 6

MARITAL RAPE AND LAWS IN INDIA

While in every field we could advance, marital rape in India is not seen as a crime. In our country, marital rape is not an established crime. The Indian Penal Code 1860, Exception to Section 375, specifically states that "sexual intercourse by a man with his own woman, the wife not being under fifteen years of age, is not rape." This is known as the "spousal exemption."

This means that non-consensual sexual intercourse with a wife over the age of fifteen is not a criminal offence, and the husband cannot be prosecuted for it, even though the intercourse was conducted without her consent or against her will, which are two of the qualifying conditions for the offence of rape under the above section in cases not involving a married woman unmarried. This is a flagrant breach of the human rights of a married woman. As a result, she is expected not only by society, but also by the legal system, to give up her right to resist and submit to her husband's sexual advances.

When it comes to the alternatives a woman has to defend herself in a marriage, we can see that the laws are either non-existent or ambiguous, and everything is left to the interpretation of the courts. After discussion in the Select Committee, the final text of section 375 of the Indian Penal Code emerged as a crystallised form of Clause 359 of Macaulay's Draft Penal Code. The provision of rape in Section 375 of the Indian Penal Code (IPC) has echoed very antiquated sentiments, mentioned as its exception clause- "Sexual intercourse by man with his own wife, the wife not being under 15 years of age, is not rape."

Rape is punishable under section 376 of the IPC. According to the section, the person accused of rape should be punished with imprisonment of either description for a term which shall not be less than 7 years but which may extend to life and shall also be liable to fine unless the woman raped is his own wife and she is not under the age of 12, in which case he shall be punished by imprisonment of either description for a period up to two years, with a fine, or both. In a very narrow context this section on sexual assault states that the rape offence only occurs if the wife is less than 12 years old, between 12 and 15 years old, however the offence is less serious, which attracts milder punishment.

Once the age reaches 15, the woman is not granted legal protection in direct violation of the provisions on human rights.

How can the same law provide for the legal age of consent for marriage to be 18 while protecting from sexual abuse, only those up to the age of 15? Beyond the age of 15, there is no remedy the woman has. The Indian Penal Code was amended in 1983 to make spousal rape a crime during the period of judicial separation.⁵⁰

According to the Indian Penal Code, the spouse can be criminally punished for marital rape under the following circumstances:

1. When the wife is between 12 – 15 years of age;⁵¹
2. When the wife is below 12 years of age,⁵²
3. Rape of a judicially separated wife;⁵³

During the time when the married couple has been divided by a judicial order or by any custom or usage, rape of a wife is illegal under Section 376A of the IPC. The Criminal Law Amendment Act of 1983 included this as a step forward in the direction of protecting women from sexual attacks, and it is certainly useful legislation for married women.

However, the fact that the amendment was enacted to protect the sexual respect of only wives who are undergoing judicial separation, rather than to punish rape of married women in general, reflects the social mindset that wives cannot deny their husbands the fulfilment of their sexual urges if they are cohabiting, and will continue to cast a shadow on the legislature's intention, casting a shadow on the conviction of the law-making body to protect the married women of India.

⁵⁰ Indian Penal Code (45 of 1860), Section 376A. Intercourse by a man with his wife during separation.—Whoever has sexual intercourse with his own wife, who is living separately from him under a decree of separation or under any custom or usage without her consent shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine

⁵¹ Indian Penal Code (45 of 1860), Section 376(1).

⁵² Id.

⁵³ Indian Penal Code (45 of 1860), Section 376A.

The Protection of Women from Domestic Violence Act, 2005, passed in 2005 and regarded marital violence as a form of domestic violence even if it was not considered a crime.⁵⁴ If a woman has been subjected to marital rape, she can seek judicial separation from her husband under this Act. This is only a patchwork of legislation, and the Parliament needs to do much more to address marital rape.

Marital rape reflects an individual's perversity. It is not only a rape of a woman's body, but also a rape of her love and trust. Being subjected to sexual violence by her own husband fills her with insecurity and fear. At the altar of marriage, her human rights are sacrificed. The Indian Penal Code has a patchwork approach to dealing with this type of rape. Various sexuality laws of the IPC promote not only Victorian morality but also women's lack of agency.⁵⁵

As a result, it is clear that the law, which is regarded as the victim's saviour, is inadequate and insufficient to safeguard the interests of individuals who are victims of marital rape. The primary argument in favour of these so-called regulations is that consent to marry automatically includes agreement to engage in sexual behaviour. But, an implied consent to engage into sexual activity does not mean consent to being inflicted with sexual violence. Women are typically assumed to have consented to the violence in marital rape, much as they are in sadomasochistic sexual practises. Rape and sex, on the other hand, cannot be separated only on the basis of violence. Violence creates a sense of fear and insecurity and this causes the women to submit to sex and this cannot be construed as consenting to sex. This dread could be exacerbated by her guilt about not fulfilling her husband's desire. The distinction between consent and non-consent in contradistinction is fundamental to criminal law.⁵⁶

6.1 INCONGRUITY IN PUNISHMENT FOR MARITAL AND NON MARITAL RAPE

There is a major difference in the nature and length of punishment for those who rape their wives versus those who rape other women. The legislature's patriarchal mentality is reflected in this. In the case of a husband raping a woman above the age of fifteen,

⁵⁴ The Protection of Women from Domestic Violence Act, 2005, Section 3 Explanation 1 (ii).

⁵⁵ Kumari, Ved, "Gender Analysis of the Indian Penal Code in Engendering Law: Essays in the honour of Lotika Sarkar" (Amita Dhanda & Archana Parashar eds.) , p. 143.

⁵⁶ Shroff, Aditya & Menzes, Nicole, "Marital Rape as a Socio-Economic Offence: A Concept or a Misnomer", Student Advocate, Vol. 6.

the perpetrator is exempt from any penalty.⁵⁷ Perhaps more troubling is the fact that the maximum penalty for a man engaging in sexual intercourse with his wife under the age of fifteen years is less ⁵⁸, despite the fact that rape of a woman under the age of sixteen is harshly punished with a ten-year sentence that can stretch to life imprisonment.⁵⁹

Nature of Crime	Provision (Section)	Nature of Punishment
Rape of Wife above the age of 15	376, Exception 2	Not Punishable
Rape of any Woman (Read wife below 15 years)	376	7 Years extendable to life imprisonment with fine
Rape by a person holding a fiduciary position towards the victim by inducing or seducing.	376C	5-10 years or more
Rape by a relative, guardian or teacher or a person holding position of authority	376(2)(f)	10 years rigorous imprisonment extendable to life imprisonment and fine
Rape during separation by decree or otherwise	376 B	2-7 years

Another ambiguity is that such sexual contact by a husband with his wife who lives separately, whether by decree or otherwise, is punishable by two to seven years in prison and a fine.⁶⁰ When the partners live apart, criminality is acknowledged; moreover, it is unfair that such assault is not recognised as a crime when they live together. Such actions, on the other hand, should be considered more serious offences because they jeopardise and call into question the fiduciary relationship between the partners, which is based on trust. It should be acknowledged that the mutuality or trust in marriage in certain cases may cease to exist even before the couple starts to live separately. It is a discrimination against a wife who is forced to make sexual contact by husband while she is living with him under the same roof. Putting a requirement of “living separately” signifies that the law considers the effect of rape by husband less grave when the couple is cohabiting than when they are living separately.

⁵⁷ Indian Penal Code, Section 376

⁵⁸ Indian Penal Code, Section 376 (1) (It is punishable with minimum imprisonment of two years extending to seven years).

⁵⁹ Indian Penal Code, Section 376 (2) (i)

⁶⁰ Indian Penal Code, Section 376B

Furthermore, Section 376C of the IPC punishes the perpetrator of the crime with a sentence of more than 5 years if he is in a fiduciary relationship with the victim, even if the victim was coerced or seduced into giving consent. When a party acts for the benefit of another person, with whom he stands in a connection indicating and necessitating great confidence and trust on the one hand and a high degree of good faith on the other hand, he is acting as a fiduciary. In the case of *Marcel Martins v. M. Printer*⁶¹, the Supreme Court established the requirements for determining a fiduciary relationship between husband and wife and their children, stating that the Court must consider the factual context in which the question arises because it is only from the factual backdrop that the existence or otherwise of a fiduciary relationship can be deduced. According to the argument, in a marriage, the partners depend on each other for material and physical comforts, companionship, and affection, resulting in a fiduciary relationship. The fiduciary existence of this partnership is shown by section 122 of the Indian Evidence Act, which considers contact during marriage to be prolonged and prohibits it from being revealed in any court, except in the case of one married spouse being prosecuted for an offence against the other. As a result, all testimony is inadmissible unless the case involves battery or any other form of physical or mental violence that is considered cruel.

⁶¹ (2012) 5 S.C.C. 342

CHAPTER 7

THE LEGISLATIVE DEVELOPMENTS AND THE 'AGE OF CONSENT'

For thirty years, after the enactment of IPC' 1860, rape law remained the same. The later amendment was made in response to a number of cases in Bengal in which the child wife died as a result of the marriage being consummated. The most significant of these was Queen Empress v. Haree Mohan Mythee.⁶² This case tells the pathetic story of phulmonee Dasse, who was eleven years and three months old when she died as a result of rape committed on her by her husband. Phulmonee died from bleeding from ruptured vagina, according to medical evidence.⁶³ In this case, rape of child wife was severely condemned and it was held that the husband did not have the right to enjoy the person of his wife without regard to the question of safety to her.⁶⁴ In 1891, Sir Andrew Scoble introduced the Bill, which culminated into Indian Criminal Law (Amendment) Act' 1891.⁶⁵ This act raised the age of consent to 12 years both in cases of marital and extra-marital rapes. The object of Act was humanitarian, viz., "to protect female children from immature prostitution and from pre-mature cohabitation".⁶⁶ Before early coexistence, the girl's immense pain and sometimes even death caused her and her progeny's in general injury to her health.

The public attitude at the beginning of the 20th century increased to improve the nation's physics and reduce causes leading to abnormal deaths of younger generations. By raise the age of consent in marital and extra-marital cases, the Rai Bahadur Bakshi Sohan Lal, MLA, requested leave to introduce a Bill to amend Section 375(1860) of the Indian Penal code (IPC), in the Assembly in 1922.⁶⁷ In the last few years, the unrest for an amended law was steadily growing as the evil consequences of early marriage and early consummation were more fully understood.

In 1934, in marital and extra-marital situations Hari Singh Gour presented a bill amending section 375, IPC which elevated the age to 14 years. The bill was sent to a select committee which made significant changes in the cases of marital rape by

⁶² ILR 1891 Cal 49.

⁶³ *Id.* at 53, 54.

⁶⁴ *Id.* at 62.

⁶⁵ Act No. X of 1891, published in Gazette of India, (1891), Pt.V.

⁶⁶ *Id.* Statement of Objects and Reasons.

⁶⁷ *Report of the Age of Consent Committee*, Calcutta, Government of India, 11 (1928-29).

reducing the age from 14 to 13 years.⁶⁸ The Bill setting age 14 in extra-marital cases and 13 in marital cases culminated in amending act of 1925 was presented by Sir Alexander Muddimans on 1st September of 1925.⁶⁹ In the 1925 amendment, the marital and extra-marital rape cases were distinguished for the first time, with different ages of acceptance in the marital cases. The distinction was further emphasised in section 376 by incorporating the words – “unless the woman raped is his own wife and is not under twelve years of age”. In which case the punishment was diluted by prescribing a maximum of two years. Thus, the purpose aimed to be achieved by raising the age of consent to 13 years, stood mitigated to a large extent by the diluted punishment provided by amended section 376.

The issue of the age of consent was not considered resolved, and Hari Singh Gaur introduced a Bill in 1927 to raise the age to 14 and 16 years in marital and extra-marital cases, respectively. It was followed by the formation of Age of Consent Committee,⁷⁰ which reviewed the current situation and proposed few amendments.

The Committee held that, due to the nature of the crime, the amended law did not work, especially when a marriage was carried out because consummation necessarily included protection of privacy.⁷¹ The wide-spread view amongst the reawakened groups was that a ban on the marriage of a girl under a given age is better than an increase in the age of sexual consent.⁷² The secularist class considered the law partly vain because it didn't provide protection to the girls over 13 years who, because of their tender age, needed it.⁷³ The Committee recommended the use of term ‘marital misbehaviour’ instead of rape in marital cases. The offence of marital misbehaviour would be committed by a husband in case of sexual intercourse with his wife below 15 years of age. The Committee suggested that the offence of marital misbehaviour be added to Chapter XX of the IPC⁷⁴ and Sections 375 and 376 of the IPC should be limited to rape committed outside of a marital relationship.⁷⁵

⁶⁸ *Id.* at 12.

⁶⁹ Act No. XXIX of 1925, published in *Gazette of India*, (Oct 3, 1925), Pt. IV.

⁷⁰ Statement of Objects and Reasons of Act No. X of 1891, published in *Gazette of India*, (1891), Pt.V at 17, 18.

⁷¹ *Id.*

⁷² Statement of Objects and Reasons of Act No. X of 1891, published in *Gazette of India*, (1891), Pt.V at 16

⁷³ *Id.* at 21.

⁷⁴ *Id.* at 123, Chapter XX, IPC deals with offences relating to marriage.

⁷⁵ *Id.*

The Committee also proposed a maximum penalty of 10 years in jail and a fine if the wife was under the age of 12 years, and a maximum penalty of one year in prison and a fine or both if the wife was between the ages of 12 and 15.⁷⁶

⁷⁶ Statement of Objects and Reasons of Act No. X of 1891, published in Gazette of India, (1891), Pt.V at 124,125

CHAPTER 8

ARGUMENTS FOR CRIMINALISATION

8.1 PHYSICAL AND MENTAL CONSEQUENCES OF MARITAL RAPE

Many people believe that the effects of rape on a married woman are far less than that of an unmarried woman. This is far from reality; moreover it is imperative to understand that a married woman is usually financially dependent on her husband and therefore finds it difficult to escape from the shackles of marriage. However the psychological and physical consequences cannot be differentiated between a married and an unmarried woman. An unmarried rape survivor has several mechanisms to effectively chart her course towards justice. Without the protection of the law, a married rape victim must deal with the following:

1. Physical injuries to the vaginal and anal areas, lacerations, bruises, and other types of injuries that may never heal due to a lack of prompt medical attention. Broken bones, black eyes, bloody noses, and knife wounds are common injuries among women who have been assaulted and raped by their husbands. Campbell and Alford in their paper report that one half of the marital rape survivors in their research sample were kicked, hit or burned during the sexual acts.⁷⁷
2. Anxiety, shock, depression, and suicidal thoughts are all factors that can reduce a woman's optimal output capacity. Without any helping hand, the women might take the recourse of suicide thus affecting her maternal duties if she has children.
3. Gynecological effects like miscarriage (when she gets pregnant without her approval or willingness), stillbirth, bladder infections, STD's etc. – again, because these medical complications are conducted due to sexual activities conducted by force in a marriage with the clear realization that there is no legal protection, more often the women suffers these physical and emotional damages and lives a substandard life. This is a classic case of modern day

⁷⁷ Campbell J. C. & Alford P. (1989) The Dark Consequences of Marital Rape, American Journal of Nursing, Vol. 89, Issue 7. p. 947

exploitation and a clear failure of the three waves of feminism, especially in a country like India.

