LAW RELATING TO SEXUAL OFFENCES IN INDIA: A CRITICAL ANALYSIS

A DISSERTATION TO BE SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENT FOR THE AWARD OF DEGREE OF MASTER OF LAWS

SUBMITTED BY

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This is to certify that the dissertation titled, "LAW RELATING TO SEXUAL OFFENCES IN INDIA: A CRITICAL ANALYSIS" is the work done by PURNIMA SINGH under my guidance and supervision for the partial fulfilment of the requirement for the Degree of **Master of Laws** in School of Legal Studies, Babu Banarasi Das University, Lucknow, Uttar Pradesh.

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LUCKNOW

LIST OF ABBREVIATIONS

AIR	-	All India Reporter
&	-	AND
AIR	-	All India Reporter
All E.R	-	All England Reporter
Anr	-	Another
Art	.-	Article
Cr.L.J.	–	Criminal Law Journal
Cr.L.R.	-	Criminal Law Review
Cr.P.C.	-	Criminal Procedure Code
D.L.R.	–	District Law Review
D.L.T.	-	Delhi Law Times
Ed	-	Edition
e.g.	-	For Example
GJLS	-	Galgotias Journal of Legal Studies
i.e.	-	*idest* (that is)
ibid	-	idem (in the Same Place)
I.P.C.	-	Indian Penal Code
JILI	-	Journal of Indian Law Institute
Malaya L.Rev.	-	Malaya Law Review
MDU.L.J.	-	MaharshiDayanand University Law Journal
Minn. L.Rev.	-	Minnisotta Law Review
N. E. L.REV.	-	New England Law Review
No.	-	Number
Ors.	-	Others
P	-	Pages

Para	-	Paragraph
Pub	.-	Publication
SA	-	South Africa
SC	-	Supreme Court
SCC	-	Supreme Court Cases
Sec.	-	Section
SCJ	-	Supreme Court Journal
Supra	-	In the work previously cited
U.K.	-	United Kingdom
U.S.A.	–	United States of America
UOI	-	Union of India
V	-	Versus
Vol.	-	Volume

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- *Naz Foundation* v *Government of NCT of Delhi,* 160 Delhi Law Times 277
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- *Navtej Singh Johar v Union of India*
- *Tukaram*v *State of Maharashtra* AIR 1979 SC 185
- *NandiniSatpaty*v*P.L.Dani*(1978) 2 SCC 424
- *State of West Bengal* v *Anwar Ali Sarkar* AIR 1952 SC75, 80
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- V*ivek Kumar @ Sanju and Anjali @ Afsana*v. *The State,* Crl M C No 3073-74/2006
- *Khanu v. Emperor AIR 1925 Sind 286*
- *LohanaVasantlal v. State AIR 1968 Guj 352*
- *FazalRab v. State of Bihar AIR 1963, Mihir v. Orissa 1991 Cri LJ 488*
- *Norris v Ireland 13 Eur Ct HR 149 (1981)*
- *Dudgeon v Great Britain 4 Eur Ct HR 149 (1981)*
- *Modinos v Cyprus 16 Eur Ct HR (1993)*

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CONTENTS

LIST OF ABBREVIATIONS i
LIST OF CASE iii

CHAPTER-I

INTRODUCTION

1.1. STATEMENT OF THE PROBLEM 3
1.2. HYPOTHESIS 4
1.3. OBJECTIVES 4
1.4. SCOPE AND LIMITATION 4
1.5. RESEARCH METHODOLOGY 5
1.6. SURVEY OF LITERATURE 5
1.7. SOURCES OF DATA 5
1.8. SCHEME OF THE WORK 6

CHAPTER-II

RAPE LAWS IN INDIA- PAST AND PRESENT

2.1. RAPE LAWS IN ANCIENT INDIA 8
2.2. RAPE LAWS IN MEDIEVAL INDIA 10
2.3. RAPE LAWS IN MODERN INDIA 10
2.4. PHULMONEE DASSEE'S CASE AND THE AGE OF CONSENT BILL, 1891 12
2.5. RAPE LAWS IN INDIA SINCE 1891 TILL INDEPENDENCE 13
2.6. LAW SINCE INDEPENDENCE TILL MATHURA RAPE CASE 14
2.7. MATHURA RAPE CASE AND THE CRIMINAL LAW AMENDMENT ACT, 1983 16
2.8. RAPE LAW REFORMS DURING 1983 AND 2013 19
2.9. NIRBHAYA CASE, J.S. VERMA COMMITTEE REPORT AND CRIMINAL LAW AMENDMENT ACT, 2013 21
2.10. CRIMINAL LAW AMENDMENT ACT, 2018 25
2.10.1. KATHUA RAPE CASE AND UNNAO RAPE CASE 26
2.10.2. TIMELINE OF EVENTS WHICH LED TO THE AMENDMENT 26
2.10.3. CRIMINAL LAW AMENDMENT ACT, 2018: A WAY FORWARD 26
2.10.3.1. THE INDIAN PENAL CODE, 1860 26
2.10.3.2. THE CODE OF CRIMINAL PROCEDURE, 1973 28
2.10.3.3. THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012 28
2.10.3.4. THE EVIDENCE ACT, 1872 28
2.10.3.5. AMENDMENT AND ITS CRITICAL ANALYSIS 29
2.10.3.6. THE DEBATE ON DEATH PENALTY 29

2.10.3.7. THE DEATH PENALTY AND UNDER-REPORTING OF CASES 30
2.10.3.8. DEATH PENALTY AND THE CHANCES OF THE OFFENDER KILLING THE VICTIM 30
2.10.3.9. THE SHIFT IN FOCUS 31
2.10.3.10. THE AMENDMENT MAKES THE DIFFERENCE OF SECTION 376(1) & 376(2) INEFECTIVE 31
2.10.6. THE DIFFERENCE IN THE PUNISHMENT FOR RAPE OF MINOR BOYS AND MINOR GIRLS 32
2.10.7. THE PROBLEM IN CASE OF NO ANTICIPATORY BAIL 32
2.10.8. CRIMINAL LAW AMENDMENT ACT, 2018 & ITS SUCCESSFUL IMPLEMENTATION 32

CHAPTER-III
MARITAL RAPE IN INDIA: AN EXAMINATION

3.1. RAPE OF A WIFE BELOW 18 YEARS OF AGE 34
3.2. RAPE OF A WIFE LIVING SEPARATELY 37
3.3. MARITAL RAPE AND THE OPINION OF PHILOSOPHERS 39
3.4. HISTORICAL BACKGROUND OF MARITAL RAPE EXEMPTION 40
3.5. TOWARDS CRIMINALIZING MARITAL RAPE 43
3.5.1. RECOMMENDATION OF JUSTICE J.S. VERMA COMMITTEE ON MARITAL RAPE 44
3.5.2. RECOMMENDATION OF DEPARTMENT RELATED PARLIAMENTARY STANDING COMMITTEE ON HOME AFFAIRS ON MARITAL RAPE 45
3.5.3. PARLIAMENTARY DEBATES ON THE ISSUES OF CRIMINALIZATION OF MARITAL RAPE 48
3.6. MARITAL RAPE AND THE INTERNATIONAL LAW OF HUMAN RIGHTS 51
3.7. MARITAL RAPE AND THE CONSTITUTION OF INDIA 52
3.7.1.1. MARITAL RAPE AND THE COMPARATIVE ANALYSIS OF THE LAW IN DIFFERENT COUNTRIES 53
3.7.2. ENGLAND 54
3.7.3. EUROPEAN UNION 55
3.7.4. UNITED STATES OF AMERICA 56
3.7.5. CANADA 57
3.7.6. NEW ZEALAND 57
3.7.7. SOUTH AFRICA 57
3.7.8. AUSTRALIA 57
3.7.9. NEPAL 58
3.7.10. BHUTAN 58
3.8. ARGUMENTS AGAINST THE CRIMINALIZATION OF MARITAL RAPE 58
3.8.1. HISTORICAL PRSPECTIVE FOR CRIMINALISATION OF MARITAL RAPE 58
3.8.1.1. THE "IMPLIED CONSENT" THEORY 58
3.8.1.2. THE "UNITY" AND "WOMEN AS MARITAL PROPERTY" THEORIES 59
3.8.1.3. THE "NARROW CONSTRUCTIONIST" THEORY 60

3.8.2. MODERN ARGUMENTS AGAINST THE CRIMINALIZATION OF MARITAL RAPE 60
3.8.2.1. MARITAL PRIVACY 60
3.8.2.2. MARITAL RECONCILIATION 61
3.8.2.3. EVIDENTIARY CONCERNS AND THE FEAR OF WOMEN LYING 62
3.8.2.4. MARITAL RAPE VIS-À-VIS NON-MARITAL RAPE 64
3.9. ARGUMENTS IN FAVOUR OF CRIMINALIZATION OF MARITAL RAPE 64
3.10. MARITAL RAPE AND THE REALITY OF THE INDIAN SOCIETY 66

CHAPTER-IV

STATUTORY PROVISIONS RELATING TO RAPE LAW IN INDIA

4.1. THEORETICAL FOUNDATIONS OF STATUTORY RAPE LAWS 70
4.2. POSITION OF INDIAN LAW 71
4.3. JUDICIAL RESPONSES 73
4.4. CONSEQUENCES OF INCREASE IN THE AGE OF CONSENT FROM 16 TO 18 YEARS 75
4.5. COMPARATIVE POSITION OF INDIAN LAW WITH RESPECT TO OTHER COUNTRIES 79
4.5.1. THE UNITED KINGDOM 79
4.5.2. NORTHERN IRELAND 80
4.5.3. SCOTLAND 81
4.5.4. U.S.A. 81
4.5.5. CANADA 84

CHAPTER-V

UNNATURAL OFFENCES AND THE LAW IN INDIA

5.1. SCOPE AND AMBIT OF SECTION 377 86
5.1.1. INGREDIENTS 87
5.1.2. PUNISHMENT 87
5.2. HISTORICAL BACKGROUND 87
5.2.1. ANCIENT INDIA 87
5.2.2. ENGLAND 88
5.2.3. MODERN INDIA 89
5.3. THE WOLFENDEN COMMITTEE REPORT 90
5.4. HART- DEVLIN DEBATE 92
5.5. REPORTS OF THE COMMISSION OF INDIA 95
5.6. POSITION IN OTHER COUNTRIES 96
5.7. JUDICIAL RESPONSE 97
5.7.1. NAZ FOUNDATION V GOVT OF NCT OF DELHI 97
5.7.2. SURESH KUMAR KAUSHAL V NAZ FOUNDATION 99
5.7.3. NAVTEJ SINGH JOHAR V UNION OF INDIA 102

CHAPTER-VI

CONCLUSION AND SUGGESTION

6.1. CONCLUSION 106
6.2. SUGGESTIONS 111

BIBLIOGRAPHY 113-115

CHAPTER-1

INTRODUCTION

Sexual offences are as old as the civilization itself. They have been a cause of concern for almost all the societies at all times and at all places. Thus, almost all the legal systems of the world enacted laws to prohibit and punish sexual offences. India, being no exception, always had laws to deal with these offences. In ancient times, the Smritis written by Manu, Yajnavalakya, Narada and Brihaspati prescribed punishments for most of the sexual offences. During medieval period, it was the Muslim Law (consisting of the Quran and the Hadith), which used to deal with these offences. In the modern period, sections 375 to 377 of the Indian Penal Code drafted by Lord Macaulay contained the substantive law dealing with the sexual offences in India but surprisingly unlike other parts of the Penal Code, this part has not remained static rather it has seen extensive amendments so far.

There have been four landmark instances when the research accompanied with mass movement has forced the Legislature of our country to amend the Law relating to sexual offences in India.

First instance is in the case of *Empress v. Hari Mohan Maiti*[1] in this case the death of an 11 years old child bride PhulmoneeDasee, who died of bleeding caused by ruptured vagina after her much older husband tried to consummate the marriage. This incident triggered a mass protest demanding the increase of the age of consent. Forty-four woman doctors brought out long lists of cases where child wives had been maimed or killed because of rape. [2] They were ably assisted by the reformers of that time and thus the then British government was compelled to increase the age of consent from 10 to 12.

The second instance was the infamous judgment of the Supreme Court of India in *Tukaram v State of Maharashtra*[3] (popularly known as Mathura Rape case), in which a sixteen year old tribal girl was declared to be the consenting partner in the entire sexual act committed by two Policemen in the compounds of the police station as no injury marks were found on her person.

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[1] Oxford University Press. p. 60. ISBN 978-0-19-514890-9

[2] Suruchi Pant, " Understanding Rape: society, law and government policy", available at: *http://shodhganga.inflibnet.ac.in/bitstream/10603/17049/9/09_chapter%205.pdf*, (accessed on Feb 12, 2019)

[3] (1979)2SCC 143

The Supreme Court's judgment was criticised by four eminent law teachers of that time –UpendraBaxi, VasudhaDhagamwar, RaghunathKelkar, and Lotika Sarkar in an open letter[4], which was quite uncommon in those days. This triggered wide public protests led by women's rights activists, popularly known as Anti-rape movement. This movement forced the Indian Parliament to bring Criminal Law Amendment Act, 1983, which included situations of aggravated rape and inserted sections 376A to 376 E in the Indian Penal Code and section 114A to the Indian Evidence Act.

Thereafter, the 'Law relating to Sexual Offences' has attracted constant attention of academicians, law researchers, social scientists and womn's rights organisations alike. Several noteworthy suggestions were made, most important among them was to widen the definition of rape to include non- penile and non- vaginal penetration within the definition of rape but all these suggestions were not accepted by the Parliament. It was the unfortunate incident of brutal gang rape of a 23 year old paramedical student Nirbhaya in a moving bus on the night of 16th December, 2012, which brought the masses on streets of Delhi to protest against the Rape Laws in India. It was this incident (third incident in this series), which again forced the Parliament of India to enact Criminal Law Amendment Act, 2013,Kathua and Unnao rape case (fourth incident) is again creats mass protest against Rape laws in India. This incident which again forced the Parliament to enact Criminal Law Amendment Act, 2018. which not only widened the definition of rape under section 375 of the Indian Penal Code but brought several others reforms, which were suggested by the researchers from time to time.

Thus, we find in all these four instances that it was ultimately the mass movements and public protests, which brought positive changes in the Rape Laws in India but the researchers ranging from doctors, law teachers, lawyers or social scientists also have their own significant contribution in the Rape Law Reforms in India.

There is one more instance, where without any mass movement or public protest; the researchers had been able to find reforms in the Law relating to Sexual Offences in India. Till 2012, the cases of child sexual abuse were dealt by the general Criminal Law of the Land (i.e. the Indian Penal Code, the Criminal Procedure Code and the Indian Evidence Act). Several lawyers, social scientists, women rights organisations

[4]Justice Verma Committee Report, p-91 available at: *http://www.thehindu.com/multimedia/archive/01340/Justice_Verma_Comm_1340438a.pdf*, (accessed on Feb 15, 2019)

and child rights organisations recommended to the government to bring a special law to deal with the cases of child sexual abuse, keeping in mind the vulnerable status of children.

Sakshi, a non-governmental organisation working for women's rights filed a writ petition before the Supreme Court of India demanding a special legislation to deal with the cases of child sexual abuse in India.[5] The Supreme Court directed the Central government to look into the demands of the petitioner. Several other persons from different walks of life supported this demand of Sakshi. SatyamevJayate, a popular television programme hosted by a renowned film actor Amir Khan dedicated one of its episodes to this issue and organised signature campaigns to request the Parliamentarians to enact a strong law on this issue. All these demands prompted the Indian Parliament to enact Protection of Children from Sexual Offences Act, 2012. It is a comprehensive legislation, which defines several forms of child sexual abuse and prescribes punishment for them. This Act prescribes the establishment of Special Courts to deal with the cases of child sexual abuse and makes it mandatory for them to follow child friendly procedure so that justice could be done to the innocent victims of these heinous offences. But in this success also, the researchers were ably assisted by the activists from all walks of life and it was an achievement of research coupled with activism.

The success of the researchers in bringing reforms in the Law relating to sexual offences in India from 1892 to 2018 and the absence of any major work critically analysing the Law relating to Sexual offences India post Criminal Law Amendment Act, 2018 has inspired this researcher to undertake this study. It is hoped that this research will prove servivalin bringing further reforms in the Law relating to Sexual Offences in India.

1.1. STATEMENT OF THE PROBLEM

The specific problem chosen for research by the researcher is ' what is the law relating to sexual offences in India at present' and 'what reforms are required in this branch of law'

1.2. HYPOTHESIS

[5]MaharukhAdenwalla, 'Child Sexual Abuse and the Law', Human Rights Law Network, New Delhi (2008), p-137

(i) Death penalty is the ultimate solution in order to protect rape.

(ii) In avariety of cultures, marriage after a rape of an unmarried women has been treated as a "resolution" to the rape.

(iii) In spite of the increased recognition of various penal laws in India, the Marital Rape has generated in the past two to three decades. There is aneed for a special law on marital rape in India, which should also be accepted with international norms on this particular issue.

(iv) There is a need of large scale amendement in section 377 of IPC.

1.3. OBJECTIVES

The general objective of this work is to critically examine the Law relating to sexual offences in India i.e. both the legislations and the judicial decisions relating to this branch of law.