4. Long drawn symptoms like insomnia, eating disorders, sexual dysfunction, negative self image etc. are some of the long term effects for which we do not have any legal, societal, governmental help at hand. Spousal rape causes the victim significant emotional distress that lasts for a long time.

If this continues there will a sizable section of the population who will continue to live a miserable life and no amount of government action/policies or uplift/empower them will work, because as we have rightly seen, the issue starts right behind closed doors.

8.2 ANOMALY IN THE LAW ON RAPE

An unmarried woman who has been raped has a number of legal options available to her. However, a married woman who has been raped by her own husband has no legal recourse, despite the fact that she has also been raped. Since the rapist is a recognised individual and the victim and the offender have a confidence relationship, acquaintance rape causes more pain than stranger rape. Being raped by your husband induces both emotional and physical pain. There is no law against marital rape in India, and no attempts are being made to criminalise it⁷⁸.

To say that a marital rape exception protects a marital relationship's privacy is just another way for a man to maintain his dominance in a relationship. However, it must be understood that the woman and her independent power over the intimacies of her body and life are at risk, not the marital relationship's privacy. The exemption maintains the ancient notions that a woman is the property of her husband, and that the husband, in particular, has the right to control her. These values have long since passed us by, and today's marriage is seen as a relationship between equals. The object of law today is to protect each individual's integrity and privacy, and the presence of this exemption runs counter to that goal.

Since the husband has immunity under exception 2 of section 375 of the IPC, there are no legal remedies for a woman who has been raped by her husband. The explanation for this immunity is that the woman is over the age of 18 and that the perpetrator and the

⁷⁸ Benjamin Kentish, Indian government files legal papers to try to stop marital rape being outlawed, The Independent

victim have a relationship, which is that they are husband and wife⁷⁹. The Indian law restricts the crime of rape to stranger rape only, thereby discriminating against and denying rights to a specific group of people: married women⁸⁰.

In addition, the 172nd law commission report⁸¹ found that removing the exemption clause of Section 375 of the IPC was unnecessary because it could conflict with the husband-and-wife relationship⁸². A woman who is raped by her own husband is already a victim of a heinous crime, and the fact that there is no legal defence or remedy for marital rape makes the married woman⁸³ even more vulnerable.

The punishment for rape of the wife between the ages of twelve and fifteen is imprisonment for a maximum term of two years, a fine, or both, according to Section 375 of the Indian Penal Code, 1860. Wives over the age of fifteen are not subject to rape, according to Section 375. However, when it comes to determining punishment, wives under the age of fifteen but over the age of twelve receive less justice than rape victims outside of marriage or raped wives under the age of twelve.

8.3 LACK OF CRIMINALISATION OF MARITAL RAPE AS A FUNDAMENTAL RIGHTS' VIOLATION

Marriage is regarded as a sacred institution that serves as the foundation of our society. It is regarded as intensely personal, and the government is wary of intruding into this delicate space. This is to protect citizens' privacy, and the government's interference into this sphere will jeopardise that privacy. As a result, the state does not force any two people to marry or divorce. However, the government's inability to access this private room, except under limited circumstances, may be problematic. For example, if a wife is subjected to cruelty in a marriage, the State must intervene in this private sphere to criminalise the cruelty that the wife is subjected to.⁸⁴ If the State fails to do so, the woman would be without legal recourse. As a result, it is necessary for the government to intrude into this private domain on occasion.

⁷⁹ Sonia Aneja, *Sexual Violence Against Women with Special Reference to Rape: Victimization and Judicial Approach in India*

⁸⁰ Id.

⁸¹ Law Commission of India, *One Hundred and Seventy Second Report on Review of Rape Laws*, March, 2000

⁸² Id.

⁸³ Benjamin Kentish, *Indian government files legal papers to try to stop marital rape being outlawed*, *The Independent*

⁸⁴ In this instance, the State has entered into the supposed private sphere by criminalizing activities that happen in the private spaces of husband and wife.

A country's Constitution is the document that represents the nation's soul. The Indian Constitution organises and governs power, protects human rights, strikes a balance between conflicting social and individual interests, reflects the country's cultures and perspectives, and serves as a platform for national development and unity.

According to the Indian constitution, any law passed in the country must adhere to the values and ideas enshrined in the Indian constitution. Any legislation that does not meet this requirement is called ultra vires and is likely to be ruled unconstitutional by the courts.

The Indian Constitution is built on the foundation of fundamental rights. These fundamental rights are the rights that every Indian citizen is guaranteed. The law makes no distinction between male and female people. Two vital rights are enshrined in our constitution among these fundamental rights. Article 14 includes the right to equality, and Article 21 includes the right to life and personal liberty. In this case, the marital exception rule infringes on a woman's human rights based on her marital status. Marital rape is a violation of a married woman's human rights, specifically Articles 14 and 21.

8.3.1 EQUAL PROTECTION OF THE LAW

Article 14 of the Indian Constitution ensures that “the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”⁸⁵ This equality can be seen as equality in the sense of equal application of law upon the people who violate it equally. Article 14 does not require that every individual be treated equally in all circumstances, but it does require that the equals within a society are not treated unequally and that the society's unequals are not treated equally.

The Supreme Court established the two requirements for a valid classification as early as 1952: -

- a. The classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others; and
- b. The differentia must have a rational relation to the object sought to be achieved by the legislation.⁸⁶

⁸⁵ INDIA CONST. art 14.

⁸⁶ State of West Bengal v. Anwar Ali Sarkar, AIR 1952 SC 75, 80.

As a result, any statute that creates a classification that is unnecessary or irrelevant to the purposes of the legislation is considered to be outside the Constitution's framework. What is fair will still be determined by the judges, and with each new generation of judges, a new interpretation of law and reasonability will arise, rendering the Constitution a living text. In order to reduce gender-related unequal treatment, it is important to avoid stereotyping based on gender.

The crime of rape is criminalised under Section 375 of the Indian Penal Code, which also protects a woman from forced sexual intercourse against her will and without her consent. In this way, the section protects women from criminal assaults on their bodily integrity and demonstrates the State's interest in punishing those who do so. As a result, it is reasonable to conclude that Section 375 of the IPC aims to preserve the woman's right of choice as an independent person capable of self-expression, and that rape is a violent crime that violates all such rights. However, ironically, under Section 375 of the IPC, a forceful sexual act within a marriage is not considered rape. Because of her marital status, a married woman's defence under Section 375 of the IPC is no longer available. Married women are classified and treated differently than other people on the basis that, unlike other people, they have no interest in seeking state protection from violence and sexual harassment. The presumption is also based on the fact that in a marriage, the wife is believed to have given her husband her irrevocable consent to sexual intercourse. Such an assumption, it is argued, is incorrect, irrational, and not based on an intelligible differentia.

The distinctions made under the exception are artificial in nature, since they divide women into three categories:

1. Raped by a stranger: These are covered under Sections 375 and 376 of the IPC.⁵¹
2. Married but judicially separated and living separately from her husband: They are protected under Section 376B⁸⁷ of the IPC in case they are victims of rape committed by their husbands.

⁸⁷ Section 376B of the IPC states that "Whoever has sexual intercourse with his own wife, who is living separately, whether under a decree of separation or otherwise, without her consent, shall be punished with imprisonment of either description for a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine"

3. Married and living with her husband: these categories of women are not covered under any Section of IPC. Further the exception (2) of Section 375 of the IPC, in essence, provides immunity to husbands for raping their wife who are above 18 years of age.

The act's stated goal is to punish anyone who engages in sexual activity without the consent of the female, but the section makes an arbitrary distinction between unmarried and married women. The aforementioned artificial differentiation runs counter to theory and ethos of Article 14. Clearly, the above classification is not justifiable as it provides protection to the victims of category 1 & 2, but has no provisions for victims of category 3. Rather, since there is no rule prohibiting husbands from forcibly engaging in sexual activity without their wives' permission, this exception allows them to do so.

Aside from that, the Marital Rape Exemption Clause discriminates between a wife and a wife who is living separately. As previously stated, Section 376A makes rape against an estranged wife punishable by a two-year prison sentence. This is also discriminatory, since in both cases, marriage is legally valid and the women are still considered the men's wives. As a result, the Section 375 exemption is proving to discriminate between married and unmarried women, as well as between separated wives and wives.

In a recent judgment in the case *Independent Thought v. Union of India*, the court partially struck down Section 375's exception by increasing the age from fifteen to eighteen, citing the justification that while it is illegal to have sexual intercourse with a child under the age of eighteen under the POCSO act, the exception under Section 375 makes it justifiable to have sexual intercourse with a child under the age of eighteen. This exemption clause viewed children between the ages of 15 and 18 differently depending on their marital status, which the court found to be unjust. As can be seen, the court has clarified that a person's marital status cannot be used as a valid classification for discrimination between married and unmarried women.

As a result, it is demonstrating that the marital rape exemption provision is a violation of Article 14 of the Indian Constitution.

8.3.2 RIGHT TO LIFE AND PERSONAL LIBERTY

Article 21 of the Indian Constitution enshrines in it the right to life and personal liberty.⁸⁸ Although couched in negative language, Article 21 grants all people the fundamental right to life and personal liberty. Article 21 states that “*No person shall be deprived of their life and liberty except according to procedure established by law*”. Post the case of *Maneka Gandhi v. Union of India*⁸⁹ it has become the foundation of all rights aimed at safeguarding human life and liberty, and courts have interpreted this clause in a variety of ways to go beyond literal guarantee and liberty. It includes right to live with dignity, right to privacy and safe environment and many more.

The meaning of the term ‘life’, has thus expanded, and can be appropriately summed up in the words of Field J. in the celebrated judgement of *Munn v. Illinois*⁹⁰ where he held that life means ‘something more than mere animal existence’, The Supreme Court of India affirmed this in the case of *Bandhua Mukti Morcha v. Union of India*.⁹¹

Rape is not only sexual violence but also an act of aggression aimed at humiliating and degrading the bodily integrity of a woman.⁹² Thus rape is a violation of the dignity and integrity of a woman, making it a violation to Article 21. In the case of *Suchita Srivastava v. Chandigarh University* of 2009 The Supreme Court noted that under Article 21, a woman's right to make reproductive choices is a dimension of "personal liberty," and that the right to make choices about sexual activity is linked to personal liberty, dignity, and bodily integrity.⁹³ However exception 2 is the exact opposite of what the Supreme Court held. The acts of forced sexual intercourse affect the mental, physical health of the woman because of which a woman cannot continue living her life with dignity.

In light of this growing body of Article 21 jurisprudence, the doctrine of marital immunity from rape infringes on a slew of rights derived from the phrase "right to life and personal liberty" in Article 21. Article 21 has never been violated in a more obvious and blatant manner. The right to privacy, bodily self-determination, and good health, all

⁸⁸ The Constitution of India, Article 21.

⁸⁹ AIR 1978 SC 597.

⁹⁰ 94 US 113 (1877).

⁹¹ AIR 1984 SC 802, 811.

⁹² *Bodhisattwa Gautam vs Miss Subhra Chakraborty* 1996 SCC (1) 490

⁹³ SCC, (2009), S.C, (9).

of which have been recognised as integral parts of the right to life and personal liberty at various times, are all violated by the marital exemption to rape.

The right to bodily autonomy is also an important right, and the 375 exemption clause has stripped away married women's right to say no, thus jeopardising their Right to Life and, more importantly, their right to live a dignified life. Justice Chandrachud in *Joseph Shine v. Union of India* had vocally rhetorically questioned - "Does a woman or man lose their degree of sexual autonomy after marriage?" According to me, "No". He went so far as to say that- "The right to say no should be there after marriage also".

The *Chairman Railway Board v. Chandrima Das*⁹⁴ was a landmark case., The Hon'ble Court ruled that rape is more than just a violation of a person's ordinary rights; it is also a violation of fundamental rights.

That a reading of the aforementioned cases, as well as various other catenas of judgments and cases, it is abundantly clear that an exception such as "marital rape" is in violation of the basic fundamental concepts on which our entire legal system is based, and that such an exception damages the entitlement of women to live with dignity and encourages society to commit crime against women, which is unjustifiable in and of itself.

8.3.2.1 RIGHT TO LIVE WITH HUMAN DIGNITY

Article 21 of the Constitution defines the right to life as the right to live with human dignity and all that entails, including the bare necessities of life such as adequate nutrition, clothing, and shelter over one's head, as well as facilities for reading, writing, and expressing oneself in various forms, as well as the freedom to move about and mix and mingle with fellow human beings.⁹⁵ One of the most intrinsic virtues of the right to life, which acknowledges an individual's autonomy, is the right to live with human dignity. If the categorization of women based on marital status is recognised, then a woman's right to bodily integrity, sexual autonomy, or life (dignity) is not violated by a person's non-consensual sexual act simply because she is married to him. Such a categorization doesn't acknowledge that every woman is an autonomous being has a right to assert her physical and psychological dignity just like every other rational being.

⁹⁴ *AIR (2000) 2 SCC 465*

⁹⁵ *Francis Corallie Muin v. Union Territory of Delhi*, AIR 1981 SC 802.

No person can be reduced to the level of an object and thus be used to accomplish a specific goal. Justifying marital rape exemption is to deprive married women of rational integrity by denying them the right to choose whether to engage in sexual activity and instead allowing them to be used solely to satisfy her husband's sexual desires. Women, regardless of their marital status, have power over their bodily integrity as human beings.

The Supreme Court has ruled in a series of cases that offence of rape violates the victim's right to life and the right to live with dignity.⁹⁶ The Supreme Court has ruled that rape is a crime against the entire society, not just an offence under the Indian Penal Code. Rape is more of an act of aggression aimed at degrading and humiliating women than a sexual offence.⁹⁷ As a result, the marital exemption doctrine is a proponent of a woman's right to live in dignity. Any statute that legitimises a husband's right to force his wife into sexual intercourse against her will and without her permission violates the very nature of Article 21's right to life and is therefore unconstitutional.

8.3.2.2 RIGHT TO SEXUAL PRIVACY

The Indian Constitution makes no mention of the right to privacy. Nonetheless, the Supreme Court has recognised that a right to privacy is constitutionally protected under Article 21 in a number of cases.⁹⁸ Article 21 of the Constitution guarantees the right to privacy, which involves the right to be left alone. The right to privacy is violated by any kind of forcible sexual intercourse. The doctrine of marital exception to rape, it is argued, infringes on a married woman's right to privacy by pushing her into a sexual relationship against her will.

It is generally argued that the object of the exception is to protect marital privacy which advocates that the state should not interfere into private matters of a married couple. It is true that state has an interest of protecting marital privacy⁹⁹ but it should not be forgotten that state is also there to protect individuals from violence which logically includes non-consensual sexual conduct between married couples¹⁰⁰. So the interest of the state involves consideration of two kinds of privacy, one is the marital privacy

⁹⁶ The Chairman, Railway Board v. Chandrima Das, AIR 2000 SC 988.

⁹⁷ Bodhisattwa Gautam v. Subhra Chakraborty AIR 1196 SC 922.

⁹⁸ Kharak Singh v. State of U.P. AIR 1963 SC 1295; Govind v. State of Madhya Pradesh, AIR 1975 SC 1378; Neera Mathur v. LIC, (1992) 1 SCC 286.

⁹⁹ State v. Smith 85 N.J. 193, 426 A.2d 38 (1981); Warren v. State 255 Ga. 151, 336 S.E.2d 221 (1985)

¹⁰⁰ State v. Bateman 113 Ariz. 107, 110,547 P.2d 6, 9 (1976)

(which is generally argued to be a ground for non-intervention of the state) and the other is individual's privacy. Both the interests of state thus have to be balanced and more compelling and legitimate interest should be protected.

A person is the final arbiter of can sexual acts he or she wishes to partake in. Similarly, a wife's identity does not become merged with that of her husband. She is equally capable of making life choices, regardless of her husband's preference. No amount of abuse or coercion would be tolerated in an attempt to persuade her to change her mind. The right to privacy includes the right to be left alone.

The Supreme Court in the case of *State of Maharashtra v. Madhkar Narayan*¹⁰¹ has held that "every woman was entitled to sexual privacy and it was not open to for any and every person to violate her privacy as an when he wished or pleased". In the case of *Vishakha v. State of Rajasthan*¹⁰², the Supreme Court extended this right of privacy to workplaces. Furthermore, even within a marriage, there is a right to privacy when it comes to entering into a sexual relationship. By decriminalizing rape within a marriage, the marital exemption doctrine violates this right of privacy of a married woman and is hence, unconstitutional.

8.4 VIOLATION OF INTERNATIONAL INSTRUMENTS

Human rights occupy a significant place in the United Nation charter. Article 1(3) of the UN charter states that "protection of human rights is one of the purposes of the U.N"¹⁰³. Furthermore, the right to equality, freedom from oppression, and acceptance of abuse as a form of discrimination are preconditions for protecting and preserving the human rights of women in special circumstances. Women's rights are recognised by a number of international instruments.

The Convention on the Elimination of All Forms of Discrimination Against Women has been ratified by India (*hereafter, CEDAW*),¹⁰⁴ the International Covenant on Civil and

¹⁰¹ AIR 1991 SC 207.

¹⁰² AIR 1997 SC 3011.

¹⁰³ The United Nations Charter, Article 1(3)

¹⁰⁴ Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

Political Rights (*hereafter*, ICCPR),¹⁰⁵ and the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹⁰⁶ Additionally, India is a signatory of the Universal Declaration of Human Rights (UDHR).¹⁰⁷ Marital rape violates the right to life and the right to live with human dignity, an important component of all these declarations.¹⁰⁸ The Committee on the Elimination of Discrimination Against Women (CEDAW) is a United Nations body made up by independent experts tasked with reviewing a country's implementation of the Convention on the Elimination of Discrimination Against Women, an international human rights treaty outlining states' obligations to women's human rights. It becomes an agenda for national action once a State signs and ratifies it.¹⁰⁹ India signed the CEDAW on 30 July 1980 and ratified it on 9 July 1993 with two declarations and one reservation.¹¹⁰ This convention is complemented by the Declaration of the Elimination of Violence against Women.

Article 2 of the Declaration of the Elimination of Violence against Women is extracted below:

“Violence against women shall be understood to encompass, but not be limited to, the following:

- a) *Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital, mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation; ...¹¹¹.”*

Marital rape is explicitly included in the concept of violence against women. The emphasis on these provisions is intended to give the victim, rather than the perpetrator, the benefit of the doubt.

¹⁰⁵ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

¹⁰⁶ Core International Human Rights Treaties, Optional Protocols & Core ILO Conventions Ratified by India, Nat'l Human Rights Commission, India, A Handbook on International Human Rights Convention (2012), http://nhrc.nic.in/sites/default/files/A_Handbook_on_International_HR_Conventions.pdf.

¹⁰⁷ Id.

¹⁰⁸ Id.

¹⁰⁹ UN Women Asia and the Pacific, <https://asiapacific.unwomen.org/en/countries/india/cedaw>.

¹¹⁰ Madhu Mehra, *India's CEDAW story*, in *Women's Human Rights: CEDAW in International, Regional and National Law* 385–409 (Anne Hellum & Henriette Sinding Aasen eds., 2013), <https://www.cambridge.org/core/books/womens-human-rights/indias-cedaw-story/AABFB0A7A4039B4D128EC396EC6D6A13>

¹¹¹ G.A. Res. 48/104, art. 2(a) (Dec. 20, 1993).

In the definition of violence against women, marital rape is explicitly included. The emphasis on these provisions is intended to give the victim, rather than the criminal, the benefit of the doubt.¹¹²

Article 16 of the *CEDAW General Recommendation No. 19: Violence against Women*¹¹³ states that family violence is one of the most back handed forms of violence against women. It is prevalent in all societies. Across the age spectrum, women are subjected to violence of all kinds which are perpetuated by traditional attitudes within their family. Many women are forced to stay in violent relationships due to a lack of financial independence. These types of violence endanger women's health and limit their ability to participate in family and public life on an equal footing.¹¹⁴

This Committee¹¹⁵ and the Special Rapporteur on Violence against Women¹¹⁶ have called on the Indian government to remove the exception for marital rape and define marital rape as a criminal offence in 2014¹¹⁷ which has not yet been adhered to. This has further been supported by the Indian Judiciary and various Law Commission reports with special emphasis on the Justice Verma Committee Report reiterated below. Despite the decisions taken by courts that reflect the existence of marital rape, its criminalisation is impending.

Article 3 of the UDHR states that everyone has the right to life and liberty, regardless of gender, age, marital status, or other factors. Articles 6–11 of the UDHR guarantee the right to equality before the law and the right to a civil remedy¹¹⁸. As a result, marital rape should be handled no differently than other forms of rape, and victims should be given legal recourse so that their right to life and liberty is not jeopardised.

No one should be subjected to unauthorised intrusions into their privacy or illegitimate attacks on their honour and reputation, according to Article 17 of the International

¹¹² Priyanka Rath, *Marital Rape and the Indian legal scenario*, India Law Journal (2007), https://www.indialawjournal.org/archives/volume2/issue_2/article_by_priyanka.html.

¹¹³ UN Convention on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 19: Violence against women*, 11th Session (1992), <https://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>.

¹¹⁴ *Id.*

¹¹⁵ UN Convention on the Elimination of Discrimination Against Women (CEDAW), *UN Committee on the Elimination of Discrimination against Women: Concluding Comments, India*, 37th Session (Feb. 2, 2007), <https://undocs.org/CEDAW/C/IND/CO/3>.

¹¹⁶ Rashida Manjoo, *Report of the Special Rapporteur on violence against women, its causes and consequences*, Mission to India (2014), para. 78(c).

¹¹⁷ Amnesty International, *India: Submission to the UN Committee on the Elimination of Discrimination against Women*, 58th session (June 2014), <https://www.refworld.org/docid/53c7cae34.html>.

¹¹⁸ Universal Declaration of Human Rights, 1948, Art. 6 - 11

Covenant on Civil and Political Rights. This article further guarantees the right to legal immunity from such attacks.

All persons, regardless of their sex, age, or marital status, have a right to good physical and mental health, according to Article 12 of ICESCR.

8.5 CONCLUSION

Legalizing marital rape allows husbands carte blanche to use their power over their wives for sex whenever they want. Because it infringes on a woman's right to bodily autonomy, this is a violation of Article 21. Marriage is considered to be profoundly personal and the state hesitates to disturb this sensitive space. The State does not want to interfere with or disrupt this privacy to maintain the privacy of the citizen. The Indian society, however, has changed in many ways in recent decades. Women have changed their status in society from a manual manufacturer and a man property. In India today, women's place is equal to a man, and the current scenario is a draconian law.

Our Constitution provides justice as; social justice, legal justice and economic justice based on the needs of society and the changing environment. The term Justice is derived from the Latin term “Justitia” which means righteousness and equity. The preamble of Indian Constitution puts ideal of Justice on the high pedestal as other principles of equality, fraternity and liberty. Immanuel Kant has defined Justice as “the aggregate of those conditions under which the will of other person can be conjoined with the will of another in accordance with the universal law of freedom”¹¹⁹

Social Justice is not defined anywhere in the Constitution, social Justice is a concept which is changeable according to the circumstances. Social Justice involves equality along with liberty. In the modern times when women are expected to be treated equally in society, they still don't have the liberty to say “no” for sexual intercourse based on the only reason of marriage. Women are still left as a “sexual object” in the Indian Society.

The Supreme Court has held that “court should do justice and in doing such justice any technicality of law will not stand in its way”¹²⁰. Thus, exception 2 of the section 375 of the Indian Penal code, 1860 is unconstitutional and against the basic principle of

¹¹⁹ Priyanka Kansara “ Theories of Justice and Constitution of India” available at: http://ijlls.in/wp-content/uploads/2015/06/International-Journal-of-Law-and-Legal-Jurisprudence_submission-short-article.pdf

¹²⁰ Sadhuram Bansal v. Pulin Behari Sarkar and ors., 1984 AIR 1471

Justice. Indian women should be given justice for violation of their privacy by removing this exception. The Indian judiciary and government have failed to offer adequate security to victims of marital rape on several occasions, not once, not twice, but an uncountable number of times. With issues like marital rape still prevalent in society and no legal remedy in place, the husband has complete legal authority to sexually assault his wife. While there are certain provisions available to the wife in the event of non-consensual and forcible sexual relations, such cases are limited to domestic abuse. While a few judges have expressed concern about marital rape, the criminal justice system will not reform until the courts or the government take action to ensure that victims of marital rape receive justice. The supreme court considered triple talaq to be unconstitutional¹²¹ in the triple talaq case¹²² because it violated the fundamental rights of women to equality, but the supreme court has remained silent on the issue despite the fact that marital rape also violates basic human rights. It is past time for the Indian judiciary and government to take marital rape seriously and give married women justice.

Moreover, non -criminalisation of marital rape is violative of international instruments to which India is signatory as discussed above and these international instruments are binding in nature and if followed, country will grow socially. In the case of *Kesavananda Bharati v. State of Kerala*¹²³, The Supreme Court acknowledged India's international obligations and held that international covenants and conventions would aid in deciding the extent of those fundamental rights. Further, in the case of *Sheela Barse v. The Secretary, Children's Aid Society*¹²⁴, Where domestic law is silent on an issue and international law is not in conflict with domestic law, the court recommended that India's domestic laws incorporate international obligations. Further, in the case of *Gita Hariharan and another v. Reserve Bank of India & Another*¹²⁵ the Supreme Court recognised the importance and necessity of adhering to foreign obligations. As a result, since domestic law is silent on certain fundamental human rights, India should adhere to international treaties.

¹²¹ Breaking: SC Declares Triple Talaq Unconstitutional By 3:2 Majority, Livelaw, (August 22, 2017), <https://www.livelaw.in/breaking-sc-declares-triple-talaq-unconstitutional-by-32-majority/>

¹²² *Shayara Bano v. Union of India*, 2017 SCC OnLine SC 963

¹²³ AIR 1973 SC 1461

¹²⁴ 1987 AIR 656

¹²⁵ 2 SCC 228

Any law in India must adhere to the fundamental values enshrined in the Indian Constitution. The fundamental rights guaranteed by the constitution are made available in society by unique laws. And it is the responsibility of the state to make these rights available and reasonably open to its people in daily life and on a realistic basis. The legislature and courts must recognise sexual harassment in marriage as a criminal offence, since otherwise, the state is infringing on married women's right to privacy by allowing their husbands to rape them without fear of being prosecuted, in violation of the Indian Constitution. Criminalization would send the message that rape in marriage is unacceptable, and therefore would serve as a deterrent. Even if it does not discourage people, it would at least make them aware of what constitutes responsible marriage activity and what is not acceptable by society as a whole.

CHAPTER 9

RECOMMENDATIONS OF LAW COMMISSION OF INDIA & OTHER REPORTS

Different Law Commission Reports and Committee recommendations have addressed the problems of rape and marital rape to varying degrees. We will discuss some of these Reports and Recommendations in the following section.

9.1 42ND LAW COMMISSION REPORT

This Report was the first to deal with the issue of marital rape.¹²⁶ It offers us an overview of how the Law Commission has looked at the question of marital rape in previous days. The Report did not expressly comment on the validity and deletion of the exception clause. However, it made two proposals.

First, it recommended that in cases where husband and wife are judicially separated, 2nd exception to Article 375 must not apply.¹²⁷ The explanation offered was that “*in such a case, the marriage technically subsists, and if the husband has sexual intercourse with her against her will or her consent, he cannot be charged with the offence of rape. This does not appear to be right.*”¹²⁸ Despite the fact that this is a sound idea, the Report fails to explain why this is incorrect. The lack of clarification demonstrates that a wife's consent to sexual intercourse with her husband is inferred when they live together, but it cannot be assumed when they are separated, according to the Law Commission. Once again, this demonstrates India's faulty definition of consent, in which a woman's "no" is insignificant once she is married because she is obligated to honour her husband's wishes as part of the marital contract.

Second, it suggested that punishment for non-consensual sexual intercourse with women aged between twelve and fifteen must be put into a separate section and preferably not be termed rape.¹²⁹ A striking characteristic of the second suggestion is the readiness to classify marital rape as a lower type of sexual misdemeanour, rather than rape itself.¹³⁰ The second suggestion is distinguished by a reluctance to classify

¹²⁶ Law Commission Of India, *Indian Penal Code*, Law Com. No. 42 (1971).

¹²⁷ *Id.* para. 16.115.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

marital rape as rape, but rather as a lesser form of sexual misbehaviour.¹³¹ In conclusion, this report emphasised the presumption of consent that exists when a husband and wife live together, as well as the distinction between marital rape and other rape, the former of which is considered less serious. It did not, however, comment on the exception clause itself, that is, whether it should be kept or removed.

This thus shows how, compared to rape in general, the Law Commission attempted to reduce the seriousness of marital rape. It failed to understand that marital rape is just as terrifying as rape by a stranger, if not more so, because the woman is raped by someone she knows and trusts.

Following these suggestions, various debates and deliberations on rape laws were held in the parliament. As a result, the Criminal Law Amendment of 1983 was enacted, which incorporated the law commission's recommendations. Rape was also redefined under section 375 as a result of this Amendment Act. It included Section 376A, which specified that in the case of judicially separated partners, the act would be considered rape and a two-year sentence would be imposed.

9.2 84th LAW COMMISSION REPORT

The government has asked the Law Commission to conduct a special study of rape laws, according to the 84th Report, in light of a series of debates in the press and other platforms about the inadequacy of the law to protect women who have been victims of rape following the judgement in the Mathura rape case. In this context, the report of the Law Committee considered:

“Rape is the ultimate violation of the self. It is a humiliating event in a woman’s life which leads to fear for existence and a sense of powerlessness. The victim needs empathy and safety and a sense of reassurance.”

We agree with the following observations of the Report:

“It is often stated that a woman who is raped undergoes two crises, the rape and the subsequent trial. While the first seriously moves her dignity, curbs her individual,

¹³¹ Id.

*disturbs her sense of security and may often ruin her physically, the second is no less potent of a mixture, in as much as it not only forces her to relive through the traumatic experience, but also does so in the grudge of publicity in a totally alien atmosphere, with the whole apparatus and paraphernalia of the criminal justice system focused upon her.”*¹³²

The legal definition of rape in India stressed the lack of consent element, according to the Law Commission. Indeed, a major aspect is the lack of consent. Where consents are irrelevant and the age of the girl is the only critical factor, the failure to consent becomes infertile as a determining factor in most rape prosecutions (due to the statutory minimum age requirement).