The specific objectives are:-

(i) To study in detail the Law relating to sexual offences in India i.e. both the legislations as well as the judicial decisions

(ii) To examine the Historical evolution of the Law relating to sexual offences in India

(iii) To examine whether any remedy is available to a victim of marital rape at present under the Indian law

(iv) To critically examine and compare the judgments of the Delhi High Court in the historic *Naz Foundation* v *Government of NCT of Delhi*[6] ferther, eveluate the judgment of SC in *Navtejsinghjohar V Union of India* and its impact.

1.4. SCOPE AND LIMITATION

The study is limited to the Law relating to the sexual offences in India. Pure Sociological and Psychological aspects of the problem are not touched upon except where the occasion so demanded.

International dimensions of this problem are covered only incidentally and to the extent necessary to explain the corresponding law or amendments in India. The study also makes a reference to judicial pronouncements but only landmark decisions of the

[6] *Naz Foundation* v *Government of NCT of Delhi,* 160 Delhi Law Times 277 (Delhi High Court, 2009)

Supreme Court and certain High Courts have been referred by the researcher in this work.

1.5. RESEARCH METHODOLOGY

In the present study, all the current literature on topic available in forms of books, research papers, reports and decided court cases etc. has been thoroughly studied and have been incorporated to enrich the research content accordingly. An attempt has been made to study and analysis of the writings that have a bearing on the subject undertaken for study. Emphasis has been laid on the case law that has been decided by Supreme Court and High Courts of different states. Doctrinal Research methodology has been adopted for conducting the research. The researcher has mainly focussed on the method of doctrinal, analytical and observational simultaneously, in addition to descriptive, explanatory, historical methods, had also been applied in accordance with the need of the study.

1.6. SURVEY OF LITERATURE

Existing Literature on the relevant topic has been extensively surveyed. Books and research papers on the aspects of Law relating to sexual offences in India have been referred to. Law Journals and other periodicals have been surveyed and bibliographic Indexes have been prepared.

1.7. SOURCES OF DATA

It covers primary sources and secondary sources. As a primary source for the presentation and analysis of information, the relevant original texts of legislations, conventions, judicial decisions and reports of the Law Commission of India, Parliamentary Select Committees and various other Committees have been examined.

Books, Journals, Periodical, Reports and the Like have been used as primary as well as secondary source materials. Further news items from various newspapers and news magazines have also been utilized as secondary source.

Websites have been browsed extensively to get information and the literature on the topic of the study both at the international and national level.

1.8. SCHEME OF THE WORK

This work is structured into VI Chapters. All the chapters are interlinked and intra linked with each other.

The First Chapter titled Introduction covers the domain- the problem and its consequences, the need, the object, the methodology and the limitation of the study.

The Second Chapter titled Rape Laws in India – Past and Present first of all discusses the History of the Rape Laws in India including the Definition of rape and Punishment prescribed for rape in ancient, medieval and modern India. Then, it critically analyses the changes brought about by the Criminal Law Amendment Act, 1983, Criminal Law Amendment Act, 2013and Criminal Law Amendment Act, 2018. It also discusses some landmark judicial decisions on this area.

The Third Chapter dealing with Marital Rape and the Law in India first of all discusses what marital rape is, then what the present position of the Indian law with respect to marital rape is, i.e. how far it is considered as a punishable offence and how far it is considered a civil wrong, then recommendation of Justice J.S. Verma Committee with regard to this issue is looked into, then the issue of marital rape is analysed with human rights angle and is tested on the touchstone of the Indian Constitution. Then, a comparative study of the Indian Law with respect to the Laws of certain other countries is done. After that, arguments against and arguments in favour of the criminalisation of marital rape are carefully analysed. Then, at last an attempt has been made to have a look at the reality of the Indian society with regard to this issue and suggestions for law reforms are made.

The Fourth Chapter dealing with Statutory Rape and the Law in India first of all discusses what statutory rape is, then it discusses the present position of Indian Law with respect to this issue, then an attempt is made to evaluate the consequences of increase in the age of consent from 16 to 18 and then a comparative study of the Indian Law with respect to certain other countries is done. Then at last, suggestions for law reforms are made.

The Fifth Chapter dealing with Unnatural Offences and the Law in India first of all discusses the scope and ambit of section 377 of the Indian Penal Code and then an attempt has been made to look into the historical, philosophical and religious background of this section. Then, the judgments of the Delhi High Court in the

historic *NazFoundation*V *Government of NCT of Delhi*[7]and that of the Supreme Court of India in *Suresh Kumar Koushal&Anr.* V*Naz Foundation &Ors*.[8]are comparatively analysed and an attempt has been made to critically evaluate the constitutional validity of section 377 of the Indian Penal Code so far as it criminalizes the consensual sexual activity between two adults in private. Recent judgement of SC in *Navtej Singh Johar V Union of India*.[9]Then at last, a comparative study of the Indian law with respect to certain other countries is done and then suggestions for law reforms are made.

The Sixth Chapter titled Conclusion summarises the results of the present research and reiterates the suggestions for reforms in the Law relating to Sexual Offences in India.

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[7]*Naz Foundation v Government of NCT of Delhi,* 160 Delhi Law Times 277 (Delhi High Court, 2009)
[8]*Suresh Kumar Koushal&Anr. v Naz Foundation &Ors*., available at: *http://judis.nic.in/supremecourt/imgs1.aspx?filename=41070,* (accessed on 18 Feb, 2019)
[9] 2018 SCC Online Bom 6956

CHAPTER-2

RAPE LAWS IN INDIA- PAST AND PRESENT

At present, the substantive Law relating to sexual offences in India consists of Sections 375, 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376DB, 376E, 377 of the Indian Penal Code, 1860 and the Protection of the Children from Sexual Offences Act, 2012. They deal with three types of sexual offences i.e. rape, unnatural offences and child sexual abuse. Out of these, Section 377 of the Indian Penal Code deals with the unnatural offences and thus it will be discussed in detail in the Seventh Chapter. The Protection of Children from Sexual Offences Act, 2012 deals with the cases of the child sexual abuse and thus it will be discussed in the Fifth Chapter. So, in this chapter, researcher has limited discussion to Sections 375, 376 and 376A to 376 E of the Indian Penal Code, 1860 as these provisions at present constitute the rape laws in India. But to have a proper understanding of the present, let us have a look at the past of the rape laws in India. The rescarcher has studied the paranomic view of rape laws in India.

2.1. RAPE LAWS IN ANCIENT INDIA

Even during ancient period, sexual offences were punishable by law. As per Hindu Law, they were mainly divided into two classes- rape (*Sahasa)* and adultery (*StriSangraha*) though the term *Strisangraha*was generally used to denote both the clauses. The ancient law givers described rape as one of the most heinous offences and prescribed severe punishments for the rapists. Sexual offences, whether against married or unmarried women or against mature or immature girls, with or without consent, were with a few exceptions, punishable by law but those with married women were generally more severely dealt with than those with maidens.[10] Rape of the prostitutes were also punishable by law though the quantum of sentence was much lower in case of an ordinary prostitute and was comparatively higher in case of a prostitute attached with the court. Rape on slave girls or female servants was also punishable in ancient India.

[10] R.D. Das Gupta , "Crime and Punishment in Ancient India", Vishvabaharati Publications, New Delhi (2006) p-76

Consent was the most important factor. If a man had any intercourse with a woman with force or fraud (i.e. without her consent), it was regarded as a more serious offence. Consent extenuated the guilt to a great extent, though not wholly as sexual offences were regarded as offences not only against human body but also against morality and matrimonial rights.[11]

There were several other factors also, which determined the nature of sexual offence. Some of them are as follows[12]:-

(i) Caste of the man and the woman involved

(ii) The civil condition of the woman (i.e. whether married or unmarried)

(iii) Whether the woman is guarded or unguarded

(iv) Who takes the initiative

(v) Personal merits of the offender and the victim

Importance of the caste as factor in deciding the punishment for rape can be seen from one of the verse of Manu, in which he states that;

"Those who commit rape on the wives of others should be marked by punishments which caused terror and then be panished."[13]But he adds that "This punishment is for the men of twice born castes and not for Sudras, who are to be capitally punished even for adultery with protected women of twice born castes."[14]

But Manu was not alone in prescribing different punishments for the same offence depending upon the caste of the offender and the caste of the victim. All other Smritikaras take the same stand. Lighter punishments were prescribed for the ravishment of the girl of an inferior caste and severe punishment was prescribed for the rape of the girl from a higher caste. An example can be seen from the book of Yajnavalakya, where he states "If a man ravishes a maiden of inferior caste, his hand shall be cut off and in the case of a maiden of higher caste, he shall be punished with capital punishment."[15]

Narada also holds a similar opinion. In one of his verses, he states, "When a man violates a maiden of an inferior or same caste against her will, two of his fingers shall

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[11] *Ibid*

[12] Ram Mohan Das, "Crime and Punishment in Ancient India (with special reference to the Manusmriti)", KanchanPubliccations, Bodh-Gaya (1982)

[13] Manu VIII 352 quoted in Gupta, R.D. Das, "Crime and Punishment in Ancient India", Vishvabaharati Publications, New Delhi (2006)

[14] Manu VIII, 354 ibid

[15] Yajnavalakya II, 288 ibid

be cut off, but if the maiden belongs to higher caste, he shall be punished with death or confiscation of entire property."[16]

2.2. RAPE LAWS IN MEDIEVAL INDIA

During the Medieval period, in most parts of the country Muslim Law was followed. The Holy Quran and the Hadith (or Sunnah) are the main sources of Muslim Law, Ijma and Qiyas being the others. Muslim Law condemned rape equally sternly with the punishment ranging from stoning to death to the infliction of 100 lashes. Quran puts rape among one of the worst crime committed by human beings.[17] The scanty literature available on this area does not throw light on whether rape was considered as the crime against the person of woman.[18]

2.3. RAPE LAWS IN MODERN INDIA

During the modern period, the courts set up by the East India Company administered and adopted Muslim penal norms of criminal justice.[19] In 1834 Lord Macaulay came to India and became Law Member of the Supreme Council, under the Charter of 1833. He started working on a code of substantive criminal law for India. Clause 359 and 360 of the draft Penal Code were devoted by him to deal with the offence of rape. Clause 359 defined the offence of rape and clause 360 prescribed punishment for it. Clause 359 of Macaulay's draft code stated;

> "A man is said to commit rape, who in except in the cases hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the following descriptions:
>
> First- Against her will
>
> Second- Without her consent, while she is insensible
>
> Thirdly- With the consent, when her consent has been obtained by putting her in fear of death or of hurt
>
> Fourthly- With her consent, when her consent is given because she believes that he is a different man to whom she is or believes herself to be, married.
>
> Fifthly- With or without her consent when she is under nine years of age
>
> Exception- Sexual intercourse by a man with his wife is in no case rape."

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[16]Narada, 12 Tit., 71 ibid
[17]http://submission.org/Rape.html, (accessed on 12 Feb, 2019)
[18]Dr. Vandan, "Sexual Violence against women", Lexis NexisButterworthsWadhwa, Nagpur (2009) p-95
[19]*Ibid*

Clause 360 stipulated that the punishment for rape should not be more than 14 years and not less than two years, with or without an additional fine.

A few peculiar features of this section were[20]

(i) The age of consent in the fifth sub clause was very less.

(ii) There is an unmistakable preference of the rights of the husband over his wife against the wife's right to herself as under no circumstances a husband can be said to have raped his wife.

(iii) Only a married woman could claim that her consent had been given under a false impression. Unmarried woman had no such right and their consent, no matter how it was obtained, was sufficient to exonerate the accused.

According to VasudhaDhagmwar, clause 359 reflected the Victorian notions of morality. This clause attracted several comments from the judicial officers of the East India Company. Messrs Cmpbell and Pyne of Madras Presidency argued that a woman, who submitted to threat of trivial hurt, was not reluctant and did not deserve the protection of law. Greenhill, a judicial officer suggested that the hurt should be amended to read 'grievous hurt'. This suggestion was accepted by the Law Commissioners but was rejected by John Mc Leod in his notes on the Report of the Law Commissioners. He went to remark that these sections were not intended to protect only rigid chastity. [21]

JF Thomas, a judge in Madras Presidency, criticised the code for giving too wide a range of punishment. He argued that once the commission of rape is proved, character of woman should be no criteria and same punishment should be awarded to all offenders. [22] But the Law Commissioners took a different view and held that injury in case of a high class woman is surely infinitely more than in case of a woman of low caste, who was presumed to be without character.

Section 375 of the final version of the Indian Penal Code, 1860 differed from clause 359 as it incorporated an important amendment "the sexual intercourse by a man with his own wife, the wife not being under ten years of age, is not rape." No reasons for this change were given by the Select Committee. Apart from that, most of the other

[20] VasudhaDhagamwar, "Law, Power and Justice", 1992 p112, quoted in Dr. Vandana, "Sexual Violence against women", Lexis NexisButterworthsWadhwa, Nagpur (2009) p- 96

[21] *Ibid*

[22] *Ibid*

things mentioned in clause 359 found their place in section 375. For next 30 years, rape law remained the same in India.

2.4. PHULMONEEDASSEE'S CASE AND THE AGE OF CONSENT BILL, 1891

In 1890, Phulmonee, an eleven year old girl, was raped to death by her husband, HariMaiti, a man of 35 years. Under existing Penal Code provisions, however, he was not guilty of rape since Phulmonee had been well above the statutory age limit of ten. The medical evidence showed that Phulmonee died of bleeding caused by ruptured vagina. The court acquitted HariMaiti of the charge of culpable homicide but convicted him for causing death by rash and negligent act.

Though full justice was not done in this case, the event, however, added enormous weight and urgency to Malabari's campaign for raising the age of consent from ten to twelve. The reformist press began to systematically collect and publish accounts of similar incidents from all over the country. Forty-four woman doctors brought out long lists of cases where child wives had been maimed or killed because of rape. It was reported that Phulmonee's case was not an isolated one. Investigations mentioned at least 14 cases of pre-menstrual cohabitation that had come to be noticed. An Indian doctor reported in court that 13 percent of the maternity cases that he had handled involved mother's below the age of thirteen. The defence lawyer threw a challenge at the court: cohabiting with a pre-pubescent wife might not have *sastric*sanction, yet so deep rooted was the custom that they wondered how many men present in court were not in some way very complicit with the practice.[23]

The definition of puberty proved to be the slamming block. Reformers proved that puberty sets in properly only after 12. While revivalist-nationalists equated puberty with menarche, medical reformers argued that puberty was a prolonged process, and menarche was the sign of itscommencement, not of its culmination. The beginning of menstruation did not indicate the girl's 'sexual maturity' which meant that her physical organs were developed enough to sustain sexual penetration without serious pain or damage. Until that capability had been attained, they argued, the notion of her consent was meaningless.

[23]Tanika Sarkar and UrvashiButalia(1995) Women and the Hindu Right. New Delhi: Kali for Women., quoted in Pant, Suruchi, " Understanding Rape: society, law and government policy", available at: *http://shodhganga.inflibnet.ac.in/bitstream/10603/17049/9/09_chapter%205.pdf*, (accessed on Feb 12, 2019)

Sarkar highlights how all strands of opinion -colonial, revivalist, nationalist, medical-reformer- agreed on a definition of consent that pegged it to a purely physical capability, divorced entirely from free choice of partner, from sexual, emotional or mental compatibility. Consent was made into a biological category, a stage when the female body was ready to accept sexual penetration without serious harm and damage. The only difference lay in assessing when this stage was reached.[24]

Finally the efforts of the reformers bore fruit and in 1891, Sir Andrew Scoble introduced the Age of Consent Bill, which culminated into the Age of Consent Act, 1891. This Act amended the Indian Penal Code and increased the age of consent from 10 years to 12 years both in the cases of marital and extra marital rape. BehramjiMalbari, Parsi reformer and a journalist from Bombay played an important role in bringing this reform.

2.5. RAPE LAWS IN INDIA SINCE 1891 TILL INDEPENDENCE

The agitation for increasing the age of consent received increased attention since the beginning of the nineteenth century. In 1922, RaiBahadurBakshiSohanLal , MLA, tried to introduce a Bill to further raise the age of consent in both marital and extra marital cases[25]. This attempt failed but it strengthened the agitation for law reforms, which became stronger with every passing year.

In 1924, Dr.Hari Singh Gaur introduced a Bill to increase the age of consent to 14 in both marital and extra marital cases. The Bill was referred to a Select Committee, which made a material alteration by reducing the age from 14 to 13 years in the cases of marital rape. On 1st September 1925, Sir AlexenderMuddiman introduced the Bill fixing 14 years as the age of consent in extra marital cases and 13 years in marital cases and this resulted in the Amendment Act of 1925. This amendment for the first time introduced a distinction between marital and extra marital rape cases by providing different age of consent in both the 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 for which the age

[24] *Ibid*

[25] 'Report of the Age of Consent Committee', Calcutta, Government of India, 1928-29, p11 quoted by Dr. Vandana, "Sexual Violence against women", Lexis NexisButterworthsWadhwa, Nagpur (2009) p- 99

of consent was raised to thirteen stood mitigated to a large extent by the reduced punishment.

The question of age of consent was still not considered finally settled and Dr.Hari Singh Gaur again introduced a Bill in 1927 to increase the age to 14 years in marital cases and 16 years in extra marital cases respectively. This led to the appointment of the Age of Consent Committee. [26] This Committee reviewed the existing circumstances and recommended that in case a husband has sexual intercourse with his wife below 15 years of age, this is a case of marital misbehaviour and thus the use of the term marital misbehaviour would be more suited than the term rape. The Committee further recommended that this offence should be included in chapter XX of the Indian Penal Code and that section 375 and 376 of the Indian Penal Code should be confined to rape outside marital relation. It also recommended maximum punishment of either description for 10 years and fine where the wife is below 12 years of age and imprisonment, which may extend up to one year or fine or both where the wife was between 12-15 years.[27]

2.6. LAW SINCE INDEPENDENCE TILL MATHURA RAPE CASE

In 1949, rape laws were further amended in respect of the age of consent. The age of consent was raised to 16 years in the extra marital cases and 15 years in the marital cases. In the year 1955, another amendment was brought in the Penal Code, which substituted the word transportation for life by imprisonment for life in section 376.