It is also the factor to which the law has devoted its most detailed attention.¹³³ The necessity of consent to sexual intercourse is highlighted in this report, as is the absence of consent, which contributes to infringement of women's rights in the context of matrimony.

9.3 172ND LAW COMMISSION REPORT

The 172nd Report was prepared by the Law Commission¹³⁴ in response to the directions of the Supreme Court in the case of *Sakshi v. Union of India*,¹³⁵ whereby the petitioner (hereafter, Sakshi) wanted the apex court to declare that the definition of rape included under Section 375 of IPC was not only limited to forcible penile/vaginal penetration, but also included all forms of forcible penetration. The questions in this case involved a thorough examination, for which the Court requested the Law Commission's assistance. Marital rape was one of these issues, and the NGO, Sakshi, called for the deletion of the exception clause. This view, however, was not accepted by the Law Commission.

As stated in the Report, Sakshi's reasoning behind this was that if the husband is adequately punished for causing physical injury to his wife, then he should not be exempted from being punished for rape.¹³⁶ This points out to the discrepancy in law where marriage is considered to be an extenuating factor solely for the offence of rape.

¹³² Law Commission Of India, *Rape and allied offences: Some questions of substantive law, procedure and evidence*, Law Com. No. 84 (1980).

¹³³ *Id.* para. 7.

¹³⁴ Law Commission Of India, *Review of Rape Laws*, Law Com. No. 172 (2000).

¹³⁵ (1999) 6 SCC 591 (India).

¹³⁶ Law Commission Of India, *Review of Rape Laws*, Law Com. No. 172 (2000), para. 3.1.2.1.

The Law Commission did not accept this view, believing that the deletion of the exception clause “*may amount to excessive interference with the marital relationship.*”¹³⁷

Even while considering sexual assault of a wife by her husband when they were living separately under a decree of separation or under any custom or usage, it was recommended by Sakshi that the clause prescribing a lesser punishment to the husband in such a case ought to be deleted.¹³⁸ Their reasoning was the same as above, that the husband should not be favoured over a stranger while determining punishment of sexual assault as it is arbitrary and discriminatory.¹³⁹ This recommendation was once again rejected by the Law Commission because in their view, “*even in such a case the bond of marriage remains unsevered.*” Despite this, the Commission agreed that the penalty for this offence should be increased.¹⁴⁰ Hence, this Report also failed to make any substantial recommendations with respect to the validity of the marital rape exception clause and sheds light on the interplay between marital rape and the sanctity of the institution of marriage.

Therefore, following recommendations for substantial change in the law with regard to rape were made in report:

- a. ‘Rape’ should be replaced by the term ‘sexual assault’.
- b. All forms of penetration, such as penile/vaginal, penile/oral, finger/vaginal, finger/anal, and object/vaginal, should be included in the definition of sexual intercourse as defined in section 375 of the IPC.
- c. In the light of *Sakshi v. Union of India and Others*¹⁴¹, ‘sexual assault on any part of the body should be construed as rape’.
- d. Custodial rape of young boys has been ignored by the law, so rape laws should be made gender neutral.
- e. A new offense Section 376F, should be introduced, with the title "unlawful sexual conduct."
- f. It was also proposed that Section 509 of the IPC be amended to provide for harsher penalties when the offence described in that section is committed with sexual intent.

¹³⁷ *Id.*

¹³⁸ *Id.* para. 3.3.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ 2004 (5) SCC 518.

- g. *Marital rape: explanation (2) of section 375 of IPC should be struck down.*
Forced sexual intercourse by a husband with his wife should be treated as an offence in the same way that any physical violence by a husband against his wife is. On the same reasoning, section 376 A was to be deleted.
- h. Under the Indian Evidence Act (IEA), when alleged that a victim consented to the sexual act and it is denied, the court shall presume it to be so.
- i. The age limit for the wife should be raised from 15 to 16 years, according to the report of the Commission.

The 172nd report of the Law Commission dealt with marital rape. It strongly argued that this contradictory exemption clause would be deleted. They stated that it should eliminate the exemption clause and put Marital Rape on the same footing as any **rape**. It also suggested that section 376A should be deleted. The Parliament ignored this proposal, instead declaring that the removal of the Marital Exemption clause would destroy the sanctity of the institution of marriage.

9.4 JUSTICE VERMA COMMITTEE REPORT

The Justice Verma Committee was established in 2012 in the aftermath of the Delhi gang rape case to recommend changes to criminal law that would allow for a faster trial and harsher punishment for criminals accused of sexual assault against women. This committee was formed in response to a nationwide movement to improve the efficiency of criminal law in dealing with cases of heinous sexual assault against women.¹⁴² This report offered progressive advice on how to deal with women's issues and achieve true equality in society. The Committee submitted its Report on 23 January 2013, giving the following views regarding marital rape:¹⁴³

- “i. The exception for marital rape be removed.*
- ii. The law ought to specify that:*
 - a) A marital or other relationship between the perpetrator or victim is not a valid defence against the crimes of rape or sexual violation;*
 - b) The relationship between the accused and the complainant is not relevant to the inquiry into whether the complainant consented to the sexual activity;*

¹⁴² As per GOI Notification No. SO (3003), December 12, 2012, this committee was constituted to give out a report in merely thirty days.

¹⁴³ The Justice Verma Committee, Report of the Committee on Amendments to Criminal Law, at 79 (2013).

c) *The fact that the accused and victim are married or in another intimate relationship may not be regarded as a mitigating factor justifying lower sentences for rape.*¹⁴⁴”

The Committee cited various court judgments in different countries, “*Our view is supported by the judgment of the European Commission of Human Rights in C.R. v. UK,*¹⁴⁵ *which endorsed the conclusion that a rapist remains a rapist regardless of his relationship with the victim.*” It stated “*the exemption for marital rape stems from a long outdated notion of marriage, which regarded wives as no more than the property of their husbands.*”¹⁴⁶ The Committee brought to light the criminalisation of marital rape in various countries, among other things, and the urgency for India to follow suit.

Moreover, The Committee is conscious of the recommendations in respect of India made by the UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) in February 2007. The CEDAW Committee has recommended that the country should “widen the definition of rape in its Penal Code to reflect the realities of sexual abuse experienced by women and to remove the exception of marital rape from the definition of rape.....”¹⁴⁷ According to a 2010 study, 18.8% of women are raped by their spouses on one or more occasions, according to the Verma committee report. The pervasive assumption that marital rape is acceptable or less serious than other types of rape contributes to the low rate of reporting and conviction.¹⁴⁸

As a result, the Verma committee report is progressive in its outlook and encourages legislators to alter and innovate in response to new circumstances. If not, the legislation will have the unenviable distinction of becoming obsolete and a hindrance to progress. This report discussed how the immunity granted in case the perpetrator is the husband of the victim stemmed from the outdated notion of women being the property of men and irrevocably consenting to the sexual needs of their husband.¹⁴⁹ It noted that this immunity has been revoked in a number of jurisdictions, and that such an exclusion clause cannot hold under the present paradigm of marriages between equals.¹⁵⁰

¹⁴⁴ Id.

¹⁴⁵ *CR v. UK*, Eur. Ct. H.R. (1995).

¹⁴⁶ The Justice Verma Committee, Report of the Committee on Amendments to Criminal Law, at 72 (2013).

¹⁴⁷ <http://nlrd.org/wp-content/uploads/2013/01/121798698-Justice-Verma-Committee-report.pdf>

¹⁴⁸ <http://www.thehindu.com/news/national/marriage-is-not-a-valid-defence-against-rape-sayscommittee/article4351148.ece>

¹⁴⁹ Id., 72.

¹⁵⁰ Id., 73-77.

The Criminal Law Amendment Bill, 2012 ('Amendment Bill, 2012') was prepared in response to this.¹⁵¹ In this Bill, the word 'rape' was replaced with 'sexual assault' in an attempt to widen its scope but it is to be noted that most of the suggestions passed by Justice Verma Committee Report were adopted and Criminal Law Amendment 2013 was passed. However, once again the legislature chose not to acknowledge the suggestion passed regarding the deletion of 'Marital Rape Exemption Clause'.

Despite the numerous excellent revisions brought about by the Criminal Amendment Act of 2013, it has a number of flaws. Despite the numerous excellent revisions brought about by the Criminal Amendment Act of 2013, it has a number of flaws. One of them is the omission of inclusion of marital rape in the definition of rape. Various criminal law reports and recommendations made by the Justice J.S. Verma Committee have fallen on deaf ears, and it should be recognised that punishing marital rape is critical to protecting women.

9.4.1 THE AMBIGUITIES AND DISCRIMINATION IN THE CRIMINAL LAW (AMENDMENT) ACT, 2013

The exception of marital rape is removed from the definition of rape in the 2007 Report of the Committee on the Elimination of Discrimination Against Women. Despite such guidelines and continuing demands from women's organisations, the Amendment Act of 2013's retained marital exemption contains several inconsistencies and demonstrates an unnecessarily discriminatory approach. Union Home Secretary R.K. Singh explained the exclusion of marital rape, saying that allegations of rape could irreparably harm the institution of marriage.¹⁵² To secure the institution of marriage, a woman cannot be subjected to rape and torture. Furthermore, it's ironic that marital rape is only marginally remembered when the partners are living apart.

¹⁵¹ The Criminal Law Amendment Bill, 130 of 2012.

¹⁵² Bharti Jain & Rakhi Chakrabarty, Govt justifies exclusion of marital rape as sexual offence in amended ordinance, *TIMES OF INDIA*, Feb. 19, 2013, available at 104

9.5 STANDING COMMITTEE REPORT

The Parliament Standing Committee on Home Affairs in its 167th Report ('Standing Committee Report') reviewed Criminal Amendment Bill, 2012 and also organised public consultations.¹⁵³ Here, it was suggested that section 375 must be suitably amended to delete the exception clause.¹⁵⁴ The Standing Committee, however, refused to accept this recommendation. The Standing Committee Report claimed that, first, if they did so, the "entire family system will be under greater stress and the committee may perhaps be doing more injustice".¹⁵⁵ Second, the Committee reasoned that adequate remedies already existed because the family could deal with such concerns on its own, and that there was a remedy in criminal law, through the idea of cruelty as defined in section 498A of the IPC.¹⁵⁶

The Ministry of Home Affairs restated this argument in 2015 in response to a bill submitted by a Member of Parliament that sought to criminalise marital rape.¹⁵⁷ The press release stated that it "was considered that the concept of marital rape, as understood internationally, cannot be suitably applied in the Indian context".¹⁵⁸ One of the reasons given for this was the "mind-set of the society to treat the marriage as sacrament".¹⁵⁹ Furthermore, in December of 2015, a private bill was submitted on the subject.¹⁶⁰ During the ensuing discussion, the Home Minister stated that this was being considered by the Law Commission, and any decision would only be taken after the report came out.¹⁶¹ A striking aspect of his speech was his reference to the existing remedy of 'cruelty' that already existed in the IPC.¹⁶² In 2016, the Home Minister was again questioned about the existence of the marital rape exception and if the government was planning on criminalising marital rape. The Home Minister responded

¹⁵³ STANDING COMMITTEE ON HOME AFFAIRS, Fifteenth Lok Sabha, *Report on The Criminal Law (Amendment) Bill, 2012*, One Hundred and Sixty Seventh Report, 45, (December 2015).

¹⁵⁴ *Id.*, 47

¹⁵⁵ *Id.*

¹⁵⁶ The Indian Penal Code 1860, section 498A.

¹⁵⁷ The Criminal Laws (Amendment) Bill, 2014, 28 of 2014. (This Bill was a Private Member Bill proposed by Ms. Kanimozhi on the 28th of November, 2014.

¹⁵⁸ Press Release, PRESS INFORMATION BUREAU, April 29, 2015, available at <http://pib.nic.in/newsite/PrintRelease.aspx?relid=119938>

¹⁵⁹ *Id.*

¹⁶⁰ *Supra* note 51

¹⁶¹ RAJYA SABHA DEBATES, *Discussion on the Indian Penal Code (Amendment) Bill, 2015*, 53, Session Number 237, December 4, 2015, available at <http://164.100.47.5/newdebate/237/04122015/Fullday.pdf>

¹⁶² *Id.*

once more that the topic was being looked upon by the Law Commission and that no decision had been made to criminalise it because the Parliamentary Standing Committee had rejected it.¹⁶³

¹⁶³ LOK SABHA DEBATES, *Question on Marital Rape, 2016*, Question No. 2872, March 15, 2016, available at <http://164.100.47.190/loksabhaquestions/annex/7/AU2872.pdf>

CHAPTER 10

ROLE OF JUDICIARY WITH REGARD TO MARITAL RAPE EXEMPTION

In the earlier part, we discussed the unconstitutionality of the Marital Rape Exemption Clause. In this part, the role of the judiciary regarding 'marital rape' will be analysed. Article 13 provides the power of judicial review to the courts. Article 13 warrants that if any law violates any fundamental right then it shall be declared null and void in nature. Article 32 and 226 confer power on the courts to protect the fundamental rights. The existence of the marital rape exemption clause in itself is an evidence of the minimal or the lack of role played by the judiciary in criminalization of Marital Rape and the justifications provided for the same. To understand Judiciary's reluctance in criminalizing marital Rape, we need to first understand the concept of 'Marital Sphere'.

As seen above, one of the justifications for non-criminalization of Marital Rape is that marriage is sacrosanct and the state should not interfere in the marital relationship of a husband and wife. The courts have purportedly refused to enter into the marital sphere of a husband and wife and enforcement of their fundamental rights in the 'Marital Sphere'. This argument can be refuted taking in other examples wherein the court has interfered in the Marital Sphere.

Drawing an analogy between the Restitution of Conjugal Rights and Marital Rape will help us establish the dichotomy between Public and Private Marital Sphere and the constitutionality of Marital Rape.

Restitution of Conjugal Rights is an instrument of law through which a court orders a husband and a wife to live together when they separate from each other without reasonable cause. Under the Hindu Marriage Act, section 9 provides provisions for Restitution of Conjugal Rights.

Section 9 of The Hindu Marriage Act is reproduced as under:

“When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the district court, for restitution of conjugal rights and the court, on being satisfied of the truth of the

statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly."

Married Women are thus often forced to resume Cohabitation with their husband which in most probabilities may result in her resuming sexual relations with their husbands despite not being willing to do so. In essence, the court whilst passing the order for Restitution of Conjugal Rights is interfering within the Marital Sphere which may give rise to resuming sexual relations with her husband against her will. Marital rape cannot be justified on the basis of conjugal rights because the husband beats his wife for forced sex, exposing her to both physical and sexual assault. It cannot be taken for granted because it carries the risk of anxiety, depression, severe fear, a proclivity to commit suicide, and, in the worst-case scenario, death. Having strict laws against marital rape, on the other hand, was not easy for a society that values the family structure, patriarchy, and a supportive state. As a result, a man who rapes his wife cannot face legal consequences based on "restitution of conjugal rights."

Let us briefly go through the Role played by Judiciary in restitution of conjugal rights to better understand it's stance on Marital Rape and the laws in the argument for not entering into the 'Marital Sphere' in case of Marital Rape whilst the Judiciary had no problem entering the 'Marital Sphere' when it came to Restitution of Conjugal Rights.

The Constitutionality of restitution of conjugal rights was first questioned in the case of *T. Sareetha v. T Venkata Subbaiah*¹⁶⁴. The Andhra Pradesh HC held Section 9 of Hindu Marriage Act to be unconstitutional and violative of Art. 14, 19 and 21 of the constitution. It was violative of the constitution since it infringes upon the personal autonomy of the woman.

Another case law to be examined is 'Harvinder Kaur v. Harmander Singh', The Delhi HC in the present case upheld the constitutional validity of section 9 of HMA stating that the intent and purpose of the impugned Section was to uphold the institution of marriage and not to force a women into entering into sexual relations with her husband. The court fails to recognize that in ordering a woman to cohabit with her husband against her will, they are in most probability signing her up to resume sexual relations with her husband.

¹⁶⁴ AIR 1983 AP 356

The issue of constitutionality was laid to rest in the case of *Saroja Rani v. Sudarshan Kumar Chada*¹⁶⁵ wherein the constitutional validity of Restitution of Conjugal Rights was upheld. In this case, the court held that the main purpose of Restitution of Conjugal Rights was to preserve the institution of marriage and hence it does not violate Article 14 as a reasonable classification is made.

In the above case, the court faced no issue in entering the 'Marital Sphere' citing the reason that it is for the preservation of the Institution of marriage. Whilst, in the case of a crime as heinous as Rape, they refuse to enter into the 'Marital Sphere' even to enforce the fundamental Right of women under Article 14 and Article 21. In India, domestic violence is a crime. Why should rape be any different if officials can interfere in such a private place between spouses? Courts and police do not get involved, and the aim is to keep husband and wife together while upholding the natural law, i.e. "Conjunctio maritima peminæ eet de nature." However, once love has flown out the window, the law has entered through the door. And, if marriage is sacred, Indian men should honour it by not imposing sex on their wives and instead respecting her choices and decisions. The aim of the law should not be to defend an organisation that disregards women's integrity. A relationship that makes a woman a sex slave is unworthy of security.

In the words of Shashi Tharoor, "What the legislature is overlooking is that rape is not a matter of sex. It is a matter of violence. It is a question of forced violence upon a woman. And whether that happens within a marriage, or whether it happens outside, when you are guilty of violence, the state should criminalize it." "Men don't want to criminalize marital rape because they don't want to give the woman the power to say 'no'," said Priya Nanda Group Director of social and economic development at the International Centre for Research on Women.

This Dichotomy of the Judiciary needs to be addressed soon to ensure Women and their Rights are protected. It is pertinent for lawmakers and Judiciary to understand that Marital rape, is Rape notwithstanding the relationship between the parties and needs to be punished accordingly.

The court has entered into the 'Marital Sphere' in the case of criminalizing Triple Talaq (*Shayara bano v. Union of India*) and criminalized an action which essentially falls

¹⁶⁵ AIR 1984 SC 1562.

under Civil law. Similarly, in reading down section 377 of The Indian Penal code, 1860, the court read down an archaic law and provided millions of people belonging to the LGBTQ community much needed freedom.

Excluding human rights violence within the family (marital rape) by making it sui generis seems unpersuasive because the state has made laws or rules on what age one should marry, or under what conditions a marriage can be dissolved, or child custody, and other issues that are very much a family matter. Whether it is committed by a family member, rape does not change from the offence that it appears to be. The judiciary shall be fully responsible for its duty to do justice and it is entirely legitimate for the judiciary itself to assume its activist role, if necessary, without fear of refutation because it has entered the legislative field. The process of making legislation does not end with the passage of a statute. It is an evolving process that shifts and evolves in response to the needs and demands of the society, and therefore the onus is on the judiciary, as well as the legislature, to be accountable to the public by keeping the law upbeat with norms representative of the marginalised and neglected.

By failing to recognise marital rape as a crime or even a wrong, criminal law sends a message to society that non-consensual sexual contact in a marriage is not a crime or even a wrong. As a consequence, a husband who rapes his wife does not see himself as a wrongdoer, but rather as a means of asserting his conjugal right; this is a social fact.

CHAPTER 11

AVAILABILITY OF ALTERNATIVE REMEDIES

This chapter examines adequacy of the present criminal and civil laws which recognize sexual violence in marriage. One of the ancillary reasons given for non-criminalisation of Marital Rape is that adequate alternate remedies already exist in law. To understand this Part, let us divide it into 2 parts –

Remedies purportedly available in Criminal law and Remedies purportedly available in Civil law.

We will further establish why these Remedies are inadequate and advance our arguments for criminalization of Marital Rape.

11.1 CRIMINAL LAW

The foremost provision that is referred to as an alternative remedy is section 498A of The Indian Penal Code, 1860. Section 498A was inserted in IPC in the year 1983 to curb the menace of cruelty to married women, which often led to dowry deaths.

This provision of IPC is however inadequate when it comes to Marital Rape. There are two major reasons for the inadequacy of section 498A as a remedy to Marital Rape.

- a) The offence of Rape and the offence of Cruelty are different offences.

It would be safe to say that Rape is a form of cruelty but the atrocious crime of Rape is much grievous than the offence of cruelty. This is the reason that the offence of Rape is covered in a different part under the sections of IPC. Rape is distinguishable from the offence of cruelty both in the nature of the crime and the evidentiary requirements respectively.

Section 498A is reproduced below:

“Husband or relative of husband of a woman subjecting her to cruelty.—Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine. Explanation.—For the purpose of this section, “cruelty” means—

- a. *any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or*
- b. *harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable surety or is on account of failure by her or any person related to her to meet such demand.*¹⁶⁶

Although explanation to section 498A defines cruelty, what constitutes cruelty is a question of fact that must be evaluated by the court on a case-by-case basis¹⁶⁷. The courts have opted to not have a concrete definition of cruelty. It has to be determined by certain factors such as matrimonial relationship between husband and wife, their cultural and temperament status in life, state of health, and their interaction in their daily life that would be relevant for determining cruelty.¹⁶⁸ The husband who commits the crime of marital rape needs to be punished for the same.

- b) Section 498A's criminal sanctions are insufficient to deal with the offence of Marital Rape.

The punishment given for the offence of cruelty under section 498A is maximum imprisonment of 3 years with fine. Whereas, the maximum punishment for rape is imprisonment for life. For a heinous crime like Rape, the punishment of maximum imprisonment of 3 years doesn't do justice even though the Rape occurs inside marital relations.

11.2 CIVIL LAW

There are a purportedly a few remedies available in Civil Law and these more often than not, also form justifications for non-criminalisation of Marital Rape. Marriage is a sacred union of two people that forms a holy bond between the spouses. Marital Relations are usually governed by family courts.

One of the most important acts to discuss herein is The Protection of Women from Domestic Violence Act, 2005. Under the Act, a wife may seek a civil remedy. To say that non-consensual sexual intercourse outside marriage has criminal remedies and non-consensual sexual intercourse within marriage has just matrimonial remedies is to

¹⁶⁶ Indian Penal code 1860

¹⁶⁷ Mohd Hoshan v. State of Andhra Pradesh, 2002 CrLJ 4124 (SC)

¹⁶⁸ Sarojakshan Shankarah Nayar and Ors v. State of Maharashtra 1995 CrLJ 4124 (SC)

underestimate the gravity of marital rape. Marital rape is not significantly different from rape outside marriage as non-consensual sexual intercourse within and outside marriage can have same consequences thus providing remedies of different nature is not logical.

This Act recognizes the concept of 'Marital Rape' even though it does not explicitly mention the term 'Marital Rape'. This has portrayed that sexual abuse can occur within the confines of the marriage and the Act has to be lauded for this, even though the Act did not consider Marital Rape as a crime but rather brought it under the purview of 'Domestic Violence'. Section 3 of the Act defines domestic violence as follows:

“For the purpose of this Act, any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it –

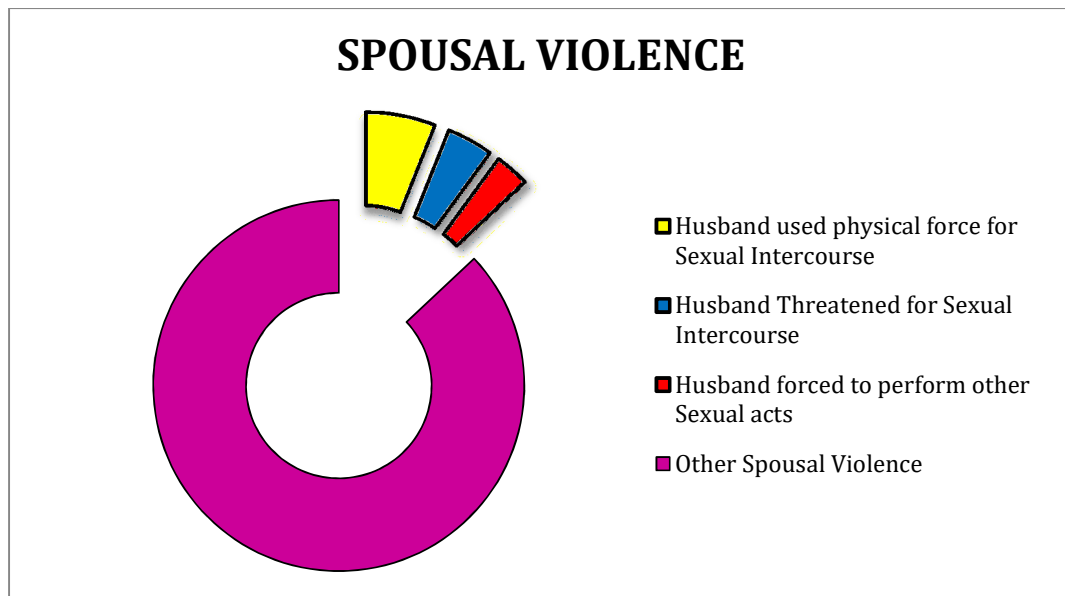
- a) harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or*
- b) harasses, harms, injures or endangers the aggrieved person with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security; or*
- c) has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned in clause (a) or clause (b); or*
- d) otherwise injures or causes harm, whether physical or mental, to the aggrieved person.”*

Therefore, if injustice to a wife in the form of Marital Rape occurs, she can file for Judicial Separation in the court. A wife who is a victim of sexual violence can file a complaint under it and obtain a protection order against the said violence. Courts can also order maintenance, compensation etc. to the aggrieved party. One of the other measures taken could be stating 'Sexual Violence' explicitly in the Definition of cruelty as defined under various Personal law.

In The Hindu Marriage Act, section 13(1)(i)(ia) could be amended and 'Sexual Violence' could be brought under the purview of Cruelty. Section 13 (ia) of the Hindu

Marriage Act of 1955.¹⁶⁹ Both physical and mental cruelty are addressed in Sub-clause (ia). The term "cruelty" is not specified in the Act. In matrimonial cases, courts have described cruelty as any treatment of one spouse by the other, or any expression of such feelings, that has caused or has the potential to cause bodily injury or injury to health, including mental health.¹⁷⁰ If it is physical cruelty, it is simple to decide by looking at the damage caused in light of the circumstances. The dilemma arises from the determination of mental cruelty. The moot point being that Criminalisation of Marital Rape should also spark changes in family law to bridge the gap between the two.

The National Family Health Survey (2015-2016) reported that the most common kind of sexual violence reported by women was their husband using physical force to force them to have sexual intercourse when they did not want to (6%). Four percent reported that their husband forced them with threats or in other ways to perform sexual acts they did not want to, and 3 percent reported that their husband forced them to perform other sexual acts they did not want to in India. Even in wealthy states like Tamil Nadu, about 4 out of every 10 married women encountered some kind of spousal abuse, according to the most recent round of the NFHS-4 (2014-15). One lakh women said they had been sexually assaulted by men other than their husbands, while 6950 said their husbands coerced them to have sex with them against their will.



¹⁶⁹ Section 13: (1) Any marriage solemnised, whether before or after the commencement of this Act may on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party - (ia) has after the solemnization of the marriage treated the petitioner with cruelty.

¹⁷⁰ Savitri Pandey v. Prem Chandra Pandey AIR 2002 SC 591

11.3 CONCLUSION

There are statutes which recognize sexual violence in marriage and criminalization of marital rape is generally opposed on the grounds that there are enough remedies available to an aggrieved wife against her husband under these statutes.

To say that non-consensual sexual intercourse outside marriage has criminal remedies and non-consensual sexual intercourse within marriage has just matrimonial remedies is to underestimate the gravity of marital rape. Non-consensual sexual intercourse within and outside marriage can have same consequences thus providing remedies of different nature is not logical. Unless the unwanted sexual conduct is accompanied by grave physical injury or severe psychological trauma or the demand for money or value then marital rape under this section is unlikely to be punished. This per se requires criminalization of marital rape.

CHAPTER 12

INDIAN JUDGEMENTS CONCERNING MARITAL RAPE

1. *Queen Empress vs. Haree Mythee*¹⁷¹

Tracing the history of judicial decisions on infliction of serious injury by the husband on the wife the court noted that the law of rape does not apply between husband and wife after the age of 15 in the case of married women; even if the wife is over the age of 15, the husband has no right to disregard her physical safety, for example, if the circumstances are such that intercourse is likely to result in serious injury. In the present case the husband was convicted of rupturing his eleven year old wife's vagina, causing haemorrhage to her death, under Section 338 of the Indian Penal Code.

2. *RIT Foundation v. Union of India*¹⁷²

In this case, the petitioners challenged the constitutionality of the marital rape exception clause. In a historic judgement, the Delhi High Court upheld that married partners can say no to physical relations, thus taking away the presumption that marriage gives one the unquestionable right to have sexual relations with their partner, with or without their consent. The Court also observed that apart from physical force, husbands can monopolize financial power to pressurize their wives into having sex. Hence, a man would have to prove that the wife was a consenting party in order to rule out rape.¹⁷³

The petitioners submitted that every adult has the right to sexual autonomy.¹⁷⁴ They supported that marital rape should be declared void ab initio under Article 13 by virtue of being inconsistent with Part III of the Constitution.¹⁷⁵ They

¹⁷¹ (1891) ILR 18 Cal. 49

¹⁷² Writ Petition (Civil) 284 of 2015.

¹⁷³ ET Online & Agencies, *Marriage doesn't mean consent for sex: Delhi HC on marital rape*, Economic Times, July 18, 2018, <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>.

¹⁷⁴ Justice KS Puttaswamy v. Union of India, (2017) 10 SCC 1 (India).

¹⁷⁵ Peerless General Finance v. Reserve Bank Of India, (1987) 1 SCC 424 paras. 48, 50 (India); Romesh Thappar v. The State of Madras, (1950) SCR 594 para. 13 (India); State Of Punjab v. Dalbir Singh, (2012) 3 SCC 346 paras. 27-29 (India).

submitted that Exception 2 to Section 375, Section 376B of IPC¹⁷⁶ and Section 198B of the Criminal Procedure Code, 1973¹⁷⁷ where rape victims were classified into three categories based on their marital status: married, married but separated, or unmarried. However, there is no intelligible differentia present here between the harms they suffer and without a plausible rational nexus to an object sought to be achieved by the criminal law, thus leading to the violation of Article 14.¹⁷⁸ They argued that the exception clause assumes non-retractable consent of women to sexual intercourse upon marriage, thus violating Article 15(1).¹⁷⁹ The petitioners also submitted that a woman's physical integrity flows directly from the right to life and liberty under Article 21,¹⁸⁰ which is violated by marital rape. The respondent opposed criminalisation of marital rape on several grounds like- violation of right to privacy of the married couple by allowing state intervention, obstruction in their sexual relationship and harassment of husbands by unprincipled wives,¹⁸¹ believing all this would lead to the destabilization of marriage.