In the year 1959, the Law Commission of India stated its intention to revise the Indian Penal Code[28] but it was only after 12 years i.e. in the year 1971, it was able to send its report to the Union Law Minister. The major recommendations of the 42nd Report of the Law Commission of India were[29]:-

(i) Section 375 should be amended to include the situations where the consent of the woman has been obtained after she has been put in fear of death or grievous hurt not only to herself but also to anyone else present on the spot.

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[26] *Ibid*
[27] *Ibid*
[28] Law Commission of India , Forty Second Report p- 2
[29] *Id* p-276

(ii) The punishment prescribed for rape should be enhanced to a maximum of fourteen years rigorous imprisonment and thus section 376 should be accordingly amended

(iii) The cases of sexual intercourse by a husband with his own wife below 15 years of age and also the cases of sexual intercourse by a man with a girl below sixteen years of age with her consent, i.e. the cases of statutory rape should not be called rape even in a technical sense. They recommended separate section 376A and 376 B for such cases.

(iv) One of the very important recommendations of the Law Commission was that if a woman is living separately from a husband after getting a decree of judicial separation or by mutual agreement, she should not be treated as the wife of that man and if he has sexual intercourse without her consent, it should be punishable as rape.

(v) With respect to the sexual intercourse by a man with his child wife, the Law Commission prescribed maximum punishment of seven years in such cases.

(vi) With respect to the illicit intercourse by man with a girl between twelve and sixteen years of age, the Law Commission recommended that such offences should not be equated with rape and they should not be as severely dealt with as rape. Maximum punishment of seven years was prescribed for such offences and bonafide mistake as to the age of the girl being above sixteen years of age was recommended to be treated as valid defence.

(vii) The most significant suggestion of the Law Commission of India was with respect to custodial rape. The Law Commission observed that under certain circumstances, woman's submission to sexual intercourse is really not a willing consent, whereby men in authority take advantage of the woman under their custody. It recommended addition of section 376 C, 376D and 376E. These sections prescribed punishment for the cases of illicit intercourse by a public servant, superintendent of women' s or children's institution or by any person, who is the manager or staff of a hospital.

This report of the Law Commission of India was followed by the Indian Penal Code (Amendment) Bill, 1972. A Joint Committee was appointed to review the Bill which presented its report on 29th February 1976. Its main observations were as follows[30]:-

(i) The Committee was of the opinion that sexual intercourse by a man with his own wife whatever might be her age, should not be regarded as rape.

(ii) It diluted the maximum punishment to 10 years from life imprisonment, which could be imposed depending upon the gravity of offence.

(iii) Punishment of three years was recommended in the case of judicially separated wife.

(iv) The case of custodial rape, cases of seduction by the public servant, etc., taking undue advantage of his position, were recognised and compulsory imprisonment with fine were imposed as punishment.

These recommendations could not see the light of the day as the Bill of 1972 lapsed. In 1979, again a Bill to amend the Indian Penal Code was introduced. It was passed by the Rajya Sabha and was pending in Lok Sabha. This Bill also lapsed due to the dissolution of the Lok Sabha in 1979. Thus, for more than 100 years, the same rape law continued to exist in India only with minor amendments with respect to the age of consent.

2.7. MATHURA RAPE CASE AND THE CRIMINAL LAW AMENDMENT ACT, 1983

In the year 1979, the country witnessed mass campaign for the amendment of rape laws. This campaign was unprecedented and was triggered by the infamous decision of the Supreme Court of India in *Tukaram*v *State of Maharashtra*[31](popularly known as Mathura Rape case). The facts of this case were that Mathura, an orphan girl, was living with her brother Gama. Both of them worked as labourers to earn a living. Mathura developed an intimacy with one Ashok and they decided to get married. On 26th March, 1972, Gama filed a complaint of kidnapping against Ashok and two of his relatives with Desai Ganj police station. On his complaint, Mathura, Ashok and two others with whom Ashok were living, were brought to the police station at 9 p.m. Statements of Mathura and Ashok were recorded. By that time it was 10:30 p.m. and everyone was about to leave, the accused asked Mathura to wait and others to move

[30] Report of the Joint Committee on the 'India Penal Code (Amnedment) Bill, 1972' , Government of India, Rajya Sabha Secreatariat, 29 February 1976

[31] *Tukaram*v *State of Maharashtra* AIR 1979 SC 185

out. The direction was compiled with. Immediately thereafter, Ganpat, one of the police constables on duty, took Mathura to a toilet and raped her despite protest and stiff resistance. The second constable Tukaram then went to Mathura and sexually molested her. He also wanted to rape her, but was unable to do so for the reason that he was in a highly intoxicated condition.

In the meantime, Ashok and two others who were waiting outside saw the lights of the police station were turned off and its entrance door was closed from within. They were behind the police station and started shouting for Mathura. A crowd gathered outside the police station. Tukaram then came out and told them that Mathura had already left. But, immediately thereafter, Mathura came out from the rear of the police station and informed the others that the accused Ganpat had compelled her to undress herself and had raped her. Thereafter a complaint was lodged and Mathura was examined by a doctor. The medical report found no injury on her person. An old rupture was found on her hymen and the vagina admitted two fingers easily. The age of the girl was estimated by the doctor to be between 14 and 16 years. The presence of semen was detected on the girl's clothes.

The Sessions court termed Mathura a shocking liar and stated that she was habituated to sexual intercourse and thus acquitted the accused of all charges. The Nagpur Bench of the Bombay High Court however reversed the order of acquittal and stated that sexual intercourse was forcible and thus amounted to rape. The High Court was of the opinion that mere passive submission or helpless surrender of the body cannot be equated with consent. The appellants convicted by the High Court moved the Supreme Court by way Special Leave to Appeal, which was granted. The Supreme Court set aside the order of the High Court on the ground that the primary burden of proof was on the Prosecution, which they failed to discharge. The Supreme Court was of the opinion that as per clause thirdly of section 375, it was only the fear of death and hurt which could vitiate the consent and since the girl was taken away from amongst her near and dear ones and thus there was no fear. The Supreme Court thus acquitted both the accused of all charges.

The decision drew the attention of four law teachers UpendraBaxi, RaghunathKelkar, Lotika Sarkar and VasudhaDhagmwar. In October 1979, they wrote an 'Open Letter

to the Chief Justice of India'[32]. In this letter, they criticised the judgment of the Supreme Court as an extra ordinary decision sacrificing the human rights of the woman under the law and the Constitution. They raised the following questions:-

(i) Why was she asked to remain in the police station even after her statement was recorded and when her friends and relatives were asked to leave?

(ii) Why were the lights puts off and doors shut?

(iii) Does the Indian Supreme Court really expect a young girl 14-16 years old to put up such a stiff resistance against well built police men so as to have substantial marks of physical injury?

(iv) Does the absence of such marks necessarily imply absence of stiff resistance?

(v) Does the absence of shouts imply easy inference of consensual intercourse in a police station?

(vi) Is the taboo against pre marital sex so strong as to provide a license to Indian police to rape young girls? or to make them submit to their desire in police station?

The open letter emphasised on the difference between consent and submission both in law and in common sense. It also expressed its displeasure with the Supreme Court on not condemning the very act of calling a girl to the police station in utter disregard to the law of the land made by the Parliament and so recently reiterated by the Supreme Court in *NandiniSatpaty*v*P.L.Dani.*[33]The letter also expressed its surprise over the fact that the Supreme Court judgment did not utter even a single word condemning the use of the police station as a theatre of rape or submission to sexual intercourse and urged the Supreme Court to hear the Supreme Court to rehear the case afresh.

This letter received tremendous publicity from the Press and gave rise to a Nation-wide movement for the amendments of the law. Many demonstrations, meetings and mass protests were organised by the women organisations, lawyers, teachers, students,

[32]UpendraBaxi, RaghunathKelkar, Lotika Sarkar and VasudhaDhagmwar, 'Open Letter to the Chief Justice of India'; (1979) 4 SCC 1, available at: *http://pldindia.org/wp-content/uploads/2013/03/Open-Letter-to-CJI-in-the-Mathura-Rape-Case.pdf*, (accessed on 20 February, 2019)

[33]*NandiniSatpaty*v*P.L.Dani*(1978) 2 SCC 424

social workers, etc. An academic protest by a group of four got transformed into a national wave and thus became a unique event in the History of Criminal Law.[34]

The judgment was widely criticised both inside and outside Parliament and thus the government took serious note of the rare degree of public and Parliamentary criticism of the law and thus the Law Commission was directed to submit its report on rape and allied offences in 1980. The Law Commission submitted its report in a remarkable time period of less than one month. The Law Commission in its 84th report recommended several significant amendments to the Indian Penal Code, Criminal Procedure Code and the Indian Evidence Act. After considering the recommendations of the Law Commission, the Criminal Law (Amendment) Bill was introduced in the Lok Sabha on 12th August, 1980. The Bill was referred to a Joint Committee of both Houses on 23rd December, 1980. The Joint Committee made several departures from the recommendations of the Law Commission. The Criminal Law (Amendment) Bill as reported by the Joint Committee was introduced in the Lok Sabha by the Minister of Home Affairs. After being vigorously debated, it was passed by both the houses of the Parliament. It received President's assent on 25 December 1983. The main changes brought about by the Criminal Law Amendment Act, 1983 were as follows:-

(i) The concept of aggravated form of rape was for the first time recognized. The cases of gang rape, rape of a minor girl, rape of a pregnant woman, custodial rape committed by public servants, police officers, persons on the management or staff of jail, remand home, women's or children's institution or hospital found mention in the list of aggravated forms of rape. Enhanced punishment were provided under section 376 (2) for the cases of aggravated forms of rape.

(ii) New clause fifthly was added to section 375. It made the consent of a woman of unsound mind or the consent which is given under intoxication or administration of some stupefying or unwholesome substance, irrelevant against a rape charge.

(iii) A new section 376A was added. It prescribed maximum punishment of two years for the rape of judicially separated wife.

[34]VasudhaDhagmwar, 'Law, Power and Justice", 1992 p252 quoted by Dr. Vandana, "Sexual Violence against women", Lexis NexisButterworthsWadhwa, Nagpur (2009) p- 113

(iv) The Act provided for minimum mandatory punishment of seven years in normal rape cases and 10 years in aggravated rape cases.

(v) Section 228A was added in the Indian Penal Code. It prescribed punishment for the disclosure of the identity of the victim punishable except with the permission of the victim.

(vi) Subsections 2 and 3 were added to Section 327 of Criminal Procedure Code, 1973. Subsection 2 provided that inquiry or trial of the cases under sections 376 or 376A to D shall be conducted in camera. Subsection 3 prohibited printing and publication of any matter in relation to the proceeding without the permission of the court.

(vii) Section 114A was added to the Indian Evidence Act, 1872, which shifted the burden of proof on the accused in the cases of aggravated rape once the sexual intercourse was proved and the victim stated that she did not consent.

Falvia Agnes has observed that the 1983 act was inadequate answer to the campaign for change in rape laws and what started with a bang ended in a whimper [35] but at the same time the Act was welcomed as a progressive step and it symbolised the beginning of future changes. [36]

2.8. RAPE LAW REFORMS DURING 1983 AND 2013

Despite several progressive steps, some lacunae still existed in the existing law. To fill them, National Commission for Women made certain suggestions. These suggestion were considered by the Law Commission of India, which came up with its 156th report. Unhappy with the existing law and the recommendation of the Law Commission, a Non Governmental Organisation Sakshi approached the Supreme Court for directions concerning the definition of the expression sexual intercourse as contained in section 375 and certain other issues. The Supreme Court directed the Law Commission to examine these issues. In response to the order of the court, the Law Commission came up with its 172nd report.

The major recommendations of the Law Commission in its 172nd report were as follows:-

[35] Flavia Agnes, "The Anti RapeCmpaign- The Struggle and the Setback", in the Struggle Against Violence, ChhayaDatar (ed), 1993, p99, quoted by Dr. Vandana, "Sexual Violence against women", Lexis NexisButterworthsWadhwa, Nagpur (2009) p- 113

[36] *Ibid*

(i) It was felt necessary by the Law Commission to include non penile and non vaginal penetration including the penetration of any other body part or an object within the definition of rape.

(ii) The Law Commission further recommended that the provision relating to rape should be made gender neutral as not only women and girls but young boys are also being subjected to rape.

(iii) The Commission favoured retaining of the Marital Rape exception though recommended the increase in the age to 16 in such cases.

(iv) It recommended the retention of the adequate and special reasons clause to section 376.

(v) It further recommended enhancement of punishment to a maximum of seven years in the cases of rape by husband during judicial separation.

(vi) It recommended deletion of section 377 of the Indian Penal Code.

(vii) The Commission reiterated its suggestion made in the 84th Law Commission Report that a new section 166A should be inserted in the IPC. It punishes a public servant who knowingly disobeys the law prohibiting from requiring the attendance at any place of any person for the purpose of investigation into any offence or during the course of conduct of investigation and such an act results in prejudice to another person.

(viii) The Commission recommended that subsection (3) and (4) be inserted in section 160, Cr.PC. to the effect that the statement of the victims shall be recorded by a female police officer or in her absence a female government servant.

(ix) It further recommended that proviso to section 160 should provide for recording of the statement of the victim in presence of one of her relatives of her choice, who shall not interfere with the recording of the statement.

(x) It also recommended the insertion of section 164A to Criminal Procedure Code for medical examination of victim with her consent by a medical practitioner without delay.

(xi) It also recommended the insertion of new section 53A to Criminal Procedure Code for the medical examination of the accused without delay.

(xii) It also strongly recommended that proviso to section 273 of Criminal Procedure Code be modified so that minor victim is not confronted by the

accused while at the same time ensuring the right of the accused to cross examine.

(xiii) The Law Commission recommended insertion of section 53A in the Indian Evidence Act, which provides that where consent of the victim is in issue, her past sexual experience with any person will not be relevant.

(xiv) The Commission was of the view that section 146 (4) should be inserted to Indian Evidence Act prohibiting the questions regarding general character of the victim.

In the year 2005, the Criminal Procedure Code was amended by the Parliament. Some of the recommendations of the Law Commission were accepted. The major changes brought in 2005 are as follows:-

(i) Section 164A was inserted in the Criminal Procedure Code. It contemplates the medical examination of the rape victim within 24 hours of the receiving of the information. Such medical examination is to be done by a registered medical practitioner employed preferably in a hospital run by the Government.

(ii) A new additional clause was added to section 176 Criminal Procedure Code, which provided for a case where rape is alleged to have been committed on a woman while in custody, an inquiry shall be held by the Judicial Magistrate or Metropolitan Magistrate having local jurisdiction over the case. The inquiry will be in addition to the police investigation.

(iii) Section53 A was added to the Criminal Procedure Code. It provided for the medical examination of the accused in a rape case by medical praticioner employed in the government hospital or by any other medical practitioner who is acting on the request of a police officer not below the rank of a sub inspector. The section further states that it will be lawful for such medical practitioner or any other person acting in good faith and under his direction to use such force as is reasonably necessary for the purpose of medical examination of the accused.

2.9. NIRBHAYA CASE, J.S. VERMA COMMITTEE REPORT AND CRIMINAL LAW AMENDMENT ACT, 2013

On the unfortunate night of 16 December, 2012, a 23 year old girl, an aspiring paramedic, was returning back after watching a movie with her male friend. It was 9

p.m. and she found difficulty in finding transportation for her way back home. She boarded a bus, not a regular one, but without sensing anything amiss. Her male friend was assaulted and she was brutally gang raped by six men inside that bus. And the inhumanity did not end there; an iron rod was forced into her body which totally destroyed her intestine. She fought for life for few days and finally died in a hospital in Singapore. This incident, not only because it happened in the heart of Delhi, the National Capital but also because of the extreme brutality shown by the rapists shocked the public conscience[37]. People came out in hordes, organized protests and demanded justice for the victim. Slowly this movement took a nation- wide character and people started campaigning for reforms in the rape laws.

Public protests took place even at India Gate and Raisina Hills, the latter being the site of both RashtrapatiBhawan and Parliament. Thousands of protesters battled police and Rapid Action Force Units. Demonstrations were lathi-charged, shot with water-canons and teargas shells. Hundreds of protesters were arrested. The government closed metro stations to discourage protesters to gather at Raisina Hills but then also protesters gathered in large numbers and demanded justice and legal reforms. After the death of victim on 29th December 2012, the movement became even more widespread and public protests were organised in almost all the parts of the country. Even inside the Parliament, the members cutting across the party lines demanded justice, swift action on the part of the government and stricter laws for crime against women.