One main argument referred to before the Court was "what might appear as marital rape to an individual woman, it may not seem so to others," which stems from a basic criminal law structure that prescribes one of the cornerstones of the standard of 'reasonability' or the 'reasonable person.' However, the Court agreed with the petitioners that marital rape violates women's rights to equality, freedom, and the right to live with dignity as provided under the Constitution, and hence, should be declared illegal.¹⁸² Since repealing the exception clause is a statutory function that will result in the development of a new offence, the government must act promptly.

¹⁷⁶ Indian Penal Code § 376B, No. 45 of 1860, India Code.

¹⁷⁷ Code of Criminal Procedure § 198B, No. 2 of 1972, India Code.

¹⁷⁸ *Budhan Choudhary v. State of Bihar*, (1955) 1 SCR 1045 (India); *Anuj Garg & Ors v. Kotlal Association of India & Ors*, (2008) 3 SCC 1 paras. 46-47 (India); *Dr Subramanian Swamy v. Director, CBI*, (2014) 8 SCC 682 para. 57 (India); *Air India v. Nargeesh Meerza & Ors*, (1981) 4 SCC 335 paras. 71, 82 (India).

¹⁷⁹ *Anuj Garg & Ors v Kotlal Association of India & Ors*, (2008) 3 SCC 1 paras. 21, 26 (India).

¹⁸⁰ *Suchita Srivastava v. Chandigarh Administration*, (2009) 9 SCC 1 (India); *Justice KS Puttaswamy v. Union of India*, (2017) 10 SCC 1 paras. 167, 198 (India); *Francis Coralie Mullin v. Admin-istrator, Union Territory of Delhi & Ors*, (1981) 1 SCC 608 para. 8 (India); *Bodhisattwa Gautam v. Subhra Chakraborty*, (1996) 1 SCC 490 paras. 9, 10 (India); *Prahlad v. State of Haryana*, (2015) 8 SCC 688 para. 17 (India); *Vishaka v. State of Rajasthan*, AIR (1997) SC 3011 paras. 12-13 (India); *National Legal Services Authority v. Union of India*, AIR (2014) SC 1863 para. 75 (India).

¹⁸¹ Himani Goyal, *Marital Rape: A Murder of Patience*, 3(1) *Jus Imperator* (Sept. 2019)

¹⁸² Uday Singh Sidhu, *The Careful Questioning of Socio-Legal Premises: A Step Towards Criminalising Marital Rape*, 4(3) *J. of Legal Stud. & Res.* (June 2018)

Although it has been two years since this judgement was delivered, the government's lack of action on this subject is very disappointing. It shows that our orthodox and patriarchal mindset is still the main obstacle to criminalising marital rape in India.

3. *Independent Thought v. Union of India*¹⁸³

In this landmark judgement, the Supreme Court of India criminalised sexual relations with a wife between 15 and 18 years of age.¹⁸⁴ Sexual relations with a minor girl is a criminal offence in India.¹⁸⁵ But earlier, when a man married a girl between 15 and 18 years, sexual relations with the wife was not considered to be rape, according to the marital rape exception clause. However, it was recognized in the judgement that such an artificial distinction is arbitrary and contrary to the spirit of Articles 14,¹⁸⁶ 15(3)¹⁸⁷ and 21¹⁸⁸ of the Indian Constitution. The fatal impact of early marriages, which permitted a man to violate a woman's physical, mental, and reproductive rights and integrity, was examined in detail in the ruling. The Supreme Court did not welcome the Union of India's argument that such practises were a traditional by-product and should therefore allowed to continue. While keeping in mind that rape is a crime committed not only against women but also against society,¹⁸⁹ the apex court declared that the law has to evolve and change with the needs of the society. As a result, outlawing marital rape for girls aged 15 to 18 was the most desirable option for protecting these women's integrity.

Whilst the court repeatedly stated during the ruling that the question of matrimonial rape of girls between 15 and 18 years and not the broad range of marital rape was concerned, several relevant observations in the course of the court analysis can also be used as strong arguments for outlawing marital rape for women over 18 years old. The court took into account cases like *C.R. v. UK*¹⁹⁰ and *Eisenstadt v. Baird*¹⁹¹ to uphold that a rapist remains a rapist and marriage with the victim does not convert him into a non-rapist. Under Article

¹⁸³ (2017) 10 SCC 800 (India).

¹⁸⁴ Krishnadas Rajagopal, *Sex with minor wife, despite consent, is rape: Supreme Court*, *The Hindu* (Oct. 11, 2017)

¹⁸⁵ Indian Penal Code § 375, No. 45 of 1860, India Code.

¹⁸⁶ India Const. art. 14.

¹⁸⁷ India Const. art. 15(3).

¹⁸⁸ India Const. art. 21.

¹⁸⁹ *Bodhisattwa Gautam v. Subhra Chakraborty*, (1996) 1 SCC 490 (India).

¹⁹⁰ *CR v. UK*, Eur. Ct. H.R. (1995).

¹⁹¹ *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

21 of the Indian Constitution,¹⁹² rape violates not only the dignity¹⁹³ and bodily integrity¹⁹⁴ of a female, but also her right to reproduction and privacy.¹⁹⁵

The IPC punishes cruelty by the husband against his wife,¹⁹⁶ but not rape. It punishes rape of an unmarried woman, but not marital rape.¹⁹⁷ Such double standards, no doubt, prove that the arbitrariness of Exception 2 to Article 375 of IPC is violative of Article 14 of the Constitution.¹⁹⁸ Hence, the exception clause allowing marital rape is clearly discriminatory and liable to be struck down.

4. *Nimesh Bhai Bharatbhai Desai v. State of Gujarat*¹⁹⁹

The High Court of Gujarat examined the law on sexual offences within this judgement. It acknowledged that, under the current law in the country, the wife cannot bring a rape case against her husband under Section 376 of the IPC. Nevertheless, Justice Pardiwala made several strictures upon the issue of marital rape and how it ought to be criminalised within India, while giving examples of other nations where it has been declared illegal.²⁰⁰

As observed by the court:

“ A husband does not own his wife’s body by reason of marriage. By marrying, she does not divest herself of the human right to an exclusive autonomy over her own body and thus, she can lawfully opt to give or withhold her consent to marital coitus.²⁰¹ Marital rape is in existence in India, a disgraceful offence that has scarred the trust and confidence in the institution of marriage. A large population of women has faced the brunt of the non-criminalisation of the practice.”²⁰²

¹⁹² India Const. art. 21.

¹⁹³ The Chairman, Railway Board v. Chandrima Das, (2002) 2 SCC 465 (India).

¹⁹⁴ Suchita Srivastava v. Chandigarh Admin-istration, (2009) 9 SCC 1 (India).

¹⁹⁵ State of Maharashtra v. Madhukar Narayan, (1991) 1 SCC 57 (India).

¹⁹⁶ Indian Penal Code § 498A, No. 45 of 1860, India Code.

¹⁹⁷ Indian Penal Code § 375, No. 45 of 1860, India Code.

¹⁹⁸ Indira Nehru Gandhi v. Raj Narain, (1975) 2 SCC 159 (India); Kesavananda Bharati v. State of Kerala, AIR (1973) SC 1461 (India); EP Royappa v. State of Tamil Nadu, (1974) 4 SCC 3 (India); Maneka Gandhi v. Union of India, (1978) 2 SCR 621 (India).

¹⁹⁹ Nimeshbhai Bharatbhai Desai v. State of Gujarat, (2018) SCC OnLine Guj 732 (India).

²⁰⁰ Id. para. 73.

²⁰¹ Id. para. 116.

²⁰² Id. para. 7.

The court agreed that marital rape is not a husband's privilege, but rather a violent act and an injustice that must be criminalised.²⁰³

Only a complete legislative repeal of the marital rape exception will convince communities that dehumanised treatment of women is unacceptable. As a result, criminalising marital rape is critical for the preservation of women's rights in our culture.

5. *Sree Kumar v. Pearly Karun*²⁰⁴

In this case, the high court in Kerala noted that, given that the woman did not live separately from her husband by a separation order, the offence under section 376A, IPC, will not be attracted even if it is subject, against her will, to sexual intercourse. There was a continuing divorce dispute between the parties in this case. Following that, the husband and wife reached an agreement, and both parties agreed to continue to live together. She said she was compelled to have sexual intercourse with her husband against her will and consent after staying with him for two days. As a result, the husband was found not guilty of raping his wife, even though he was de facto guilty.²⁰⁵ Although the wife continued to stay with the husband, sexual intercourse without consent was not implied and the realization of the same is essential. Further when the wife files a complaint regarding marital rape in later stages of the marriage, it does not imply that the said complaint is dubious.²⁰⁶ Proper guidelines and criminalisation of marital rape in a detailed manner is essential.

6. *T. Sareetha v. T. Venkata Subbaiah ('Sareetha')*²⁰⁷

This was the first time the Andhra Pradesh High Court overturned the constitutionality of the Hindu Marriage Act's restitution of conjugal rights. The Court was held to have violated Articles 14, 19 and 21 of the Constitution by section 9 of the Hindu Marriage Act. This claim was accepted by the Court. The

²⁰³ Id. para. 130.

²⁰⁴ *Sree Kumar v. Pearly Karun*, 2 ALT Cri 77 (1999) (India).

²⁰⁵ Id. para. 6.

²⁰⁶ *Dhanus Nair & Ors v. State of Kerala Rep by Public Prosecutor Anr*, (2018) SCC OnLine Ker 16139 (India).

²⁰⁷ AIR 1983 AP 356.

restitution of conjugal rights solution was found to be illegal because it transferred the woman's right to choose whether or not to engage in sexual activity to the state. Because it infringes on an individual's personal autonomy, this would be a violation of Article 21 of the Constitution.²⁰⁸ Furthermore, the Court acknowledged that this clause would harm women and emphasised the value of a woman's sexual autonomy. It is also here that the Court agrees that “no positive act of sex can be forced upon the unwilling persons, because nothing can conceivably be more degrading to human dignity and monstrous to human spirit than to subject a person by the long arm of the law to a positive sex Act”.²⁰⁹ Interestingly and it is very rare for the Court to do so – it notes that even within the realm of marriage, the concept of forced sex can exist. However, the Court held that the concept of restitution of conjugal rights is not in tandem with the concept of the ‘marital sphere’.²¹⁰

In all probability, the judiciary seems to have relegated the idea that rape cannot be done during marriage or that the stigma of a woman's rape can be rescued by marrying her to the rapist. The problem is that marital relationships have been accepted to be practically sacrosanct. It is supposed to have prosperous, mutual respect and confidence that the woman worships the husband's every whim, particularly in sex. It's far more traumatic to have to live together with someone known to rape, a family member, and worse.

Accordingly, it is imperative that law makers combat this patriarchal view and strive to remove the exemption clause for marital rape in accordance with these or other decisions listed above. It is illegal because it infringes on a woman's human rights.

²⁰⁸ *Id.*, 31-32.

²⁰⁹ *Id.*, 18.

²¹⁰ *Id.*, 38.

CHAPTER 13

REASONS WHY MARITAL RAPE IS NOT CRIMINALIZED

It's critical to grasp the basis of the issue, which is why marital rape is still not considered a crime in Indian law. India is a country where morality and values are held in high regard. As a result, they are unable to find any flaws in it. In India, weddings are in a similar predicament. Marriages are considered as the most important institution in the society and people are unable to find any flaws in it. But the reality is quite different than what it seems. Marital rape can be seen as an example of it. There are a variety of reasons why it is still not criminalised. The factors are as follows-

- **Preservation of the institution of marriage:** According to the Central Government, factors such as an ignorant and conservative population have a role in the act of marital rape not being criminalised. The administration also claims that if the conduct is criminalised, many women who were previously unaware of their rights may seek justice and protection through the legal system. It can be inferred that what the government is trying to say if marital rape is criminalized, it will lead to many marriages which will be destroyed. But this cannot be given as an excuse for the men to continue raping their wives. Crimes such as dowry or domestic violence do not undermine the institution of marriage, then how marital rape can do it. It is important to understand that in order to maintain the sanctity women should be given the dignity and respect they deserve.
- **Implied consent and contract theory:** According to the Indian society, when a woman is married, she hands her perpetual consent for sexual intercourse. This concept has been ingrained in people's thoughts for generations. Hale's idea that a marriage is a contract is the most popular justification for the marital rape exemption. Between husband and wife, he claims, there is an implied consent and contract. The rules of this contract indicate that a woman gives her husband her irrevocable consent to have sexual relations with him whenever he wishes. Because all sexual contact within a marriage is presumed to be consenting, marital rape cannot occur, according to the principle of implied consent. Under the contract theory, as stated by Hale, when a woman marries, she forms a contract with her husband whether it is implied or expressed. It instantly grants a husband the

right to have sexual intercourse with his wife. The wife's consent is irrelevant in this case because the marriage itself conveys implied consent.

- **Women as property:** The idea that a husband possessed his wife as property was another common law origin that was a cornerstone in the foundation for the marital rape exemption. Because he couldn't take what he already held, a husband couldn't rape his wife. As women were considered property, rape was viewed as a violation of a man's property interest rather than a crime against women.
- **Marital unity:** The term "marital unity" usually refers to a woman's non-existence once she marries. It signifies that the wife's identity is merged with her husband's once they marry. The doctrine is known as the Marital Unity Doctrine. Firstly, in the olden days, women were considered as property of men. They were treated as chattel. A man was free to exercise all and any right against his property and the right to have sex was merely one of the rights he enjoyed. How could a man commit a crime against his own property? This ensured that the women were not regarded as a separate legal entity.
- **Public and private divide:** The idea is that public law cannot invade the limits of the bedroom, hence marital rape cannot be deemed actual rape. There is a difference between public and private life, and the law cannot intervene in a person's private life. Compulsory sexual relations in marriage are usually beneficial to the male since it allows him to gather more resources - both material and physical. It is not logical to consider that law respects the public-private divide only in regard to the regulation of abortion and unnatural acts but not marital rapes. Although it is also a very serious crime to be considered.

Absence of legal provisions recognizing marital rape as an offence; which encourages the man to continue with his behavior and leaves the wife with no legal remedy to which she can resort to.

CHAPTER 14

A REVIEW OF CRIMINALISATION OF MARITAL RAPE IN OTHER NATIONS

The Sacrosanct institution of marriage In India identifies that there is a perpetual consent of the wife to give into sexual intercourse whenever the man pleases to do so. India is one of the thirty six countries which have still not criminalized the idea of marital rape. However this is not the case in many countries.

A number of countries around the world have recognised marital rape for the heinous crime that it is and have made it illegal. In most significant jurisdictions, this immunity has now been revoked. In 1991, the House of Lords in England and Wales declared that the status of married women had changed dramatically after Hale's proposal. 'Marriage is in modern times treated as a relationship between equals and not one in which the wife must be the subservient chattel of the husband,' said Lord Keith, speaking for the Court.

With the passage of time, some revolutionary developments began to occur. The following are some of the important changes that are leading to a shift in attitudes on marital rape:

- Recognition of human rights of the woman.
- International organisations recognise that assaulting a woman in her private space is also a violation of her rights.
- The marital rape has always played a big role in transmitting STDs, hence now public health policy makers has come up and asked for its recognition by the state authorities.
- The institution of marriage has undergone a global shift, with women now having more liberty and respect than ever before.
- Demand by global feminist groups regarding sexual autonomy of the women in the 20th century

14.1 UNITED KINGDOM

The issue of marital rape in the United Kingdom gained currency at a political level in the 1970s. The exemption of marital rape had never been a rule of statute, having been promulgated first in 1736 by Matthew Hale whereby he stated that a woman's consent to intercourse upon marriage is irrevocable by virtue of the marital contract.²¹¹

At last, it was in 1991 that the marital rape exemption was finally abolished by the Appellate Committee of the House of Lords in England and Wales in the case of *R v. R*.²¹² In this case, the Lordships disregarded the myth that a wife is deemed to have consented irrevocably to sexual intercourse with her husband upon marriage. Lord Keith remarked in his decision that the lower courts' attempts to avoid applying the marital rights exception were evidence of the rule's absurdity, and he held, agreeing with previous Scottish judgments²¹³ and in the Court of Appeal in *R v. R*, that “*the fiction of implied consent has no useful purpose to serve today in the law of rape*” and that the marital rights exemption was a “*common law fiction*” which had never been a true rule of English law. Hence, R's appeal was dismissed and he was convicted of raping his wife. There are slew of case law that make the situation slightly better than Indian law.

Following this landmark judgement, a corresponding amendment to statutory law was made through Section 142 of the Criminal Justice and Public Order Act, 1994. The European Court of Human Rights upheld the same in *S.W. v. UK*²¹⁴ and *C.R. v. UK*.²¹⁵ Thus, marital rape has been explicitly criminalised in the United Kingdom, recognized even by the Sexual Offences Act 2003.

14.2 UNITED STATES OF AMERICA

Since the 1970s, there has been an increase in discussions that address women's rights to bodily autonomy, dealing with domestic abuse and rape. Until the 1975s, the situation in the United States was similar to that in India. In the United States, every state had a rape statute that contained an exception for marital rape, which protected the husband if he raped his wife. By the late 1980s and 1990s, academicians began to focus on the confluence of

²¹¹ Comment, *The Marital Exception to Rape: Past, Present and Future*, 13 Det. C. L. Rev. paras. 261, 262 (1978).

²¹² [1991] UKHL 12, [1992] 1 AC (HL) 599

²¹³ (1989) SLT 469 (Scot.).

²¹⁴ Eur. Ct. H.R. (1995).

²¹⁵ Eur. Ct. H.R. (1995).

these issues: rape in marriage.²¹⁶ In United States, the Federal Criminal Code, 1986²¹⁷ based on the use of force or the degree of fear produced by the offender, distinguishes between aggravated sexual abuse and sexual abuse. The Code recognises the defence of marital status in case of sexual abuse of a minor or ward,²¹⁸ whereas in case of aggravated sexual abuse, the defence marriage is not recognised. By the year 1993, all states had recognised marital rape as a criminal offence.²¹⁹ However, under different state laws, the classification of the offence and the punishment for it varied.

Oregon v. Rideout was the first case in the United States to challenge this cohabitation clause in 1978.²²⁰ Although the husband was acquitted of raping his wife, the case fueled the reform movement. By 1993, all 50 states had made marital rape a crime.²²¹ The only marital exemption that still exists is statutory rape.²²² Even in the 1990s, most jurisdictions continued to distinguish between marital and non-marital rape in terms of how they were seen and treated. Laws have continued to change and evolve, with the majority of states reforming their laws in the twenty-first century.²²³

Later, in *People v. Liberta*²²⁴, the court ruled marital rape to be unconstitutional, ruling that a married woman has the same rights to regulate her body as an unmarried woman, and that marriage should not be seen as a licence for a husband to rape his wife. The marital rape exemptions from the sodomy law (*Williams v. State*²²⁵) and the rape law (*Merton v. State*²²⁶) were subsequently ruled unconstitutional in Alabama.

In India, it is assumed that if a woman marries a man, she has given her implied consent to have sexual relations, whereas in India, the principle of consent has been interpreted several times and nowhere does it state that implied consent is a part of consent. As

²¹⁶ Joann M Ross, Making marital rape visible: a history of American legal and Social movements criminalising rape in marriage (Dec, 2015), <https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1085&context=historydiss>.

²¹⁷ Federal Criminal Code, 1986.

²¹⁸ Federal Criminal Code, 1986, s. 2243 (c) (2)

²¹⁹ Marital Rape, Violence against Women Online Resources @www.vaw.edu

²²⁰ Law Commission Of India, *Rape and allied offences: Some questions of substantive law, procedure and evidence*, Law Com. No. 84 (1980).

²²¹ Jennifer Bennice & Patricia Resick, *Marital Rape: History, Research, and Practice*, 4 Trauma Violence & Abuse 228-246 (July 2003).

²²² Monica Stenier, Marital Rape Laws, Criminal Defense Lawyer-<https://www.criminaldefenselawyer.com/marital-rape-laws>.

²²³ Core International Human Rights Treaties, Optional Protocols & Core ILO Conventions Ratified by India, Nat'l Human Rights Commission, India, A Handbook on International Human Rights Convention (2012), http://nhrc.nic.in/sites/default/files/A_Handbook_on_International_HR_Conventions.pdf.

²²⁴ *People v. Liberta* 64 NY 2d 152, 474 NE 2d 567, 485 NYS 2d 207(1984)

²²⁵ *Williams v. State* 1959, 110 So 2d 654

²²⁶ *Merton v. State* 1986, 500 So. 2d 1301

indicated in the Oregon v. Rideout judgement, marrying is a risk, so it defines the whole situation and status of women who have been married and are still faced with marital rape.

14.3 AUSTRALIA

From the late 1970s to the early 1990s, statutory and case law in Australia started to criminalise marital rape in all states and territories. The first Australian state to address marital rape was South Australia. The exception was only partially eliminated by the 1976 amendments. The Criminal Law Consolidation Act, 1935²²⁷ which was amended in 1976 states: “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.”²²⁸

In the case of R v. L,²²⁹ The court held that it is not a common law, if it is always by common law that a wife gives her husband's irrevocable consent to intercourse by marriage.²³⁰ It also claimed that a husband could be found guilty of raping his wife.

In 1981, New South Wales was the first Australian jurisdiction to remove the marital exemption in total.²³¹ The same happened in Western Australia, Victoria in 1985; and Tasmania in 1987. The loss of a husband's immunity went some way to acknowledging a woman's individual bodily autonomy and her right to consent to each and every act of sex.²³²

14.4 NEPAL

Under Nepali criminal law, Sub-Section (4) of Section 219 states, “If a man rapes his wife when he is still in marital relationship with her, he shall be sentenced to upto five years in jail.”²³³ The country's poverty, illiteracy, backwardness, and male-dominated society all contribute to marital rape.

In 2008, the Nepalese government amended the rape law to include 'marital rape.' In the case of Forum for Women, Law and Development v. His Majesty's

²²⁷ Criminal Law Consolidation Act 1935 (SA) (Austl.).

²²⁸ Criminal Law Consolidation Act Amendment Act 1976 s 12 (SA) (Austl.).

²²⁹ (1991) 174 CLR 379 (Austl.).

²³⁰ Id.

²³¹ Lisa Featherstone, *Rape in marriage: Why was it so hard to criminalise sexual violence?*, Australian Women's History Network (Dec. 7, 2016), <http://www.auswhn.org.au/blog/marital-rape/>.

²³² Id.

²³³ The Muluki Criminal (Code) Act (2017) (Nepal).

Government/Nepal,²³⁴ the Nepalese Supreme Court found the failure to criminalise marital rape in the ‘Muluki Ain’, the General Code of Nepal, as unconstitutional and against the principles of the ICCPR.²³⁵ As a signatory to a number of international treaties, Nepal is obligated to uphold the obligations arising from those treaties.

Following this decision, the Muluki Ain was amended in 2006, criminalising marital rape under Section 3 of the rape chapter. If a husband was found guilty of raping his wife, he faced 3 to 6 months in prison. The sentence has been increased on realising the severity of the crime in the amendment to the criminal law as stated above.²³⁶

14.5 SOUTH AFRICA

The South African law has been influenced and moulded by both Roman-Dutch civil law and English common law.²³⁷ In 1992-93, South African courts began to consider the issue of marital rape. Until then, husbands had the legal right to rape their wives.

The defendant in the case of *S v. Ncanywa*²³⁸ The appeal was based on a conviction for marital rape, which was later reversed by the Ciskei Appellate Division on the grounds that a husband cannot be held criminally accountable for raping his wife even if they are no longer living together. The rationale stated by the judges pointed towards the fact that explicit Roman-Dutch civil law allowed marital rape, even though English common law had criminalised it.²³⁹ Thus, the court was divided in its decision.

Finally in 1993, the South African legislature passed the Prevention of Family Violence Act²⁴⁰ which explicitly criminalised marital rape by clearly stating that “*a husband may be convicted of the rape of his wife.*”²⁴¹ As a result, South Africa was one of the first African countries to criminalise marital rape. Currently, the Criminal Law (Sexual Offences and Related Matters) Amendment Act governs the offence of marital rape.

²³⁴ Writ No 55 of the year 2058 BS (2001-02) (Nepal).

²³⁵ Core International Human Rights Treaties, Optional Protocols & Core ILO Conventions Ratified by India, Nat’l Human Rights Commission, India, A Handbook on International Human Rights Convention (2012), http://nhrc.nic.in/sites/default/files/A_Handbook_on_International_HR_Conventions.pdf.

²³⁶ Harsh Mahaseth, *Nepal’s Parliament raises punishment for marital rape – but differentiates*, South Asia Monitor (Apr. 11, 2018), <http://southasiajournal.net/nepals-parliament-raises-punishment-for-marital-rape-but-differentiates/>; *Harsher punishment set for sexual harassment*, The Himalayan Times, Kathmandu, Aug. 15, 2018.

²³⁷ Dr Nico P Swartz & others, *Is A Husband Criminally Liable For Raping His Wife? A Comparative Analysis*, IS A HUSBAND CRIMINALLY LIABLE FOR RAPING HIS WIFE A COMPARATIVE ANALYSIS.

²³⁸ 1992 (1) SACR 209 (Ck) (S. Afr.).

²³⁹ R v. R [1991] UKHL 12, [1992] 1 AC (HL) 599 (appeal taken from Eng.).

²⁴⁰ Prevention of Family Violence Act 133 of 1993 Section 5 (S. Afr.).

²⁴¹ Anne Look, *In Africa, Criminalising Marital Rape Remains Controversial*, Voa News (Nov. 7, 2013), <https://www.voanews.com/africa/africa-criminalising-marital-rape-remains-controversial>.

14.6 COLOMBIA

Marital rape was criminalised in Colombia in 1996.²⁴² However, the law related to marital rape provided for a lesser punishment than for rape in general.²⁴³ The Colombian Constitutional Court deemed this disparity in punishment unlawful.²⁴⁴

Hence, apart from explicitly recognising that sexual assault can take place in intimate relationships, the new Penal Code also made rape in spousal or intimate relationships an aggravating factor to rape, warranting a stricter punishment.²⁴⁵

Despite the existence of comprehensive laws punishing violence against women, domestic and sexual violence continue to be highly prevalent in Colombia. According to UN Women, at least once in their lives, 37% of Colombian women would witness physical and/or sexual intimate partner abuse and over 50% of the Colombian men surveyed for a 2010 UN study admitted to abusing their female partners.²⁴⁶ Thus, this proves that legislation requires proper implementation in order to be successful, and countries which have criminalised marital rape still have a long way to go before they can completely eradicate this social evil.

14.7 PHILIPPINES

Marital rape was deemed illegal in 1997, with stiff penalties and prison sentences ranging from 12 to 14 years. In the Philippines, as in any other country, marital rape was not a crime. It was declared illegal by the Anti-Violence Against Women and Their Children Act of 2004. The Act was concerned not only with the condition of women in marriage, but also with ensuring that cruelty to children was prohibited. The case of *People of the Philippines v. Edgar Juawan* reinforced the case of marital rape. In this case, the defendant argued that marital rape is not the same as rape by making a statement. The case reached the Supreme Court; the court revoked the defendant's plea

²⁴² Melanie Randall, Jennifer Koshan, Patricia Nyaundi, *The Right to Say No: Marital Rape and Law Reform in Canada, Ghana, Kenya and Malawi* (Hart Publishing 1st ed., 2017) 71.

²⁴³ *Id.*

²⁴⁴ Colombia Constitutional Court, decision C-285 of 1997, Presiding Judge Carlos Gaviria Diaz (action for unconstitutionality of Article 25 of law 294 of 1996) (Colom.);

²⁴⁵ Colombia Ley 599 de 2000, Diario Oficial No 44097 del 24 de Julio de 2000, Art 211(5) (as amended by Art 30 de Ley 1257 de 2008) (Colom.); C Benninger-Budel & L O'Hanlon, *Violence against Women in Colombia*, Report Prepared for the Thirty-First Session of the Committee on Economic, Social and Cultural Rights, Violence Against Women: 10 Reports/Year 2003 (World Organization Against Torture (OMCT), 2004) 156.

²⁴⁶ Combating Domestic and Sexual Violence in Colombia, Vital Voices, <https://www.vitalvoices.org/2016/07/combating-domestic-and-sexual-violence-in-colombia/>.

and stated that the woman's implied consent was no reason for the husband not to be convicted.

In India, a large number of writ petitions have been filed before the Supreme Court and High Courts in response to marital rape, but no specific responses have been awarded. In India, marital rape is classified as either sexual domestic abuse or cruelty, but there is no specific penalty for the crime.

14.8 SINGAPORE

Singapore recently made marital rape a crime. It became a crime on January 1, 2020. Previously, in Singapore, husbands were arrested for forced sexual intercourse with their wives under the charges of abuse and others. Marital rape was only a crime when the couple was separated.

The act criminalising marital rape is the most recent, and cases of marital rape are viewed similarly to assault, domestic abuse, and other crimes in Singapore. There is a compelling need for a different law since the subject is much more complex and involves a large number of victims.

It can be deduced that the majority of countries have criminalised marital rape. The countries have done this either by court order or it expressly mentioned in their criminal jurisprudence. Apart from the above countries, 49 countries including Canada, Australia, France and many others have criminalized the act of marital rape. These countries act as evidence that marital rape is a crime and should have the same or rather more degree of punishment as that of the crime of rape of an unmarried woman. If not then certainly more as if a wife is financially dependent on her husband, he may use this as a validation to do whatever he seems fit. The judiciary, as well as the country's legislation, are responsible for criminalising this heinous act of marital rape. However this seems as an improbable idea as the judiciary was unwilling to try on the idea of Marital Rape in as recent as 2017.