The Government of India appointed Justice (retd.) UshaMehra Commission of Inquiry to inquire into the very aspects of this incident, to identify the lapse on the part of the police, any authority or any person and also to give suggestions to improve the safety and security of women.[38]

Another Committee headed by Justice J.S. Verma and consisting of Justice Leila Seth and Gopal Subramanium as members was constituted to look into amendments into possible amendments of Criminal Law to provide for quicker trial and enhanced punishment for criminals committing sexual offences of extreme nature against women.[39]

The major recommendations of Justice Verma Committee Report were as follows:-

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[37] Justice UshaMehra Commission of Inquiry Report, p-6
[38] *Ibid* p-1
[39] Justice Verma Committee Report, p-2

(i) The definition of the term rape in section 375 should be broadened to include non-penile and non-vaginal penetration i.e. penetration by any other body part or any object.

(ii) The broader gender neutral term sexual assault should be used but the term rape should also be retained within its confines.

(iii) The marital rape exception should be deleted and an explanation should be added to section 375 that the relationship between the accused and the victim should neither be a defence for the charge of rape nor it should be a mitigating factor to determine the quantum of sentence. [40]

(iv) The Committee did not favour the lowering of the age of the juvenile from 18 to 16. It did not also recommend increase in the age of consent.

(v) It was recommended that any officer who fails to record the information given to him commits an offence which should also be punishable.

(vi) The protocols of medical examination of victims of rape were also suggested by the Justice Verma Committee. The Committee recommended the discontinuation of two finger test.

(vii) The Committee rejected the proposal to introduce chemical castration as one of the punishment for rape.

(viii) The Committee also recommended introduction of various other offences against women in the Indian Penal Code like acid attack, stalking, voyeurism, disrobing, etc.

(ix) The Committee recommended that in the conflict area, the requirement of sanction for initiating the prosecution of armed forces personnel should be specifically excluded when sexual offence is alleged. Complaints of sexual violence must be afforded witness protection.

(x) The Committee further recommended certain steps for police reforms. These include the establishment of State Security Commissioner to ensure that the influence of the state government on state police is minimized.

(xi) The Committee also recommended electoral reforms. It was of the view that filing of charge sheet and cognizance by the court should be sufficient for disqualification of the elected representatives.

[40] *Ibid* p-117

(xii) The Committee also recommended educational reforms. It was of the view that children's experiences should not be gendered. It has recommended that sexuality education should be imparted to children.

On the basis of the recommendations of the Verma Committee, the Criminal Law Amendment Ordinance was promulgated by the President. It replaced the offence of rape with sexual assault and made the offence gender neutral. It increased the age of wife in the cases of marital rape to 16. The age of consent in other cases was increased to 18. Punishment in the cases of rape was increased and the rape laws were made stricter.

Thereafter Criminal Law Amendment Bill, 2013 was presented in the Parliament. It was referred to a Select Committee, which in its report differed with some of the recommendations of the Verma Committee, especially with regard to marital rape and the age of consent. The new Bill was passed by both the Houses of the Parliament and received the assent of the President on 2nd April, 2013 and thus became Criminal Law Amendment Act, 2013.

The major changes brought about by the Criminal Law Amendment Act, 2013 are as follows:-

(i) The most important change brought up by it was the change in the definition of the term rape. Long standing demand of the women's organisation, academicians and activists was accepted. Now even non-penile and non- vaginal penetration either by any body part or any object was included within the definition of rape.

(ii) The age of consent was increased to 18 years in normal case but in the cases of marital rape, it remained 15 years.

(iii) The recommendation of the Verma Committee report with respect to criminalization of marital rape was not accepted.

(iv) In the cases of aggravated rape case, the punishment was increased to life imprisonment, which shall mean imprisonment till the remainder of one's natural life.

(v) Minimum Punishment of twenty years was prescribed in the cases of gang rape.

(vi) Enhanced punishment of imprisonment for the rest of the natural life or death penalty was prescribed for repeat offenders.

(vii) Exception to section 376, which gave the court discretion to give punishment less than the minimum prescribed, was deleted.

(viii) Several new offences of stalking, voyeurism, disrobing, acid attack, sexual harassment etc. were included in the Indian Penal Code.

(ix) Punishment prescribed for section 354 was increased to minimum one year and maximum five years and that for section 509 was increased to maximum three years.

(x) A new section 166A was added in the Indian Penal Code. This section prescribes punishment for a public servant, who does not record an information given to him under section 154 of the Cr.P.C. in relation to the offence punishable under section 376, 376A, 376B, 376C, 376D, 376 E, 354, 509, 326A, 326B or 354B of the Indian Penal Code or who knowingly disobeys any direction of law with regard to investigation of the offence.

(xi) A new section 166B was added in the Indian Penal Code, which imposed an obligation on the hospitals not to deny treatment to any victim of sexual offence or acid attack. Denying the same has been made a punishable offence.

(xii) A proviso was added to section 154 of the Criminal Procedure Code that in case, the information is given by a woman against whom the aforementioned offences have been committed; the information shall be recorded by a woman police officer.

(xiii) Section 160 of the Criminal Procedure Code was also amended and it was provided that the statement of the victim in such cases should also be recorded by a woman police officer.

(xiv) An explanation was inserted to Section 197 of the Criminal Procedure Code and it was declared for the clarification of doubt that no sanction will be required for the prosecution of a public servant accused of the aforementioned offences.

(xv) An explanation was added to section 273 of the Criminal Procedure Code and it was declared that while recording the statement of a minor victim of sexual offence, the court shall take appropriate measure to ensure that such

woman is not confronted by the accused while at the same ensuring that the accused is able to listen to her statement.

(xvi) Section 357B was added to the Criminal Procedure Code. It states that compensation payable by the state government under section 357A will be in addition to the fine paid to the victim under section 326A or 376D of the Indian Penal Code.

(xvii) Section 357C was added to the Criminal Procedure Code. It imposes an obligation on all hospital, whether public or private to immediately provide medical treatment or first aid to the victim of sexual offences or acid attack free of cost.

(xviii) Section 53A was added to the Indian Evidence Act. It states that evidence of character or previous sexual experience of the victim shall be irrelevant in the aforementioned cases.

(xix) Proviso was added to section 146 of the Indian Evidence Act. It states that it shall not be permissible to adduce evidence or to put questions to the victim in cross examination as to her general immoral character or her past sexual experience.

Thus the rescarcher has traced the History of the Rape Laws in India from 1860 to 2013. The Amendment Act of 2013 has been apprecated by different sections of the society. No doubt it contains several progressive steps and has accepted several longstanding demands of legal reforms in India but even then there are several lacunae, which still exist in these laws. Some of them are very old like marital rape and some of them are comparatively new and have been highly aggravated by the Amendment Act of 2013 like statutory rape. Thus, in the next two chapters, rescarecher will critically analyse the Law relating to Sexual Offences in India with respect to the issues of Marital Rape and Statutory Rape respectively.

2.10. CRIMINAL LAW AMENDMENT ACT, 2018

The Indian Penal Code, 1860 governs the substantive part and the Code of Criminal Procedure, 1973 along with the Indian Evidence Act, 1872 governs the procedural part of the criminal law of the country. These Acts have been amended several times to keep pace with the changing needs of society. One major amendment in these laws was the Criminal Law (Amendment) Act, 2013. This is also commonly known as the 'Nirbhaya Act' and it amended the provisions relating to sexual offences. These

amendments were the consequence of the brutal rape and consequent death of a 23-year old woman in a bus in Delhi and were based on the recommendations of Justice J.S. Verma Committee Report.

The Criminal Law Amendment Act, 2018 is also a consequence of such barbaric incidents which shook the conscience of the entire nation. The demand for making anti-rape laws more stringent had started developing due to various child rape incidents. The infamous Kathua rape case and the Unnao rape case triggered this demand and this gave birth to the amendment of 2018.

2.10.1 KATHUA RAPE CASE AND UNNAO RAPE CASE

An 8-year-old girl was raped in Kathua, a district of Jammu and Kashmir. It has been alleged that she was kept in a Shrine for several days and raped continuously and later murdered.

The Unnao rape case was another shock to the nation where a teenage girl accused an MLA of raping her in the year 2017. She tried to set herself on fire in front of the MLA's residence in Unnao, northern Uttar Pradesh.

2.10.2. TIMELINE OF EVENTS WHICH LED TO THE AMENDMENT

Several state assemblies such as Madhya Pradesh, Haryana, Rajasthan, and Arunachal Pradesh passed stringent anti-rape laws for committing rape of minor girls after the Kathua rape and the Unnao rape incidents.

(i) Following this, the President had promulgated the Criminal Law Amendment Ordinance on 21 April 2018.
(ii) The Criminal Law (Amendment) Bill was then tabled in the Parliament which replaced the Ordinance.
(iii) The Bill was passed by the Parliament on 6th August 2018.
(iv) The President gave assent to the Bill and thus, the Criminal Law (Amendment) Act, 2018 came into force.

2.10.3. CRIMINAL LAW AMENDMENT ACT, 2018: A WAY FORWARD

This followed the Criminal Law (Amendment) Ordinance, 2018 and brought amendments in four major Acts.

(i) The Indian Penal Code, 1860
(ii) The Code of Criminal Procedure, 1973
(iii) The Protection of Children from Sexual Offences Act, 2012
(iv) The Evidence Act, 1872

2.10.3.1. THE INDIAN PENAL CODE, 1860

Before the amendment, Section 376 dealt with punishment for the rape of women in two circumstances.

(i) Section 376(1) dealt with punishment for rape of a woman in all the circumstances except those mentioned in Section 376(2). The punishment in such cases was rigorous imprisonment of a minimum seven years which may be extended to imprisonment for life. The punishment under this section has now been amended.
(ii) Section 376(2) dealt with punishment for the rape of a woman done by police officers, public servants, member of the armed forces, etc. This punishment has not been amended and is a minimum ten years rigorous imprisonment which may be extended to imprisonment for life.

After the amendment, Section 376 deals with three categories of punishment for rape, apart from rape of women by police officers, public servants, member of the armed forces, etc.

(i) Punishment for the rape of a woman to be a minimum ten years rigorous imprisonment which may extend to imprisonment for life. {Section 376(1)}. Thus, the quantum of punishment has increased from a minimum of seven years to a minimum of ten years.
(ii) Punishment for rape on a woman under sixteen years of age has been added by the amendment. Punishment in such cases has to be rigorous imprisonment of a minimum twenty years which may extend to life imprisonment. {Section 376 (3}

(iii)Punishment for rape on a woman under twelve years of age has also been added by the amendment. The punishment in such cases is defined as a minimum twentyyears rigorous imprisonment which may extend to imprisonment for life. The offender in such cases can also be punished with death penalty. {Section 376AB}

(iv)Thus, for the first time, death penalty has been introduced for the offence of rape considering the gravity of the offence.

(v) Moreover, Section 376DA and 376DB have been added by the amendment which deals with punishment for gang rape on a woman under sixteen years and twelve years respectively. The punishment in such cases has to be invariably imprisonment of life. However, for gang rape on a woman under twelve years of age death penalty can also be awarded.

(vi)Clause (i) of Section 376(2) has been omitted.[41]

2.10.3.2. THE CODE OF CRIMINAL PROCEDURE, 1973

There have been simultaneous amendments in the Cr.P.C to meet the ends of justice in such cases of rape.

(i) If a person is accused of rape on a woman of under sixteen years of age, he shall not be granted anticipatory bail under Section 438 by a High Court or a Court of Session.

(ii) The amendment has provided for speedy trial and investigation.

(iii)The investigation has to be mandatorily completed within two months.

(iv)The appeal in rape cases has to be disposed within six months.

(v) Moreover, the amendment has also made two changes in Section 439 of the Code.

(vi)A proviso has been inserted which states that the High Court or the Session Court has to give notice to the public prosecutor within 15 days of which it receives the bail application of an accused of raping a girl under 16 years of age.

(vii) A sub-section has been inserted which makes the presence of informant or a person authorized by him mandatory during the hearing of bail application of the accused in such cases.[42]

[41] The Criminal Law (Amendment) Act, 2018

2.10.3.3. THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012

(i) Section 42 of the Act which deals with alternative punishment has been amended to include Sections 376AB, 376DA, and 376DB.[43]

2.10.3.4.THE EVIDENCE ACT, 1872

(i) Section 53A and Section 146 have been amended to make the provision of the Act to be in consonance with the amendments in other Acts.[44]

2.10.4.AMENDMENT AND ITS CRITICAL ANALYSIS

2.10.4.1. THE DEBATE ON DEATH PENALTY

The amendment in Criminal Law with respect to the introduction of the death penalty triggered the debate whether such punishment addresses the issue at hand.

The supporters of the punishment of death for committing rape on a woman under twelve years of age argue that the punishment is apt for such a heinous crime and it will act as a deterrent. One of such supporters is retired Justice P.D. Kode of the Bombay High Court who said that such offence is a "dastardly act" and is inflicted on minors who are actually incapable of protecting themselves and therefore, the punishment of death penalty is not harsh.[45] Another opinion is that a person committing rape on a girl whose body has not even matured is an evil and devious act and thus, to be punished by death penalty is the best answer.

However, there are many activists and lawyers who argued against such punishment on various grounds. The argument that the death penalty will act as a deterrent is dismissed as a futile exercise as stringent punishments in a very few cases have led to a decrease in the rate of commission of crimes. Such arguments have been mostly based on two points.

(i) The 2013 amendment of Criminal Law was targeted towards the same objective i.e. to make the laws stringent so as to create deterrent in the minds

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[42] Ibid
[43] Ibid
[44] The Criminal Law (Amendment) Act, 2018
[45] SonamSaigal, Activists, Lawyers split over death for minors' rape, The Hindu, https://www.thehindu.com/news/cities/mumbai/activists-lawyers-split-over-death-for-minors-rape/article23639421.ece. (accessed on 24 Feb, 2019)

of the perpetrators. However, records show that the stringent laws have not helped much in bringing down the rate of crime. Moreover, there was a strong demand after the Nirbhaya incident too that death penalty should be included as a punishment for rape but Justice Verma Committee recommended against it stating that "there is a strong submission that the seeking of the death penalty would be a regressive step in the field of sentencing and reformation."[46] A similar view was also reiterated by the Law Commission of India in its 262nd report.

(ii) Another ground is that the death penalty is also a punishment in case of an offence of murder. However, this has not stopped the crime and in fact, the crime rate is on increase. The offender is not in the state of mind to analyse the punishment before committing the crime and thus, the death penalty is not an effective deterrent.

2.10.4.2. THE DEATH PENALTY AND UNDER-REPORTING OF CASES

This is one of the arguments given by people opposing the death penalty. National Crime Records Bureau (NCRB) data shows that rapes in India are mostly committed by a person known to the victims or relatives of the victims. Out of 38,947 reported rape cases in 2016, 36,859 cases were such in which the victims knew the offenders.[47] As a consequence, there is massive underreporting of rape cases and with death penalty as a punishment, this will only intensify. This is because "we are effectively asking the child's family to risk sending a family member or a known person to the gallows."[48]

2.10.4.3. DEATH PENALTY AND THE CHANCES OF THE OFFENDER KILLING THE VICTIM

This is another view against the punishment of the death penalty. The punishment for murder under Section 302, IPC is death penalty or imprisonment for life. Thus, effectively the punishment for committing rape on a minor girl and committing

[46]Justice Verma Committee Report, at 245.
[47]Soibam Rocky Singh &JaideepDeoBhanj&Saurabh Trivedi, Better conviction rate not death penalty will deter sexual offenders, The Hindu, https://www.thehindu.com/todays-paper/tp-national/tp-newdelhi/better-conviction-rate-not-death-penalty-will-deter-sexual-offenders/article23640863.ece. . (accessed on 24 Feb, 2019)
[48]AnupSurendranath, Ineffective and arbitrary, The Hindu, https://www.thehindu.com/todays-paper/tp-opinion/ineffective-and-arbitrary/article23166394.ece. (accessed on 24 Feb, 2019)

murder has become same. Therefore, now the chances are high that the offender will make sure that the victim does not survive. This point was also raised by the Delhi High Court when a Bench comprising of Acting Chief Justice Gita Mittal and Justice C. Hari Shankar remarked "Have you thought of the consequence to the victim? How many offenders would allow their victims to survive now that rape and murder have the same punishment?"[49] Thus, this might result to be of fatal consequence for the victims.

2.10.4.4. THE SHIFT IN FOCUS

One of the major arguments against the amendment is that this is a step to pacify the public and a step away from addressing the real problem. The real and persisting problem lies in the criminal justice system of the country.

(i) The focus should be on taking steps to increase the conviction rate. In 2016, a total of 38,947 cases of rape were reported in the country. Of these, the Courts completed trial in 18,552 rape cases. However, with a conviction rate of 25.5%, the accused in 13,813 cases were acquitted. Similar statistics can be seen in cases of child rape. Out of 6,626 cases of which trial was completed, 4,757 resulted in the acquittal which means a conviction rate of 28.2%.[50] Thus, the need of the hour is to focus on addressing these issues.

(ii) Another issue which requires greater attention is providing protection to the victim as well as the witness. Because of lack of any such system, more often than not the victim, witness or the family members face threats and intimidation. There is a need to create a conducive environment for the victim to report the crime and provide protection to the victim as well as the witness. Thus, there are more intricate issues to deal with and until these are resolved it is difficult to control the rate of such crimes.

[49] Staff Reporter, Was any study done before bringing out rape ordinance, The Hindu, https://www.thehindu.com/todays-paper/tp-national/tp-newdelhi/was-any-study-done-before-bringing-out-rape-ordinance/article23652406.ece (accessed on 24 Feb, 2019)

[50]Soibam Rocky Singh &JaideepDeoBhanj&Saurabh Trivedi, Better conviction rate not death penalty will deter sexual offenders, The Hindu, https://www.thehindu.com/todays-paper/tp-national/tp-newdelhi/better-conviction-rate-not-death-penalty-will-deter-sexual-offenders/article23640863.ece. (accessed on 24 Feb, 2019)

2.10.5. THE AMENDMENT MAKES THE DIFFERENCE OF SECTION 376(1) & 376(2) INEFECTIVE

Section 376 (1), IPC deals with the punishment for the offence of rape in general, i.e. for all the cases except for those provided in Section 376(2). The latter section deals with the punishment for rape if the offence is committed by a specific person or the offence is committed in specific circumstances. There are several categories mentioned in the section such as a police officer, a public servant, a member of the armed forces, a person in a position of trust or authority, etc. Before the amendment, the minimum punishment under Section 376 (1) was seven years imprisonment and in Section 376(2) was ten years imprisonment. This difference was created as the crime becomes more heinous if committed by persons who are held high in the eyes of the public due to their position or if committed in specific circumstances. However, after the amendment, the minimum punishment in both the sub-sections is ten years of imprisonment and thus, there remains no difference.

2.10.6. THE DIFFERENCE IN THE PUNISHMENT FOR RAPE OF MINOR BOYS AND MINOR GIRLS

The Protection of Children from Sexual Offences Act, 2012 was enacted because the sexual offences were dealt under IPC for all the victims and a need was felt that the children who are victims of sexual violence need special protection and care and hence, a separate legislation. This is gender neutral legislation as it defines a 'child' as the one who is under the age of 18 years. The maximum punishment under this Act is imprisonment for life and the maximum punishment for a sexual offence under IPC for minor girls has become death penalty. Thus, a difference has been created by theamendment of 2018 as punishment for rape on minor girls has become more stringent as compared to rape on minor boys.[51]

2.10.7. THE PROBLEM IN CASE OF NO ANTICIPATORY BAIL

The amendment in Cr.P.C provides that no anticipatory bail shall be granted in cases of rape on a woman less than sixteen years of age. Thus, now the accused has no

[51] https://www.hindustantimes.com/india-news/centre-to-make-sexual-assault-of-boys-under-age-of-12-punishable-by-death-penalty/story-JRPmcyeu8pHgGupvJJICMI.html (accessed on 24 Feb, 2019)

provision to get an anticipatory bail even if there are chances of being booked under a false case.

2.10.8. CRIMINAL LAW AMENDMENT ACT, 2018 & ITS SUCCESSFUL IMPLEMENTATION

The Criminal Law (Amendment) Act, 2018 through the amendment of Code of Criminal Procedure, 1973 provides for speedy trial and investigation in rape cases. Having considered all the views in favour and against the amendment, it is also important to throw some light on the practical results of the amendment.

(i) The state of Madhya Pradesh has shown a successful implementation of the provisions of the amendment. The state has completed the investigation of rape cases within the time frame i.e. within 60 days in 72% of the cases.
(ii) In a rape case in Bhopal, the arrest was done within 12 hours and the investigation was completed in 72 hours which also included recording the statement of 25 witnesses and the accused was awarded death penalty.
(iii) In another case, the trial for rape of a 4-year-old was completed in a day after four days probe.
(iv) These statistics clearly show that the provision laid down in the amendment is an achievable task and can lead to improvement of delivery of justice all over the country.
(v) Even the Centre has applauded the government of Madhya Pradesh for the successful implementation of the amendment Act and has asked other states to follow the same.

2.11 Conclusion

The courts and the legislature have to make many changes if the laws of rape are to be any deterrence. The sentence of punishment, which normally ranges from one to ten years, where on an average most convicts get away with three to four years of rigorous imprisonment with a very small fine; and in some cases, where the accused is resourceful or influential- may even expiate by paying huge amounts of money and get exculpated. The courts have to comprehend the fact that these conscienceless criminals- who sometimes even beat and torture their victims- who even include small children, are not going to be deterred or ennobled by such a small time of imprisonment. Therefore, in the best interest of justice and the society, these criminals should be sentenced to life imprisonment.

Law remains but the number of victims (including minor) continues to increase destroying the very soul of the helpless women. The concept of marital rape does not exist in India. Contrary to the popular belief rape is almost never perpetrated for sexual gratification. It is an 'acts of violence that happens to be expressed through sexual means'.

The Amendment 1983 has brought about some important changes in the existing laws of rape as a response to the growing public opinion demanding more stringent anti rape laws. It amends Section 376 IPC and enhances the punishment of rape it also provides enhanced punishment of minimum of 10 years of imprisonment for police officers or staff of jail, the remand homes or other places of custody established by law. The Act further inserts a new Section 114-A IEA, by raising a presumption as to absence of consent in cases of custodial rape, rape on pregnant women and gang rape at least partially, removed the infirmity from the evidence of a victim of rape that was hitherto unjustly attached to her testimony without taking note of the fact that in India, unlike the occident a disclosure of the girls identity, rehabilitation in society for all times to come and unless her story was painfully true she would not have taken such a grave risk merely to malign the accused.

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CHAPTER-3

MARITAL RAPE LAW IN INDIA: AN EXAMINATION

Marital rape is non-consensual sex in which the perpetrator and the victim are related to each other as spouse. It is also called spousal rape and rape in marriage. For a very long time, marital rape was widely condoned or ignored by most of the societies around the world but now a large number of countries have criminalized it. India is one of those countries, where marital rape is a crime only in few exceptional circumstances. To have a look on the present position of Indian Law with respect to marital rape, rescarcher need to classify marital rape into three categories:-

(i) Rape of a wife below 18 years of age

(ii) Rape of a wife living separately

3.1. RAPE OF A WIFE BELOW 18 YEARS OF AGE

Before the Criminal Law Amendment Act 2018 as per section 375 of the Indian Penal Code, rape of a wife below 15 years of age is a crime and is punished in a similar manner as any other rape. When the India Penal code was prepared by Lord Macaulay, the age of consent was fixed at 10. The researcher have already seen in the last chapter how the public protests after PhulmoneeDasee's case forced the British government to increase the age of consent to 12 years in 1891. In 1924, Dr.Hari Singh Gaur introduced a Bill to further increase the age of consent to 14 but the Select Committee created a distinction and recommended 14 years of age in normal cases and 13 years of age in the cases of marital rape. This recommendation was accepted and thus it culminated into the Amendment Act of 1925. This amendment for the first time created a difference between the cases of marital rape and the cases of extra marital rape, which was further emphasised by the fact that a mild punishment of maximum of 2 years imprisonment was prescribed for the rape of a woman between 12 to 13 years of age by her husband.

In 1940, the age of consent was further increased to 16 years but in cases of marital rape it was increased to 15 years only and the same continued till 2013. Before the Amendment of 2013, Section 376 prescribed a very mild punishment of maximum 2 years imprisonment if the age of the raped child wife was between 12 and 15 years. Criminal Law Amendment Act, 2013 deleted this difference in punishment.

It was a significant change brought about by Criminal Law Amendment Act, 2013 but in several other respects this Amendment could not stand up to the expectations of the child rights activists. For a very long time, the activists have been demanding the same age of consent in the cases of both marital and extra marital rape cases but Criminal Law Amendment Act, 2013 further aggravated the difference by increasing the age of consent in extra marital cases from 16 to 18 whereas leaving the age of consent in the cases of marital rape at 15. Prohibition of Child Marriage Act, 2006 prohibits the marriage of a girl child below 18 years but the Indian Penal Code does not recognise sex by a man with his own wife aged 15-18 as rape. This has led to a standing confusion as to marital rape within prohibited child marriages in India.

This confusion is further aggravated by the Protection of Children from Sexual Offences Act, 2012 which prohibits any sexual relationship with a child below 18 years of age. The consent of the child in such cases is immaterial. Section 5 (n) of this Act further states that a person who is related to the child through marriage and commits penetrative sexual assault shall be liable for committing aggravated penetrative sexual assault for which section 6 prescribes minimum punishment of 10 years of imprisonment and maximum punishment of life imprisonment.

Independ thought V Union of India [52] In this case, Independent Thought, an organization working on the issue of child rights, has filed a Public Interest Litigation in the Supreme Court of India on this issue and has requested the Supreme Court to declare the exception allowing marital rape within prohibited child marriage as unconstitutional[53]. The petitioner contends that Exception 2 to Section 375 of IPC, as amended by Criminal Law (Amendment) Act, 2013, is violative of Articles 14, 15 and 21 of the Constitution. The petitioner has also raised the following contentions[54]:

(i) The said provision discriminates between a girl child aged between 15 to 18 years and those aged below 18 years on the ground of marriage which has no rationale nexus to the purpose sought to be achieved. Thus, this classification is not a reasonable classification and thus is violative of Article 14 of the Indian Constitution.

(ii) The age for grant of consent for sexual relationship has increased over a period of time from 10 years in 1860 to 16 years in 1940 and now the same

[52] SC 11 Oct 2017
[53] *http://ithought.in/action_pil.html*, (accessed on 24 Feb, 2019)
[54] *http://www.ithought.in/download/2014/PIL-Short-Note.pdf*(accessed on 24 Feb , 2019)

has been increased to 18 years in normal cases by way of Criminal Law (Amendment) Act, 2013. There is no justification whatsoever to maintain the age at 15 years only because the girl child is married. Thus, the provision is arbitrary and violates Article 14 of the Constitution.

(iii) By virtue of provisions of Juvenile Justice (Care and Protection of Children) Act, 2000 and provisions of Protection of Children from Sexual Offences Act, 2012, Parliament has recognized that a girl less than 18 years is a child and therefore, she is not in a physical and mental condition to take an informed decision as to sexual relationship. In such circumstances, there is no reason for Parliament to retain the age of 15 years in Exception 2 of Section 375 of IPC. Hence, the said provision is arbitrary and violates Article 14 of the Constitution and thus is liable to be struck down.

(iv) The Parliament has failed to take notice the recommendation of the Law Commission made in 84th Report and 172nd Report. The Law Commission of India, way back in 1971 in its 84th report, has recommended, "The minimum age of marriage now laid down by law (after 1978) is 18 years in the case of females and the relevant clause of section 375 should reflect the changed attitude. Since the marriage with a girl below 15 years of age is prohibited (though it is not void as it is a matter of personal law), sexual intercourse with a girl below 18 years of age should also be prohibited." [55]

The Law Commission though in its 172nd report has changed its view and recommended that the age of consent should be increased to 16 in the cases of marital rape[56] but the Parliament completely ignored the views of the Law Commission and maintained status quo in this respect.

(v) While Protection of Children from Sexual Offences Act, 2012 protects and secured girls between ages of 15-18, the Exception Clause of Section 375 of Criminal Law (Amendment) legalizes penetrative sexual assault; a clear contradiction in law.

(vi) Parliament has failed to note that various medical studies and data show that pregnancy in a girl, less than 18 years, is detrimental not only to the health of the girl, but also to the child in the womb, Parliament by permitting lawful sexual intercourse with a girl aged 16 to 18 years who is, in a matrimonial

[55] Law Commission of India 84th report, p- 9
[56] Law Commission of India 172nd report, para 3.2.3

relation, has put the lives of lakhs of such girls at risk and also the lives of children in their womb at considerable risk.

(vii) For that Parliament could not have upheld the right of the parents to violate the rights of their daughters who are less than 18 years, who have the right, like any other citizen, to grow in the best way possible manner, without being forced into sexual intercourse only on the ground that they have been married of by their parents.

Finally, the court found relevant, the many anomalies associated with child marriage and consequential marital rape and how married (minor) woman between 15 and 18 were being deprived of their right to life against marital rape. It was finally held that this law was inhabiting the overall well-being of the girl child and marital rape exception was amended in the best interests of the women.

Through the Criminal Law Amendment Act, 2018 the Exception 2 of Section 375 of IPC will be omited.

3.2. RAPE OF A WIFE LIVING SEPARATELY

At present under the Indian Law, non-consensual sexual intercourse by a man with his own wife, who is living separately, is considered a crime. Section 376B of the Indian Penal Code as amended by Criminal Law Amendment Act, 2013 states that "if a man has sexual intercourse with his own wife, who is living separately either under a decree of separation or otherwise, without her consent, shall be punished with an imprisonment of either description of a term which shall not be less than two years but which may extend to seven years and shall also be liable for fine."

Thus, this provision is available not only for a judicially separated wife but also for any wife who is living separately, whether under a decree of separation or due to any to other reason.

Till 1983, the Indian Penal Code contained no such provision and Exception to section 375 imposed a blanket ban on the possibility of rape of a woman by his own husband if she was above 15 years of age. It was for the first time the Law Commission of India, which is in its 42nd report pointed out that the exception to section 375 of the Indian Penal Code fails to take note of one special situation, namely, when the husband and wife are living apart under a decree of judicial separation or by mutual agreement. In such a case the marriage technically subsists and if the husband has sexual intercourse with her against her will or without her

consent, he cannot be charged with the offence of rape. The Law Commission did not consider it to be right and was of the opinion that in such circumstances, sexual intercourse by a man with his wife without her consent should be considered as rape. In the light of the aforementioned reasons, the Law Commission recommended to add an Explanation to section 375, which states that "a woman living separately from her husband under a decree of judicial separation or by mutual agreement shall be deemed not to be his wife for the purpose of this section"[57]

Though this report was submitted to the Government of India way back in 1971 but the government failed to take any step in this direction till 1983. It was the Anti rapemovement of 1980s, which started after the infamous judgment of the Supreme Court of India in Mathura Rape case, which forced the government to introduce a Bill to reform the Rape Laws in India. The Bill has taken into account the recommendation of the Law Commission but diluted the provision by prescribing a very mild punishment in such cases. Criminal Law Amendment Act, 1983 inserted section 376 A (present 376 B) to the Indian Penal Code, which criminalised the non-consensual sexual intercourse by a man with his wife, who is living separately from him under a decree of separation or under any custom or usage but this section prescribed a meagre punishment of maximum two years imprisonment.

In 1997, Sakshi, a non-governmental organization working on women's issues, filed a writ petition before the Supreme Court of India and raised several issues related to law relating to sexual offences in India. The Supreme Court by order dated 9th August, 1999 requested the Law Commission to examine the issues raised by Sakshi. The Law Commission in response came up with 172nd report. This report, among other issues discusses the issues of rape of judicially separated wife.

Representatives of Sakshi wanted the Law Commission to recommend the deletion of section 376 A (present section 376B) as well as the exception to section 375. Their logic was that when a man who causes hurt or any other physical injury to his own wife is liable to be punished for such offence like any other person causing such hurt or physical injury, why should a husband who sexually assaults his wife, who is living separately under a decree of separation or under any custom or usage, be not punished like any other person. Section 376A (present section 376B), which provides a lesser punishment to a husband who sexually assaults his own wife living separately in the

[57]Law Commission of India 42nd Report, p- 278

aforesaid circumstances, they argued, is arbitrary and discriminatory. They were of the view that once section 376A is deleted; the husband in such a case would be punished under section 376(1) which carries higher punishment than section 376A. While the Law Commission appreciated the force of the said argument in the context of the wife who is living separately under a decree of separation or under any custom or usage but the Law Commission was at the same time of the view that it cannot ignore the fact that even in such a case the bond of marriage remains unsevered. Because of the above mentioned reasons, the Law Commission recommended that that this section should be retained on the statute book[58]but it recommended the enhancement of the punishment to a minimum 2 years and maximum 7 years of imprisonment. Despite this recommendation being made way back in 2000, the Parliament did not take any step in this direction and it was only after the Nirbhaya movement, when again public protests forced the Parliament to reconsider rape law reforms that in 2013, the Criminal Law Amendment Act, 2013 was passed. This Amendment renumbered this section from section 376A to section 376B.

This Amendment among other things brought two significant changes with regard to this issue. First, it is no more the wife, who is living separately only under a decree of judicial separation or under a custom or usage but any wife, who is living separately due to any reason can bring an action under section 376B (old 376A). Second, the punishment was enhanced from a maximum of two years of imprisonment to minimum two years and maximum seven years of imprisonment. Both these changes can be said to be positive changes but most people are not yet aware of these changes.

3.3. MARITAL RAPE AND THE OPINION OF PHILOSOPHERS

From the beginning of the 19th century women's movement, activists started challenging the presumed right of men to engage in forced sexual intercourse with their wives. Lucy Stone singled out women's right to control marital intercourse as the core component of equality. She once famously said, "It is very little to me to have the right to vote, to own property, etc., if I may not keep my body, and its uses, in my absolute right. Not one wife in a thousand can do that now."[59]

[58]Law Commission of India 172nd Report para 3.3

[59] Letter from Lucy Stone to Antoinette Brown (1855), quoted *In* Diana E.H.Russell, 'Rape In Marriage' p-27 (2d ed. 1990)

Lucy Stine even in that time was quite vocal on this issue but she.was not alone in her fight against marital rape and was supported by many.

British Liberal Feminist John Stuart Mill and Harriet Taylor also attacked marital rape. In their opinion, it was gross double standard in law and central to women's subordination. They compared the condition of a wife with that of a slave and found her condition to be worse than that of the slave. John Stuart Mill once famously said, "Marriage is the only actual bondage known to our law. There remain no legal slaves, except the mistress of every house. A female Slave has an admitted right and is considered under a moral obligation to refuse her master the last familiarity not so the wife however brutal and unfortunate a tyrant she may be chained to…though she may know that she hates her , though it may be his daily pleasure to torture her , and though she may feel it impossible not to loathe him …he can claim from her and enforce the lowest degradation of human beings that being made the instrument of an animal function contrary to her inclinations.*"*[60]J.S. Mill was far ahead of his time, he attacked the marital rape exemption in the year 1869, at that time there were hardly any nation where this exemption was abolished.