CHAPTER 15

OPPOSITION

15.2 CRITICAL VIEWS ON CRIMINALISATION

The exception to the section 375 of the Indian Penal Code regarding marital rape makes the woman the property of her husband. Even after the verdict ruled out in the case of Independent Thought v. Union of India, there is no amendment made in the exception of section 375. The age of majority for all legal purposes is 18 years but for the offense of marital rape it is 15 years. Due to this there is a conflict between the exception and the provisions of Protection of children from Sexual Offences (POSCO), 2012. However, in justification to this age bracket, it is stated that the concept of age of puberty among Muslims for the age of marriage comes into picture. The reason why marital rape cannot be criminalized is because of the position of women in the Indian society. The various reasons why marital rape cannot be criminalized are as follows:

1. Women who "take up weapons" against their families, particularly their husbands, are frowned upon in India's social system. The wife's role is traditionally defined as homemaker, soft and obedient by nature who regards her husband as next to god the concept of (Patiparmeshwar).
2. Sex (even though forced) is viewed as a marital obligation.
3. Sex is a taboo in Indian Society. Thus, women's sexual rights or their right to say no has never been talked about.
4. Except when one married partner is being prosecuted for an infraction against the other, Section 122 of the Indian Evidence Act prohibits communication during marriage from being disclosed in court. Because marital rape is not a crime, the evidence is inadmissible, even if it is relevant, unless the prosecution is for battery or some other form of bodily or mental abuse under the cruelty clause. It will be nearly impossible to prove the crime of marital rape in court by combining the provisions of the Domestic Violence Act and the Indian Penal Code.
5. It would give unlimited power in the hands of the wife which she could use as a bargaining chip every now and then to get her whims and fancies and her demands fulfilled. In the hands of his wife, the husband would be compelled to become a toy. The very law which was made to promote equality in the

marriage would be used as a tool to hamper equality. Moreover it would ruin the sacred institution of marriage.

6. It should not be criminalized because a huge number of fraudulent cases may be filed against husbands. Due to continued sexual contact and the lack of injuries frequently associated with passive consent, marital rape is thought to be difficult to prove. The criminalising statute can then be abused by disgruntled women who aim to harm their husband's social standing and overall well-being.
7. The presence of a third party and bringing the marital affairs before the court would jeopardise the privacy of the marriage.
8. The women don't talk about violence suffered by them due to the societal pressure. Many women don't even know that can they raise their voice against their husbands for such an offense. They don't know that their consent matters for sexual activity. This is the reason that most of the marital rape cases are not even reported.

A careful analysis of these claims reveals that they are nothing more than excuses for a male-dominated society devoid of any legal substance or moral power. The above-mentioned arguments are not difficult to refute. However, courts in India have been hesitant to hear cases of marital rape.

In addition, many marital rape victims are unable to leave their marriage because they have no other financial protection than her husband's income. If she has children, she faces the additional responsibility of caring for them or losing them to her husband. Often, even though the relationship is unhealthy or abusive, some women may be unable to leave because of their devotion to their partner, which takes precedence over her pain and suffering.

15.2 REBUTTAL TO THE ABOVE

Each of the above points, however, has a counter-argument. Firstly, the definition of marriage has been modified in India by changes to our current laws by the legislature and the judiciary. Judicial separation, divorce, divorce based on irreparable breakdown of marriage, legal marriage age of 18 for girls and 21 for boys, punishment for bigamy, maintenance provision for the spouse after divorce, and recognition of rape during judicial separation have shaped the traditional Indian concept of marriage into a modern, more liberal form that has been followed by the progressive Marriage does not

necessitate the sacrifice of a woman's human rights. Coercion of the wife into having sexual relations is a violation of the fundamental principles of the right to life.

Second, in response to the abuse of the criminalization of marital rape, the primary rebuttal is that every law has the potential to be abused by those who can, but that does not mean that the law should not be passed. If there are no laws to check people's actions and penalise them for their wrongdoings, society as we know it will descend into a state of nature. In a similar vein, it has been noted in D.D. Basu that any law may be abused²⁴⁷: “(a) The possibility of abuse of a statute does not impart to it any element of invalidity. (b) Conversely, a statute which violates the Constitution cannot be pronounced valid merely because it is being administered in a manner which might not conflict with the constitutional requirements. It is well settled that mere possibility of abuse of a provisions of law does not per se invalidate legislation. It must be presumed, unless contrary is proved, that administrative and application of a particular law would be done “not with an evil eye and unequal hand”²⁴⁸ .

Take, for example, sections 354²⁴⁹ and 509²⁵⁰ of the IPC, which deal with sexual harassment. Women can certainly abuse these provisions by filing false complaints, but there are numerous cases²⁵¹ that show that these laws, despite their flaws, have aided women in their fight for the right to their bodies. It is the responsibility of the legislature and the judiciary to account for the difficulty in gathering useful evidence, such as the lack of bruises on the body and private parts, which may be due to the wife's inability to resist the act of rape due to fear of grievous harm.

Even if there are no injuries on the woman's genitalia to show that sexual contact occurred and it was non-consensual, courts have previously ruled that the accused may be found guilty of rape²⁵². “The presumption, and indeed the belief, of resistance are predicated on a variety of myths, family assumptions, and misunderstandings about sexual harassment. According to this viewpoint, if approached by a rapist unexpectedly, a woman would struggle, battle back, and vehemently refuse the attack, demonstrating her refusal to agree to sexual intercourse. When attacked, however, some women will

²⁴⁷ Durga Das Basu, *Shorter Constitution of India* (Lexis Nexis, Nagpur, 14th ed, 2009)

²⁴⁸ *A Thangal Kunju Musaliar v. M. Venkatachalam Potti*, *Authorised Official and Income-Tax Officer*, AIR (1956) SC 246

²⁴⁹ “assault or criminal force to a woman with the intent to outrage her modesty”

²⁵⁰ “word, gesture or act intended to insult the modesty of a woman”

²⁵¹ See *Vishaka v. State of Rajasthan* [AIR 1997 SC 3011], *Apparel Export Promotion Council v. A. K. Chopra* [AIR 1999 SC 625], *Rupan Deol Bajaj v. Kanwar Pal Singh Gill* [AIR 1996 SC 309]

²⁵² See *Rahul Pundalik Birahade v. State of Maharashtra* [2000 (5) BomCR 148]

prefer not to physically resist because they believe their protection, and possibly their life, would be better protected if they do not resist.”²⁵³ In a series of landmark judgments, the Supreme Court has maintained that passive consent, or permission provided under pressure or fear of danger, does not exempt an act from the definition of rape.²⁵⁴

Furthermore, the law has the ability to draw a straight distinction between marital rape and domestic abuse, ensuring that a prosecution involving the latter is not wrongly prosecuted alongside marital rape. Third, marriage equality is important for the country's social development. A husband cannot compel his wife to have sexual intercourse against her will. In *State of Maharashtra v. Madhukar Narayan Mardikar*²⁵⁵, the Supreme Court stated that “a woman has a right to sexual privacy, and it is not accessible to any and every person to violate her privacy whenever he wishes.”

There is no implied consent to sexual intercourse based on the husband's whims and fancies. The Supreme Court, in broadening the scope of Article 21, ruled that mere existence does not constitute a right to life. It is a human right to be treated with respect. As part of her right to life, it grants women the right to health, profession, privacy, freedom from sexual abuse, and the right to live with human dignity²⁵⁶. The right to equality necessitates the express consent of both spouses, whether married or not.

It is also argued that the object of the exception is to preserve family relationships and spousal reconciliation and criminalization of marital rape would leave no scope for reconciliation between spouses and thus would be detrimental to the institution of marriage. Such an argument overlooks the fact that it is the act of a husband forcing himself on his wife, not the claim of rape that damages the marital connection and the chances of reconciliation. This is not a compelling reason to not criminalize nonconsensual conduct.

²⁵³ Randall M, (2010), *Sexual Assault Law, Credibility and Ideal Victims : Consent, Resistance, and Victim Blaming*, *Canadian Journal of Women and the Law*, 22(2), p. 418-419

²⁵⁴ See *Uday v. State of Karnataka* [AIR 2003 SC 1639], *Pradeep Kumar Verma v. State of Bihar* [AIR 2007 SC 3059]

²⁵⁵ AIR 1991 SC 207

²⁵⁶ *Suo Moto v. State of Rajasthan* [RLW 2005 (2) Raj 1385]

CHAPTER 16

RECOMMENDATIONS

The researchers suggest following steps that could help in preventing this heinous act:

1. Foremost of all, Sections 356 and 357 of the Criminal Code should be changed to include marital rape of a wife of any age as a rape offence and to provide a punishment comparable to that which would be imposed on a rapist in ordinary circumstances.
2. Mutual victimization – mutual consent happens between both the parties. Due to societal pressure, women should speak up instead of remaining silent. Men alone cannot be blamed for this act. “A person who silently bares the violence is also equally wrong.”
3. To distinguish consent from coercion, the term "consent" needs be defined. Coercion refers to acts in which consent is not freely given and is secured by the use of force or threat.
4. Inequalities should be eradicated and gender-neutral laws should be enacted.
5. Marital rape should be considered one of the important grounds for divorce under all personal Laws such as the Hindu Marriage Act, 1955; the Special Marriages Act, 1954; and various other acts prevailing in the society.
6. If the exception is amended, the punishment should include supporting the wife as she is financially dependent on her husband. Section 376 should be followed for sentencing and fine. The offence of marital rape should be cognizable, non-bailable and non-compoundable to convey the seriousness of the crime.
7. The women especially in the rural areas should be made aware about their rights and that they can approach the Courts for justice.
8. A provision for filing a FIR against the offender should be created. Practical mechanisms must be established for the proper registering of complaints. To address such complaints, specific police units made up of women must be established, so that battered wives are not afraid to go to the police station for fear of male authority.
9. The Code of Criminal Procedure (Amendment) Act, 2008 provides that “any offence under section 376 and sections 376A to 376D of the IPC shall be tried

as far as practicable by a Court presided over by a woman.”²⁵⁷ Cases of marital rape should preferably be tried by female magistrates to guarantee that the male abuser is not prejudiced.

10. Creating real state-funded Sexual Assault Services, particularly for victims of spousal rape, to teach them on how to file criminal charges against their husbands, to alleviate their fear of litigation and society, and to assist them in cooperating with police in investigations. Women who have been victims of violence should be able to seek competent assistance. Women's free phone hotlines are critical for early contact, offering information about victims' rights and giving initial counselling. Victims must have the right to safe housing and adequate assistance in order to be safeguarded from violence.

²⁵⁷ Amendment of S. 26 of Code of Criminal Procedure, 1973

CHAPTER 17

CONCLUSION

‘Fiat jūstitia ruat cælum’- let justice be done though the heavens fall. Looking back from where we are now, we can see how far we have come as humans and as a society, from the Stone Age to the age of tabloids, and from a man with an animal-like life to a suited man. But why haven't we been able to break free from the patriarchal mindset? In this era of modern justice and equality it's time to realise that the husband is not the master of wife. The governing parameter is equality and all historical perceptions should evaporate. It is acknowledged that changing the legislation relating to sexual offences is a difficult and delicate task, especially in a country like India, where there is a mix of many independent frameworks of individual and strict legislation that may clash with any new revisions relating to the subject. However, recognising the nature of marital rape and emphasising the significance of criminalising it is critical.

In India marital rape exists de facto and not de jure. The prevalence of marital rape in India can be seen through NFHS reports. The debate on whether any man who commits the heinous and inhuman crime of raping a woman may be immune from criminal law simply because he is her husband needs to end. Such a husband must be liable to the punishment for the offence he has committed. The existence of marital rape is unknown to the layman which is worse for a woman because she would silently adhere to her husband's actions.

There are countries such as Israel, South Africa, Ghana, Ireland, Malaysia, Canada, New Zealand and US, among others, which have criminalised marital rape since the 1980s breaking the age old male chauvinistic viewpoint. It was an old notion that women are male's sexual property. It is past time for India to acknowledge the existence of marital rape in society and the necessity of criminalising it. Now in a marriage both are equals. After all, whether it's outside or inside marriage, "NO" means "NO." Based on the parties' positions, an illegal conduct cannot be made legal. Marital rape, like other crimes such as murder, leads in the defilement of the victim's body. However, unlike murder victims, marital rape victims must suffer and then relive the case due to a lack of legal protection. The worst thing is that the victims of marital rape are unable to escape the crime scene, which is her house.

On one hand, it is said that criminalisation of marital rape can lead to destruction of the institution of marriage, however on the other hand, the non-reporting of spousal rape can also lead to breakdown of marriage and that same glorified institution. A marital rape victim is psychologically more traumatized than a stranger rape victim. The safe and protective environment that marriage promises is not provided in such cases. The sense of mistrust, isolation and fear felt by a rape victim, if forced to continue with the way things are, can result in the downfall of the entire family. Just because many crimes without witnesses are difficult to prove and are time consuming, this is no reason for making a crime 'not prosecutable'.

Labelling all wives as potentially vindictive is also not correct and backed by no evidence. When the state makes culture a reason to refuse to legislate on a serious criminal matter, the message that percolates down the line to the entire criminal justice system is that the non-criminalisation of such an act makes women vulnerable to being hurt over and over again by the man they call their husband.

There is an urgent need to translate some of the recommendations that the Law Commission has made into actual legal provisions. Inspiration can be drawn from the various representatives of continents around the globe in criminalising marital rape and emancipating the woman within a marriage. Training, awareness programmes and educating the masses will lead to social change as well.

In the 2013 Criminal Law (Amendment) Ordinance, assault and lewd behaviour guilds were unbiased and solid protests were raised by women's activist gatherings that made the Indian government choose to re-establish the expression assault and express that no one but men can be attackers of ladies.

The discussion over marital rape is critical in establishing fundamental equality for married women who are otherwise confined to the boundaries of their homes in public and legal discourse. It is critical to recognise that there is still a significant gap in criminal law that is undermining constitutional protections that give women equality and autonomy. There have been strong political, legal, and cultural arguments against criminalization, as we have repeatedly shown.

As for the current scenario the narrow and restrictive definition of rape, which allows for the marital exemption make the definition of rape, a hollow statement, which provides escape-route for many perpetrators of sexual violence and the quest for justice

remains unquenched. Marital rape can be only seen as the legally permitted rape which takes away the element of consent from a married woman. The Indian legal framework has no provision to help a married woman who is regularly subjected to evil as a result of Indian society's harmful perception of sex as a duty. It is as if after marriage a woman ceases to be under the jurisdiction of the Indian law and enter the jurisdiction of a single man who would govern her life from then.

If we assume that once the exception for husbands is abolished, the crime of marital rape will be addressed, we will be deceived. The issue of how to reform society's patriarchal standards is a far bigger and more pressing one. The plight of a woman cannot be improved simply by changing the law. It must be backed up by a change in society's patriarchal mindset and by the woman herself. As a result, women must be educated about their rights.

Through the criminalisation of marital rape, India can curtail patriarchal banality, social stigma and stereotypes concerning women and strive for excellence in all spheres of individual and collective activity, so that the nation is always striving for greater levels of effort and achievement. The prevalent belief in the country that rape by one's husband is insignificant needs to be acknowledged and questioned, and reforms in the legislation should be implemented as a result. It is undeniably a significant kind of violence against women, deserving both public and governmental attention.

It is not enough to simply declare behaviour to be illegal. The true goal of criminalising marital rape can only be realised if society rejects the widely held belief that rape by a spouse is insignificant. More needs to be done to raise awareness among the judiciary and the police. Women should be empowered enough to speak up about it, but not to the point where they become tyrants who abuse the laws. This can only be accomplished by bringing about a social shift, and only then can this issue be eradicated.

Therefore, the deletion of the marital rape exception clause is of paramount importance in broadening. India's legal and social horizons are expanding. It is the collective responsibility of the law makers, intellectuals, activists and homemakers to come up with a more pro-active and practical measure though not stringent to curb marital rape.

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