Bertrand Russel in his book Marriage and Morals deplored the situation of married women. He wrote, "Marriage is for women the commonest mode of livelihood and the total amount of undesired sex endured by women is greater in marriage than in prostitution."[61] The views of Bertrand Russel have been substantiated by the research conducted by Diana Russel, who interviewed over 900 randomly selected women and found that while 3% had experienced completed rape by stranger, 8% had experienced completed rape by husband.

3.4. HISTORICAL BACKGROUND OF MARITAL RAPE EXEMPTION

Originally, the word 'rape' was akin to Latin term 'rapine' or 'rapere' and referred to the more general violations – looting, destruction, enslavement, talking away and capture of citizens-inflicted upon a tribe, town, city or country during war.[62] Compensating the father for the rape of daughters was institutionalized in ancient law. Susan Brown Miller stated that "Rape entered the law through the back door, as it were as a property crime of man against man. It was theft of virginity, an

[60]J.S. MILL, *The Subjection of Women,* in Three Essays (1912) p-463 quoted in Sandra L. Ryder & Sheryl A. Kuzmenka, Legal Rape: The Marital Rape Exemption, 24 J. Marshall L. Rev. 393 (1991)
[61]*http://www.notable-quotes.com/r/russell_bertrand.html,* (accessed on 3rd March, 2019)
[62]Stellina Jolly and M.S Raste "Rape and Marriage :Reflections On the Past Present and Future." 48 *JILI* 283 (2006)

embezzlement of his daughter's fair price in the market".[63] Sexual connotation associated with it came much later and then developed an inseparable link between rape and marriage as both sort to regulate sexuality. The relationship between marriage and rape can be traced backed to some religious texts like the Bible provides "if a man happens to meet a virgin who is not pledged to be married and rapes her and they are discovered he shall pay the girl's father fifty shekels of silver. He must marry the girl, for he has violated her. He can never divorce her as long as he lives."[64] Following this the Babylonians considered and put down that if the rapist is unmarried, he should pay the father of the victim three times the marriage price and marry the victim.[65]This historic relationship between rape and marriage is seen to have given rise to the exemption of marital rape.

Throughout the history of most societies it has been acceptable for men to force their wives to have sex against their will.[66]The traditional definition of Rape in most countries was "sexual intercourse with a female not his wife without her consent". This provided husbands with an exemption from prosecution for raping their wives .The marital rape exemption came to be seen as a licence to the husband to rape their wives.[67] The foundation of this exemption can be traced back to the Statements made by Sir Mathew Hale Chief justice in 17th century England. Lord Hale wrote that "the husband cannot be guilty of rape committed by him on his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband which she cannot retract."[68] For over a period of 330 years this statement has been used to justify the concept of marital rape exemption and has served the backbone for judicial recognition of spousal immunity.[69]the basic principle behind this provision is that the husband is the lord and master of his wife and has full authority and control over the person and body of his wife and sexual intercourse between the husband and the wife ,even without her consent is lawful as it is the

[63]*Ibid*
[64] The NIV Bible, Deuternomy 22:28.Also see *supra* note 25 at 279
[65]*Ibid*
[66]Subash Chandra, ''Marital Rape: How offensive is it'', *Cri.L.J* 194-203 (2009)
[67]*Id*. at 194
[68]Sir Mathew Hale, History Of the Pleas Of the Crown, 629 (1736)
[69]ManjulaBatra ''Marital Rape- Is there a remedy'', 10(1) *MDU.L.J* 216 (2005). P 207

husbands marital right.[70]Lord John Holt, CJ described the act of a man having sexual relations with another man's wife as "the highest invasion of property".[71]

Thus we can Marital rape exemption was a vestige of the common law.[72] However what is surprising to note is the fact that when Sir Mathew Hale made this statement which became the backbone of spousal immunity for centuries, he had no argument, case law or legal basis to support his statement. Some critics believe that this exemption had its origin in the concept of 'marital debt' in medieval moral theology and the law of church. The concept derived from biblical statement on marriage that" both the husband and the wife had a duty to perform sexually at the request of the mate" [73]Some say that it was hales on creation based on the contractual principles. This theory of implied consent came up as both a novel idea as well as a fallacious one.[74]

Hale's comments were discussed in the Virginia case of *Weishaupt*v. *Commonwealth,*[75] the court held that "the true state of English commonlaw was that marriage carried with it the implied consent tosexual intercourse; but that consent could be revoked.The court stated that "Hale's statement was not law, common or otherwise. At best it was Hale's pronouncement of what he observed to be a custom in 17th century England." [76] The court concluded that English common law never recognized an absolute irrevocable marital exemption that would protect a husband from rape charges in all circumstances. Similarly, in *State v. Smith,*[77]the Supreme Court of New Jersey criticized Hale's statement when confronted with the defendant's argument that New Jersey's rape statute incorporates the common law marital rape exemption. The court criticized Hale for citing no authority for his extrajudicial proposition. Nonetheless, Hale's statement has traditionally been accepted as the origin for the marital rape exemption.

However apart from the concept of implied consent there were two other theories that the courts traced back to justify the marital rape exception .the first of this rested on

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[70]*Ibid*
[71]Ibid
[72]Sudhansu Roy and Iti Jain, ''Criminalization Marital Rape in India: A Constitutional Perspective", *Cri. L.J* 81-92 (2008)
[73]*Ibid See*, Elizabeth M. Makowski "The Conjugal Debt and Medieval Cannon Law" 3 J. *Medieval. Hist*. 99(1977)
[74]*Id* at 82.
[75]315 S.E.2d 847 (1984).
[76]*Ibid*
[77]85 N.J. 193, 426 A.2d 38 (1981).

the origin of the offence of rape .As discussed above rape was seen as an offence against property rather than a crime against the person.

Women were chattel, and men had a property interest in their wives and daughters' sexuality.[78]Therefore the original purpose of rape statutes was to protect property rights of men rather than the body and person of women.[79] The second was the doctrine of marital unity propagated by Blackstone. Blackstone was of the opinion that "by marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing,-protection, and cover, she performs everything; and is therefore called in our law-French a *feme-covert, feminaviro co-operta;* is said to be *covert-baron,* or under the protection and influence of her husband, her *baron,* or lord; and her condition during marriage is called her *coverture."*[80] Marriage merged the identity a woman's identity into her husband's, and the two were considered as one this premise made it physically impossible to commit rape within marriage because the man could not rape himself. This legal euphemism reinforced the notion of women being man's own (property).

Katherine O'Donnonvan states in the context of marital rape that: "Its immunity from the purview of criminal law is explained on the grounds that the female victim is wife .This justification can be understood in the context of the dominant family ideology and female sexuality which treats wife as the property and as having no sexual agency or decision making ability in sexual activity within the marital context"[81]

Another traditional justification behind emergence of this exemption can be traced back to the biblical phrases which laid down that 'any carnal knowledge outside marriage was deemed unlawful, while any carnal knowledge within the marriage contract was considered lawful'.

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[78]*Supra* note 76 at 83. *See*, Emily Brown ,"Changing the Marital Rape Exemption :I am Chattel?!:Hear Me Roar" 18 *AM.J Trial Advoc* 657 (1995).

[79]Lotika "Emancipation From Rape: Discovering The Self Of Women Beyond the Body" 3 *The Bangalore Law Journal* 98 (2010).

[80]Tan Cheng Han "Marital Rape – Removing the Husband Legal Immunity."31 *Malaya L. Rev.* 112 (1989).

[81]Subhash Chandra Singh "Marital Rape: A Feminist Critique" 3 *SCJ* 47 (2002)

Such type of societal perceptions laid the foundation for the common law principle that was cemented by the infamous statement of Sir Mathew Hale, which became the basis of the marital rape exemption in law over centuries.

3.5. TOWARDS CRIMINALIZING MARITAL RAPE

It was Justice J.S. Verma Committee, which for the first time recommended criminalization of marital rape in India and thus initiated a nationwide debate on this issue. Let us thus have a look on the recommendation of Justice J.S. Verma Committee on the issue of marital rape.

3.5.1. RECOMMENDATION OF JUSTICE J.S. VERMA COMMITTEE ON MARITAL RAPE

The brutal gang rape of a 23 year old physiotherapy student Nribahya on 16 December, 2012 by six men in a moving bus shocked the conscience of the society. People came on street and started demanding justice for the victim. Slowly these public protests converted into a Nation-wide movement for rape law reforms. This movement forced the government of India to constitute a Committee, chaired by Justice J.S. Verma and consisting of Justice Leila Seth and Gopal Subramanium as members. This Committee, among other things, favoured criminalization of marital rape in India. The Committee was of the opinion that 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.[82] According to common law, the wife was deemed to have consented at the time of the marriage to have intercourse with her husband at his whim. Moreover, this consent could not be revoked. The Committee further noted that this immunity has now been withdrawn in most of the major jurisdictions of the world. The Committee cited the example of England and Wales, European Union, Canada, South Africa and Australia. The Committee therefore recommended that the exception for marital rape be removed. The Committee further recommended that the law ought to specify that[83]

(i) A marital or any other relationship between the perpetrator or victim is not a valid defence against the crimes of rape or sexual violation.

[82]Justice J.S. Verma Committee Report, p- 125
[83]*Id* p-129

(ii) the relationship between the victim and the complainant is not relevant to the inquiry into the fact whether the complainant consented to the sexual activity and

(iii) 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.

The Committee relied upon the view of Prof. Sandra Fredman of the University of Oxford that "training and awareness programmes must be provided to ensure that all levels of the criminal justice system and ordinary people are aware that marriage should not be regarded as extinguishing the legal or sexual autonomy of the wife."[84]

It is heartening to note that this recommendation of the Committee got wide publicity and initiated a nationwide debate on the issue of marital rape. The debate reached the Department related Parliamentary Standing Committee on Home Affairs, which was scrutinizing the Criminal Law Amendment Bill, 2013. Let us have a look on the recommendation of the Standing Committee in this regard.

3.5.2. RECOMMENDATION OF DEPARTMENT RELATED PARLIAMENTARY STANDING COMMITTEE ON HOME AFFAIRS ON MARITAL RAPE

Criminal Law Amendment Bill, 2012 which was introduced in the Lok Sabha on 4th December, 2012 was referred to the Department related Parliamentary Standing Committee on 28th December, 2012. Shri M. Venkaiah Naidu was the Chairman of the Committee. The Committee invited suggestions from the states, union territories and public at large. It scrutinized all these suggestions and initiated a discussion on the Criminal Law Amendment Bill, 2012. Some members of the Committee suggested that somewhere there should be some room for wife to take up the issue of marital rape. They further opined that no woman takes marriage so lightly that she will just go and complain blindly. They were further of the opinion that consent in marriage cannot be consent forever. However several members felt that the marital rape has the potential of destroying the institution of marriage. The Committee felt that if a woman is aggrieved by the acts of her husband, there are other means of approaching the court. The Committee further observed that in India, for ages, the family system has evolved and it is moving forward. Family is able to resolve the problems and there is also a provision under the law for cruelty against women. The

[84] *Id* p-130

Committee further felt that if the marital rape is brought under the law, the entire family system will be under a great stress and the Committee may perhaps be doing more injustice.[85]

The view of the Committee was surprising when it said that marital rape has the potential of destroying the institution of marriage. What it failed to look into is the fact that rape occurs within marriage and criminalizing marital rape will deter men from raping their wives and in this way, it will not only save the institution of marriage but also make husband and wife equal partners in marriage. The immunity granted to the Husband under the present law gives an unequal supremacy to husbands and some of them consider this immunity as a license to rape their wives. A similar fear was felt by many, when the Hindu Code Bill was being discussed inside and outside the Parliament that the introduction of the concept of divorce under Hindu Law will destroy the institution of marriage but sixty years have passed since the enactment of Hindu Marriage Act, 1955 the institution of marriage still survives. It is now proved beyond reasonable doubt that their fear was baseless. Similarly the fear expressed by the Committee members at present is also not well founded. 104 countries of the world have criminalised marital rape but nowhere this criminalization has become a stress on the family system. In most of these countries the problem, which still persists, is that very few women have the courage to file complaints against their husbands. The purpose of the law has always been to strengthen weak hands but the present law in India has strengthened the strong hands by granting them a complete immunity from any possibility of prosecution for rape of their own wives. In the garb of family system, majority of the Committee members sided with patriarchy, which is unfortunately not considered a problem but as normal in our country. It appears that the Committee was really fearful, fearful to take an opinion against the dominant sections of the society and fearful to acknowledge before the world that rapes occur within marriage, which they boast to be sacrament. The shame which has been associated with the offence of rape and which prevents the victim and her family members in large number of cases to report these cases seems to have affected the Committee members, who are finding ways and means to hide that this problem exists in our society as well. Had the family been so able to solve the problems, what was the need of Family Courts? Why to waste so much of public

[85]Department related Parliamentary Standing Committee Report on Home Affairs One Hundred Sixty Seventh Report on the Criminal Law (Amendment) Bill, 2012 p- 47

resources on them? The Family courts deal with the problems like divorce, maintenance, custody and guardianship which are not as grave as marital rape. The patriarchy is so deep ingrained in our society that the views of women, their rights and their well being hardly matter in a large number of cases. If the family has to decide an issue, there is a fear that they might ignore what is right and what is wrong and decide an issue in favour of the person who is more powerful.

As far as the law relating to cruelty is concerned, it is hardly any remedy for the victim of marital rape. Under section 498A, only those wilful conduct which are of such nature as is likely to drive a woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman. Though certain cases of marital rape can be covered by this section but there will be many which might not fall within the purview of this section. What if a woman has been raped by her husband but this act is not likely to drive her to commit suicide or it does not cause grave injury or danger to her life, limb or health? Even if it does, it will be very difficult to prove. Moreover the courts, just after seeing the exception to section 375 are more likely to dismiss the petition on the very threshold. Moreover the punishment of maximum three years is nothing in comparision to the gravity of the offence of marital rape. It is a matter of extreme regret that majority of the members of the Standing Committee have exposed their double standards with respect to the same act when committed by a stranger and when committed by husband.

But some progressive voices emerged from within the Select Committee. Shri D. Raja, member, Rajya Sabha representing Tamil Nadu (Communist Party of India) and Shri Prasanta Chatterjee, member, Rajya Sabha representing West Bengal (Communist Party of India Marxist) submitted their notes of dissent on the 167th report of the Department related Parliamentary Select Committee on Home Affairs on the Criminal Law Amendment Bill, 2012. They expressed their dissatisfaction with the way in which the recommendations of the Verma Committee report have been diluted. They were of the opinion that exemption of marital rape from being considered a crime under section 375 of the Indian Penal Code is contrary to the provisions of the Indian Constitution which considers all women as equal human beings who have a right to live with dignity and free from violence within and outside marriage. They were also of the opinion that this exemption is also contrary to the Verma Committee report which had pointed out that the exemption from marital rape

stems from a long outdated notion of marriage which regarded wives as no more than property of her husband whereas marriage in modern times is regarded as partnership of equals. [86]

The dissenting opinions of both these Honourable members show that even within the Parliament, there is a small group of members who are in favour of criminalising marital rape. It is hoped that in future these Parliamentarians may become successful in convincing their colleagues and bring a Historic reform in the Law relating to Sexual Offences in India.

3.5.3. PARLIAMENTARY DEBATES ON THE ISSUES OF CRIMINALIZATION OF MARITAL RAPE

From the Select Committee, the debate on the issue of marital rape reached the Parliament twice though both the times the government turned down the issue of criminalization of marital rape but it is heartening to note that the discussion on this issue has at least begun.

For the first time, the debate on the issue of criminalization of marital rape occurred during the discussion on the Criminal Law Amendment Bill, 2012. Sandeep Dikshit, an M.P. from Congress (the then ruling party at the Centre) requested fellow Parliamentarians to enlighten him on the issue whether marital rape should be made a crime or not. Sumitra Mahajan, then an M.P. from BhartiyaJanta Party (present Speaker of Lok Sabha) speaking after him, was of the opinion that marital rape should not be made a crime as it is not in accordance with our social system or family system. She told the house that such issues need to be tackled through counselling and in our Indian society; elders have been working as a buffer and playing a significant role in resolving matrimonial disputes. She further opined that making marital rape a crime will not resolve matrimonial dispute rather it will increase the same. She even echoed the demand of her party to delete section 376B, which deals with the rape of a wife living separately but this demand was not accepted by the then government.

Mrs. Mahajan's opinion reflects the widely prevalent thinking of considering marital rape as a matrimonial dispute but that is far from truth. Rape is a rape, no matter who commits it. In fact Psychologists and medical experts are of the unanimous opinion that marital rape can be more traumatic than stranger rape. Suffering at the hands of a spouse, who is usually a source of trust and care, produces feelings of betrayal,

[86] *Id* p-81

disillusionment, and isolation in the woman. Thus there is no logic behind treating marital rape as just a mere matrimonial dispute. Even Ms. Mahajan's suggestion of resolving such issues through counselling does not appear to be sound. Under the Protection of Women from Domestic Violence Act, 2005, there is a provision of sending the victim and the respondent for counselling. A female victim of sexual violence by her husband are also sent for counselling but these counselling are hardly effective as the husbands many a times feel that they have committed no wrong by raping their wives. This fact was revealed by ShaminaShafiq, who is a member of National Commission for women and has a long experience of working on women's issues.[87] Thus we find that the suggestion of Mrs.Sumitra Mahajan is not supported by experts working in this area but sadly inside the Parliament, nobody contradicted her opinion. Moreover many of the members of the House were busy in expressing their fear that such provisions will be misused by women.

Mr. A. Sampath, member of Parliament from Attingal, Kerala representing Communist Party of India (Marxist), was the only member who spoke in favour of criminalization of marital rape. He raised the question why should the exception to section 375 which grants exemption to husband for raping his wife not below 15 years be there. He further countered the issue raised by many members that criminalising marital rape has the potential of being misused by stating any law for that matter can be used or misused and that fear should not stop the Parliament from making laws.

On 29 April, 2015, the issue of criminalisation of marital rape was again raised in the Parliament. DMK MP Kanimozhi, through a question submitted in the Rajya Sabha, asked Minister of State for Home Affairs HaribhaiParathibhai Chaudhary whether the government would bring in an amending Bill to the Indian Penal Code to remove the exception of marital rape from the definition of rape in the light of the U.N. agencies' findings and recommendations. Mr. Chaudhary, in his written reply, said that while the U.N. Committee on Elimination of Discrimination against Women had recommended that India criminalise marital rape, India's Law Commission had not recommended this, and the government had no plan to bring in an amendment.

"It is considered that the concept of marital rape, as understood internationally, cannot be suitably applied in the Indian context due to various factors — e.g. level of

[87] *https://www.youtube.com/watch?v=ibTz9mSnUf4, (*accessed on 25 Feb, 2019)

education/illiteracy, poverty, myriad social customs and values, religious beliefs, mindset of society to treat marriage as a sacrament, etc," Mr. Chaudhary said. [88]

But Ms.Kanimozhi expressed her disagreement with the Minister in the following words, "I accept that the institution of marriage is an integral part of our social structure. Many people across many faiths hold it sacred. But it has not stopped us from bringing the anti-dowry law or domestic violence legislation". She further stated, "Today, we are more receptive to women's rights and issues. This is not against our culture. It is about protecting our women from violence and abuse". [89] She has also introduced a Private Member Bill seeking the removal of the marital rape exception from the Indian Penal Code.

While Mr. Chaudhary's reply referred to the Law Commission's report of 2000, it did not talk of the more recent Justice Verma Committee report of 2013 on sexual violence laws which said that the exemption for marital rape "stems from a long out dated notion of marriage which regarded wives as no more than the property of their husbands" and recommended the removal of the marital rape exception. However the Criminal Law Amendment passed by the UPA following the report also avoided the marital rape question.

Senior advocate Vrinda Grover said that this was against the principle of upholding a woman's bodily integrity which underlay the amendment. She further expressed her opinion the reason why they are not bring a laws to make marital rape a crime is that Parliament is full of Patriarchal and conservative people. [90]

Thus, rescarcher find that the issue of criminalization of marital rape has been discussed in the Parliament twice and though the majority did not agreed with it but there were some forceful voices advocating the same. The Parliamentary debates have given rise to a discussion on this issue even outside the Parliament. Various television channels have organised panel discussion on this issue and several articles have been published on this issue in various newspapers. This is good beginning for the Indian society, which was so far reluctant to acknowledge that such things happen. Democracy is the government of debates and discussions. Let us hope that this beginning will take some more steps ahead in this direction.

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[88] 'Indian not to criminalize marital rape", The Hindu, April 29, 2015 *http://www.thehindu.com/news/national/concept-of-marital-rape-cannot-be-applied-in-india/article7154671.ece ,* (accessed on 26 Feb, 2019)

[89] *Ibid*

[90] *Ibid*

3.6. MARITAL RAPE AND THE INTERNATIONAL LAW OF HUMAN RIGHTS

The most cherished right of a human being available to him just by virtue of being born a human is right to life. Right to life does not only mean mere animal like living rather it means right to live with human dignity. Rape per se is an offence, violating the dignity and self respect of a woman and when it occurs within the four walls of a matrimonial home, it reduces the woman to the status of an object used merely for sexual gratification. [91] Thus marital rape is not merely an offence rather it is violation of the most precious human right of woman i.e. the right to live with human dignity.

The Universal Declaration of Human rights in its Preamble has proclaimed that the recognition of inherent dignity and equal and inalienable rights of human is the foundation of justice, freedom and peace in the society. In its thirty articles, the Universal Declaration has laid down a common standard of achievement for all people and all nations. Article 16 of the Universal Declaration has declared that men and women, of full age have right to marry and found family and they shall have equal rights as to marriage, during the marriage and at its dissolution.

The International Covenant on Civil and Political Rights, which is a legally binding document and has been signed and ratified by India, has under Article 23 (4) imposed an obligation on the state parties to ensure that the no marriage shall be entered into without the free and full consent of the intending spouse. Article 23(5) further imposes the obligation on the states to take appropriate steps to ensure the equality of rights and responsibilities of spouse as to marriage, during marriage and its dissolution. Indian government has taken no step to ensure that the marriages are entered into by the free consent of the parties and thus no attempt has been made so far to fulfil the first obligation.

India has also signed and ratified the Convention on Elimination of all forms of Discrimination against women. Under Article 2 (g) of this Convention also, India is under a duty to repeal all national penal provisions, which constitute a discrimination against woman. [92] Declaration on Elimination of Violence against women, adopted by the United Nations General Assembly in the year 1993 has firmly established marital rape as violation of Human rights.

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[91] Dr. Bhavish Gupta and Dr. Meena Gupta, 'Marital Rape: Current Legal Framework and Need for change", Galgotias Journal of Legal Studies 2013 GJLS Vol. 1, No. 1

[92] *http://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf*,(accessed on 2nd April, 2015)

The United Nations Committee on Elimination of Discrimination against women in 2007 have called on the Indian government to remove the exception of marital rape from the definition of rape and define marital rape as a criminal offence.[93] The Special Rapporteur on Violence against women has also asked the Indian government to include the definition of marital rape as a criminal offence.[94] Indian government has retained the marital rape exemption and has allowed the husbands to have complete sexual control over their wives, which is in direct contravention to these human right regulations.[95]

3.7. MARITAL RAPE AND THE CONSTITUTION OF INDIA

The Constitution of Indian in Part III has guaranteed several fundamental rights to its citizens. Some of these rights are available to non-citizens as well. All these rights are available without any distinction to women as well. Under Article 13, the State is under a duty not to make any law, which is inconsistent with the fundamental rights guaranteed under this Part. Most important of these fundamental rights is the right to life guaranteed under Article 21, which has been interpreted by the Supreme Court as right to live with human dignity. In *BoddhisatvaGautam v Subhra Chakraborty*[96], the Supreme Court of India has declared that rape is a crime against human rights and a violation of the victim's most cherished right of fundamental rights, i.e. right to life contained in Article 21. If rape is a violation of right to life, there can be no reason to believe why it will not be so if the aggressor happens to be victim's husband.

Article 21 has been interpreted to include right to privacy, which means right to be left alone. Any form of forceful sexual intercourse violates the right to privacy. It is submitted that the marital rape exemption violates right to privacy and in effect violates Article 21 of the Constitution. This exception is also violative of right to bodily self determination, right to privacy and right to good health, all of which are integral part of right to life. At its core, this provision of Law is unconstitutional though so far the Supreme Court has not got the opportunity to decide its Constitutional validity.

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[93]Concluding Comments of the Committee on the Elimination of Discrimination against Women: India (CEDAW/C/IND/CO/3), 2 February 2007, para. 23

[94] *http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session26/Documents/A-HRC-26-38-Add1_en.doc,*(accessed on 2 March, 2019)

[95]StellinaJollly and M.S. Raste "Marriage and Rape: Reflections on Past, Present and Future", *Journal of Indian Law Institute,*Vol 48, No 2. April -June 2006, p 277

[96] 1996 SCC (1) 490

Under Article 14 of the Indian Constitution, right to equality has been guaranteed to all the persons. This Article does not require everyone to be treated equally in all circumstances rather it requires that equals within the society are not treated unequally and the non-equals within a society are not treated equally. Thus, this article allows classification but the classification has to be reasonable. The Supreme Court in *State of West Bengal v Anwar Ali Sarkar*[97] has laid down the test of reasonable classification:-

(i) The classification has to be founded on the intelligible differentia, which distinguishes those that are grouped together from others

(ii) The differentia must have rationale nexus with the object to be sought by this legislation.

Exception II of section 375 of the Indian Penal Code classifies women into two categories- women who are raped by their husband and women who are raped by someone else. This classification rests on the assumption that married women do not need the protection of law within their private spheres. The assumption further stems from the fact that in marriage, women are presumed to have given an irrevocable consent to sex to her husband. It is submitted that such an assumption is wrong, irrational and not based on any intelligible differentia. The rest of section 375 is interested in protecting the right of the rape victim but this right is withdrawn in case the perpetrator is her own husband. It takes away a woman's right of choice and deprives her of her bodily autonomy and her personhood. Thus, the classification is unnecessary and unintelligible and thus violates the mandate of Article 14.[98]

3.8. MARITAL RAPE AND THE COMPARATIVE ANALYSIS OF THE LAW IN DIFFERENT COUNTRIES

The rescracher has preferred to compare the Law relating to Marital Rape in different countries of the world. The countries that were early to criminalize marital rape are Czechoslovakia[99], and Poland [100] (which have a law dating back to procommunist days of 1932). In those countries, husbands may be charged with marital rape. Marriage does not give a right to force one's wife to have sexual intercourse with him.

[97] AIR 1952 SC75, 80
[98] *Supra* note 56
[99] C. Z. CRIM. CODE Section 238 (1950)

[100] POL. CODE Art. 204 (1932)

In Sweden it has been possible to prosecute a husband for marital rape since 1965, though the crime is considered less grave in view of the spousal relationship. Rape by a stranger carries a prison term of no less than two and not more than ten years. Husbands can be prosecuted only for *valdforande*(sexual coercion or assault), which carries a maximum sentence of four years' imprisonment. In Denmark, the Penal Code defines rape as sexual intercourse obtained by force with *any* woman. Once again the penalties to which husbands-and others who have had a sexual relationship of a lasting kind-are lighter.' The Norwegian law is similar to the Danish law in this regard.

3.8.1. ENGLAND

Sir *Mathew Hale* gave birth to common law's 'marital exemption' in rape in 1736.[101]Ever since then up till 1991 the marital rape immunity in England was given institutional legitimacy. Research have shown that there were no circumstances in which the wife could be held to have retracted her matrimonial consent to sexual intercourse It was for the first time in the case of *R v Clarke*[102] , that an exemption to the general common law rule of marital exemption was first recognized. An allegation of rape made by wife against husband as the forceful sexual intercourse occurred when there was a separation order in force. The court held that in such a situation the wife was under no obligation to cohabit with the husband. Bryne J. held that ''in those circumstances consent of wife had been revoked by an order of the court for non-cohabitation''. However in 1954 in *R*v.*Miller* [103] in a regressive decision by LynskeyJ., court granted the benefit of marital exemption and held that the wife had not legally revoked her consent despite having presented a divorce petition. In this case the act was held to be an assault and not considered as 'rape'. Later in *Reg*v. *Reid*[104]the court observed that "the notion that a husband can ,without incurring punishment treat wife whether she be a separated wife or otherwise ,with any kind of hostile force is obsolete".[105]

Similarly in *R* v. *Roberts*[106]the court of Appeals further expanded the definition of marital rape and held that forceful sexual intercourse after order of separation would

[101]*Ibid*
[102] (1949) 2 All ER 448
[103] (1954) 2 QB 282
[104](1972) 2 ALL E.R.1350
[105]*Id.* at 1353
[106](1986) Cri.LR.188

amount to rape. However it was in the year 1991 in case of *R* v *R*[107]that the 'marital rape exemption' was finally completely abolished by the Appellate Committee of the House of Lords. The court held thus: "Accepting that it is implied or presumed that a wife consents to sexual intercourse when she marries her husband on agreement between the parties sufficient to displace the marital exemption to law of rape may both be informal and implied from conduct .Furthermore a wife may unilaterally withdraw implied consent to sexual intercourse by withdrawal from cohabitation accompanied by a clear indication that the consent to sexual intercourse has been terminated"

Again in *R* v. *C,*[108]the court held that there is no " marital exemption" to the law of rape and accordingly the husband may be convicted of rape of his wife in case of non consensual sexual intercourse whether he is living together or apart from his wife.

Lord Keith of Kenkel held 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''. Court further held that ''marriage in modern times is regarded as partnership of equals. And Hales position involves that by a marriage a wife gives her irrevocable consent to sexual intercourse with her husband under all circumstances irrespective of her health……but a wife is not obliged to obey her husband in all things nor to suffer excessive sexual demands on part of her husband.'' *Lord lone* CJ. held this common law fiction as 'anachronistic and offensive'.

In 1994, Sexual Offences Amendment Act was passed which by way of Section 147 abolished the 'marital exemption' in England.[109]

3.8.2. EUROPEAN UNION

European Commission of Human Rights in *C.R.* v *U.K.*[110]endorsed the conclusion that a rapist remains a rapist regardless of his relationship with the victim. It was acknowledged that this change in the common law was in accordance with the fundamental objectives of the Convention on Human Rights, the very essence of which is respect for human rights, dignity and freedom.[111]

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[107] (1991) 2 All ER 747
[108](1991)1 ALL.E.R. 755.
[109] Rakesh Singh, "Trauma of Marital rape: Husband turns Predator", *CrLJ*104 (2006)
[110] Government Of India, *Committee on Amendments to Criminal Law*, ''Report on Amendments to Criminal law" 114 (Minstry Of Home Affairs ,January23, 2013).
[111]*Id* at p-116

3.8.3. UNITED STATES OF AMERICA

For over 330 years Sir Mathew Hale's statement alone served as a justification for a spousal immunity involving rape charges, and was the origin for judicial recognition of the marital rape exemption in the United States.It also served to maintain the position of men in our society as dominators and women as their property.[112] In *Common wealth* v.*Forgarty*[113] court following the Sir Hales preposition held that 'a husband cannot be convicted of raping his wife'. This was the first case where Hales preposition was first time followed. And after this there is plethora of cases where this preposition was followed in United States

The state of Michgan was the first states to have achieved rape law reforms with the initiative and support of women activists. One of the most significant changes was the redefinition of "rape" to criminal sexual conduct".[114]

In *Smith* v *State*[115], the court observed that 'the principal of implied consent' should be abandoned. Forced sexual intercourse is a violation of the person's bodily integrity whether it is committed within or outside marriage''. And in 1984 *People* v*Liberta*[116] New York court held 'marital exemption' clause as unconstitutional and violative of the equal protection clause guaranteed under the constitution. The court in this case could not find a rational basis for distinguishing between marital rape and non-marital rape. Marital rape is now illegal in almost all American states.

In the state of South Dakota, there is a classification of rape cases into two degrees. Rape is of the first degree if the victim is not the defendant's voluntary social companion on the occasion of crime and has not previously permitted him sexual contract. Marriage or previous sexual intercourse however reduces the offence to second degree.[117]Hawaii also classifies rape in a similar classification. Later on, state of Oregon in 1977 made 'spousal rape' a new offence. Under this new offence a husband could be convicted for raping his wife. State of Nebraska also enacted a law under which even live-in husband can be convicted under the offence of rape.[118]

3.8.4. CANADA

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[112]Sallee Fry Waterman "For Better or Worse :Marital Rape" 15 *N. Ky. L. Rev.* 611(1988).
[113] 74 Mass.(8Gray)489(1857).
[114]*Id*. at 215.Also *see*NenaBohra, "A Comparative Study Of Rape Law", *Lawyer's Collective* 1991
[115] 85 NJ 426A2d
[116] 64 NY 2 ed,474NE2d(1984)
[117] MVS Sankaran "Marital Status Exemption In Rape" 20 *JILI* 602(1978)
[118]*Id*. at 604

Marital rape was abolished in year 1983 after the introduction of the bill C-127 which repealed the existing rape statute and marital rape was criminalized. In 2011, The Canadian Supreme Court in *R v. J.A.*[119], Chief Justice McLachlin emphasized that the relationship between the accused and the complainant does not change the nature of inquiry. The defendant cannot argue that the complainant's consent was implied by the relationship between the accused and the complainant.

3.8.5. NEW ZEALAND

The marital rape exemption was abolished in 1985 by the present Section128 of Crimes Act, 1981. Subsection 4 provides that ' a person can be convicted of sexual violence in respect of sexual connection with another person notwithstanding that they are married at the time sexual connection occurred.'[120]

3.8.6. SOUTH AFRICA

In 1993, South Africa criminalized marital rape, reversing the common law principle that a husband could not be found guilty of raping his wife. The Prevention of Family Violence Act, 1993, Section 5 provides that '' Not withstanding anything to the contrary contained in any law or in the common law, a husband may be convicted of the rape of his wife.''In 2007 Criminal Law (Sexual Offences and Related Matters) Amendment Act in 'Sexual Offences Act' was done which provides in Sec. 56 (1), that 'a marital or other relationship between the perpetrator or victim is not a valid defence against the crimes of rape or sexual violation'.

3.8.7. AUSTRALIA

In Australia, the common law 'marital rape immunity' was legislatively abolished in 1976.[121] In 1991, *R v.L*[122] Australian High Court through Mason CJ held that: 'If it was ever the common law that by marriage a wife gave irrevocable consent to sexual intercourse by her husband, it is no longer the common law'.[123]

3.8.8. NEPAL

The Supreme Court of Nepal has declared that marital sex without a wife's consent should be considered rape and be punishable by law. The Landmark decision resulted

[119] [2011] 2 SCR 40
[120] *Id.* at 104
[121] Section 73(3)Criminal Law Consolidation Act ,1935
[122] (1991) 174 CLR 379
[123] *Supta*note *56* at 115

from a petition filed in July 2001 by the Forum for Women, Law and Development, a women's right organization.[124]

3.8.9. BHUTAN

Section 199 of the Penal Code of Bhutan declares marital rape to be an offence though section 200 classifies it as a petty misdemeanour.[125] Thus a person convicted of marital rape can be sentenced to an imprisonment ranging from one month to one year.

3.9. ARGUMENTS AGAINST THE CRIMINALIZATION OF MARITAL RAPE

Those who argue against the criminalization of marital rape cite two kinds of reasons. First set of reasons are historical in nature. They consist of historical justification given in favour of marital rape exemption. Another set of reasons is modern reason. Let us have a look on both these justifications one by one and at the same time. The rescarcher has thron light on the criticism of these arguments.

3.9.1. HISTORICAL PROSPECTIVE FOR CRIMINALISATION OF MARITAL RAPE

Historically, the acceptance and development of marital rape exemptions are rooted in three theories: the theory of implied consent, the "unity" and "women as marital property" theories, and the "narrow constructionist" theory. Although the implied consent theory was the initial rationale for the recognition of marital exemptions, the unity or property and narrow constructionist theories provided additional justification for the exemptions' widespread acceptance.

3.9.1.1. THE "IMPLIED CONSENT" THEORY

The most frequently cited basis for marital rape exemptions, both legislatively and judicially, is the common law doctrine of irrevocable implied consent. The theory of implied consent originated with a seventeenth century statement by Sir Matthew Hale that a "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."' [126]A woman, upon entering marriage, impliedly and irrevocably consents to sex on demand with her husband, at any time and under any circumstances.

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[124] *http://panos.org.uk/features/marital-rape-outlawed-by-nepals-supreme-court/* (accessed on 3rd March, 2019)

[125]http://www.judiciary.gov.bt/html/act/PENAL%20CODE.pdf, (accessed on on 3rd March, 2019)

[126] *http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1296&context=wmjowl*,(accessed on March 5, 2019)

Modern critics suggest that even if implied consent theory was at some point of time valid, that time has passed both socially and logically. Additionally, after the passage of Hindu Marriage Act, 1955 Hindu marriage is no more only a sacrament rather both a sacrament as well as contract. Muslim and Christian marriages were already considered contract and thus Marriage and Divorce laws of India at present recognise that either spouse can unilaterally withdraw from the marriage contract. This ensures that either spouse can unilaterally withdraw consent to marital sex. If the victim truly has "revoked" a term of the marriage contract by refusing sexual intercourse, the proper remedy for the harmed spouse is in the matrimonial courts, not in violent or forceful self-help. Thus, this theory is no longer relevant to justify the marital rape exemption.

3.9.1.2. THE "UNITY" AND "WOMEN AS MARITAL PROPERTY" THEORIES

Blackstone best articulated the unity theory when he wrote that "by marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into her husband." [127]Once the couple is married they become one. The unity theory stands for the proposition that because the husband and wife are one, the husband is incapable of raping his wife because he is incapable of raping himself. The unity doctrine is a basis for the historical view of women as the property of marriage. Women are their husbands' chattels to be "deprived of all civil identity." Early rape laws, which either explicitly exempted wives from the laws' protection or were interpreted by their silence to include the English common law exemption, reflect this notion of women as, property and were intended initially only to protect the property interests of the woman's husband, if married, or father, if single. Courts have largely rejected the unity and "women as marital property" theories by invoking language from various judgments which asserts that nowhere in the modern society, a woman is regarded as chattel or demeaned by denial of a separate legal identity and the dignity associated with recognition as a whole human being." Critics also challenge the unity theory on the basis that husbands can be charged with committing other crimes against their wives. As far as India is concerned, in India wife was never considered her husband's property nor were the husband and wife considered a single person. Thus this argument also fails in the Indian context.

[127]*Ibid*

3.9.1.3. The "Narrow Constructionist" Theory

English common law defined rape as the unlawful carnal knowledge of a woman against her will. In the narrow constructionist theory, the term "unlawful," as it is used in rape statutes, means "not authorized by law. Because marriage sanctions, or authorizes, sexual relations between husband and wife, all carnal knowledge between husband and wife is lawful, and there are no sexual relations within a marriage that are unauthorized or unlawful. Thus, no sexual relations within a marriage fall within this definition of rape. Supporters of this theory find it superior to Hale's theory of implied consent not only because it is less likely to become outdated but also because it alleviates the need to feign consent where there is none. Modern legislatures have dismissed this argument by drafting statutes that no longer contain the "unlawful carnal knowledge" language.

3.9.2. MODERN ARGUMENTS AGAINST THE CRIMINALIZATION OF MARITAL RAPE

Nowadays, support for marital rape exemptions is grounded in four rationales that are as a group distinctly more modern, and thus more easily accepted, than their predecessors: marital privacy, marital reconciliation, fear of false allegations and difficult proof requirements, and the belief that rape within marriage is less severe than rape outside marriage.

3.9.2.1. MARITAL PRIVACY

Marital privacy is one of the foremost modern day justifications for marital rape exemptions. Proponents of the marital privacy rationale suggest that the right to privacy within one's marriage is so fundamental that the public, and hence the legal system, should be precluded from defining or judging the activities therein. Professor Hilf analogizes marital privacy rights to "drawing a curtain" around the marriage so the "public stays out" and the "spouses stay in." Keeping the public out, Hilf argues, prevents voyeurism as well as the embarrassment of disclosing private lives.[128]

Courts in the United States have proposed numerous counterarguments to the marital privacy theory. The New York court of appeals in People v. Liberta4 3 rejected the marital privacy argument and stated clearly that the right recognized in *Griswold v. Connecticutt*[129]applies only to consensual acts, not to violent sexual assaults. Nor is marital privacy an absolute right. States must balance their interest in protecting marital privacy against their interest in protecting individuals' bodily integrity. Some

[128] Michael G. Hilf, Marital Privacy and Spousal Rape, 16 NEW ENG. L. REV. 31, 33 (1980)
[129] 381 U.S. 479 (1965)

courts maintain that the exemption itself interferes with the marital relationship because it gives the husband legal control over his wife's bodily integrity that he otherwise would not have.[130] These judgments of the courts in the United States are relevant even in the Indian context and they have strongly rebutted the arguments given by the proponents of the marital privacy theory.

3.9.2.2. **MARITAL RECONCILIATION**

The marital reconciliation rationale for marital rape exemptions is an extension of the "closed curtain" and marital privacy justifications. By keeping the spouses "in," and the law and the public "out," spouses are supposedly forced to resolve their differences independent of external interference. Reconciliation theorists maintain that this resolution process, as opposed to one which allows "access to the criminal justice system for every type of marital dispute, fosters greater mutual respect between the parties and eases their ultimate reconciliation. Inherent in this theory is the idea that if a victim of spousal rape is capable of bringing, and in fact does bring, criminal charges against her spouse, then the law will have fostered marital discord and prevented reconciliation. Although some foreign courts have accepted this reasoning, most of the courts throughout the world and critics reject the reconciliation and marital harmony theory on the basis that little exists to reconcile if the relationship has deteriorated to the level of forcible rape. Some courts and commentators have also noted that the relationship and potential for reconciliation is disrupted by the rape itself, not the rape charge.

3.9.2.3. **EVIDENTIARY CONCERNS AND THE FEAR OF WOMEN LYING**

Evidentiary concerns are perhaps the most common basis for the partial or limited marital exemptions found in the rape laws of several countries. One primary objective of the partial exemptions is to guard against false accusations made by deceitful or vindictive women. Until recently, Lord Hale's infamous warning that rape "is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, was used as a cautionary jury instruction. To guard against falsely convicting an innocent man, Wigmore advised that 'no judge should ever let a sex offence go to the jury unless the female complainant's social history and mental makeup have been examined and testified by a qualified physician. The psychic

[130] People v De Stefano, 467 N.Y.S.2d 506, 517 (County Ct. 1983)

complexes of women are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offenses by men.' Although these archaic procedural requirements no longer exist in the realm of stranger or non-stranger rape, the prejudicial notions supporting them do remain when victims are married to their assailants.

Opponents of this "fear based" justification offer three arguments. First, other crimes exist that are equally difficult to prove yet they are not decriminalized. The best example of the same can be section 377 of the Indian Penal Code. Our society instead relies on a criminal justice system that is sufficiently sophisticated to ensure that innocent individuals are not frivolously prosecuted or wrongly convicted. Next is the jurisprudential view that convictions are not the sole reason for enacting laws. In addition to convicting criminals, laws serve as deterrents and educational tools, announcing to society what is morally right and morally wrong, what is socially acceptable behaviour and what is not. Finally, rape is recognized as a vastly underreported crime. Reasons offered for this phenomenon include the social stigma attached to victims of rape, fear of retaliation and reluctance to endure the double victimization of the judicial system. Fabrications of rape charges are unlikely not only for the reasons stated above, but also because "rape prosecutions are often more shameful for the victim than the defendant."

Kavita Krishnan, President of All India progressive Women's Association, in a panel discussion conducted on Lok Sabha channel, stated that some of the persons who support the marital rape exemption because of the fear that the law may be used by some women have been affected by the stereotype that women are more prone to lying.[131] There are several other laws, which can be misused but nobody shows a fear that they might be misused. Recently when there were public protests with the demands of a Strong Lokpal in India, nobody except the Politicians or bureaucrats expressed a fear that the same will be misused. A lot of hue and cry is being made about the extensive misuse of section 498A of the Indian Penal Code but no one was able to prove the extent of its misuse by an empirical study before the Law

[131] *https://www.youtube.com/watch?v=ibTz9mSnUf4* (accessed on 4th March, 2019)

Commission of India.[132] No doubt section 498A is being misused but the extent of the misuse is being blown out of proportion by those who do not want that the law should interfere and change the social hierarchy of the society, which has been settled for several centuries and others are misled by them and join the chorus. Prof.UpendraBakshi has rightly pointed out that one of the biggest problems of the Indian society is that patriarchy is not considered to be a problem rather it is considered to be natural. In a deeply patriarchal Indian society, whenever laws are made in favour to strengthen the position of women, eyebrows are raised. Even use is termed to be misuse as in the eyes of the society use of the law against husband is not something which they are accustomed to and women are supposed to tolerate all the atrocities of the husband in silence. Her raising her voice against the same is also termed misuse of law. But that does not mean that women cannot file any false case against her husband but the probability of the same is either at most equal to that of any man filing a false against any other man or that of a common man filing a false corruption case against a Politician or an officer. Moreover there are provisions in the Indian Penal Code itself which are able to tackle the problem of misuse.

Section 211 of the Indian Penal Code prescribes punishment for any person, who makes a false charge of offence with the intent to cause any injury knowing that there is no lawful justification for such charge. This provision of law should be used by Prosecution agencies and the courts in appropriate cases[133]but as a matter of caution a provision similar to section 198B of the Criminal Procedure Code should be inserted for marital rape cases and the cognizance of the court should be barred except upon a prima facie satisfaction of the facts which constitute the offence upon a complaint having been filed or made by the husband against the wife. Moreover arrest should be made only in accordance with section 41 of the Criminal Procedure Code as amended by Criminal Law Amendment Act, 2013.

3.9.2.4. **MARITAL RAPE VIS-À-VIS NON-MARITAL RAPE**

There is a perception that rape by, a known individual, particularly an individual with whom the victim has had past voluntary sexual intercourse, is less severe than rape by an unknown individual. This perception supports both broad marital rape exemptions and the treatment of marital rape as a lesser sexual offense. Contrary to this "less harmful than" theory, victims of spousal rape suffer greater harm than victims of

[132]Law Commission of India, 243rd Report p-40
[133]Kusum, 'Harassed Husbands", Regency Publications New Delhi (1993)

stranger rape. Data demonstrates that rape in marriage is actually more emotionally traumatic than any other kind of rape and carries with it longer lasting emotional effects. Victims of marital rape also tend to suffer greater physical harm than victims of non-marital rape and are in fact often victims of the most brutal and life-threatening rapes. Critics of the "less harmful than" theory also argue that the very existence of rape laws indicates a recognition that harm caused by rape, any rape, is more severe than harm caused by assault and should be treated as such. In the words of Dr. David Finkelhor, "rape is traumatic not because it is with someone you don't know, but because it is with someone you don't want." [134]

3.10. ARGUMENTS IN FAVOUR OF CRIMINALIZATION OF MARITAL RAPE

The persons who support the criminalization of marital rape not only ably rebut the arguments put forward by the supporters of marital rape exemption but they also have their own arguments against the marital rape exemption and the arguments in favour of the criminalization of marital rape.

(i) The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights emphasised on the equal rights of men and women during marriage. The marital rape exemption denies the same to women. Moreover it is also in violation of the commitment of India under the Convention on Elimination of All forms of Discrimination against woman. Declaration on Elimination of Violence against women has declared marital rape as a violation of human right and India by continuing the marital rape exception is violating the human rights of women.

(ii) The argument that the criminalization of marital rape has potential to destroy the marriage is baseless. It is the act of marital rape, which has the potential to destroy marriage not its criminalization. The removal of the marital rape exemption will instead educate men to respect the right to bodily autonomy of their wives and prevent them from considering marriage as a license to rape.

(iii) The implied consent theory given by Justice Hale has been rejected by the courts in most of the countries of the world and it is even more difficult to accept this theory in Indian context as in India even at present a large

[134] Linda Jackson, Marital Rape: A Higher Standard Is in Order, 1 Wm. & Mary J. Women & L. 183 (1994), *http://scholarship.law.wm.edu/wmjowl/vol1/iss1/8* (accessed on March 4,2019)

number of marriages are arranged by the parents of the bride and she has little say in the same. Even if she gives her free consent at the time of marriage, that consent cannot be taken to be forever.

(iv) Argument given by Parliamentarians that the issue of marital rape can be tackled through counselling has been rejected by experts, who argue that in several cases husbands do not believe that they have committed any wrong by raping their wives. It is submitted that the removal of the marital exemption coupled with educational reforms may educate such husbands to respect the dignity of their wives.

(v) The argument that in India, due to social and cultural reasons, marital rape cannot be made crime is far from truth. There were several other social customs, like Sati Pratha, ban on widow remarriage, dowry system, child marriage, etc, which were outlawed by the Parliament despite being deeply engrained in the Indian society. Marital rape has no such historical or cultural sanction and thus can easily be criminalized by crime. The fact that in India marriage is considered to be a sacrament should enhance the responsibility on the husband to respect the wishes of her wife.

(vi) The argument that criminalising marital rape will violate the right to marital privacy has been ably rebutted by the courts in the United States as they have taken a consistent view that right to marital privacy is not an absolute right and they are available only for consensual acts and not for violent acts. There is no logic to believe why the same view should not hold true even in the Indian context.

(vii) The argument that since marital rape is difficult to prove, it should not be made a crime has no weight as there are several other offences which are as difficult or even more difficult to prove but they have still found a place in the statute book.

(viii) The argument that women will misuse this law and make false allegations of marital rape appears to be based on the stereotype that women are more prone to lying, which has no scientific backing. Any law has the potential to be misused and that's why our criminal justice system requires a charge to be proved beyond reasonable doubt. Moreover there are provision within the Indian Penal Code (section 211), which can be used to punish

the person who puts false charges against another with the intent to cause injury to him and thus this provision can be used to deter persons from filing false cases.

(ix) The argument that rape by a partner is less harmful than rape by a stranger has been found to be incorrect by the research conducted worldwide. The researchers instead found that rape in marriage is actually more emotionally traumatic than any other kind of rape and carries with it longer lasting emotional effects.

3.11. MARITAL RAPE AND THE REALITY OF THE INDIAN SOCIETY

Some persons argue that marital rape might be a problem in western countries but in India this problem is non-existent. Several researches have found such claims to be incorrect. According to the UN Population Fund, more than two-thirds of married women in India, aged 15 to 49, have been beaten, or forced to provide sex. In 2011, the International Men and Gender Equality Survey revealed that one in five has forced their wives or partner to have sex.[135]

National Family Health Survey has a conducted a survey on Domestic Violence and in that survey, they also focused on the issue of sexual violence inside homes. Ten percent of currently married or widowed women, 1 percent of never married women, and 2 percent of women whose gauna has not yet been performed report have experienced sexual violence. However, compared not only with women in other marital statuses, but also with all other subgroups in the table, it is divorced, separated, or deserted women have the highest prevalence of sexual violence (25 percent). [136] Five percent of women aged 15-19 report having experienced sexual violence, the lowest rate among all the age groups. Ten percent of rural women have experienced sexual violence, compared with 6 percent of urban women.

The prevalence of sexual violence declines sharply with education from 12 percent among women with no education to less than 5 percent of women with at least 10 years of education. As in the case of physical violence, women who were employed (either for cash or not for cash) during the 12 months preceding the survey have a somewhat higher prevalence of sexual violence (10 percent) than women not

[135]International Centre for Research on Women, International Men and Gender Equality Survey, 2011, p-46, available at:*http://www.icrw.org/publications/evolving-men*, accessed on 2nd March, 2019

[136] *http://hetv.org/india/nfhs/nfhs3/NFHS-3-Chapter-15-Domestic-Violence.pdf*, (accessed on 8th March, 2019)

employed (7 percent). According to religion, Buddhist/Neo-Buddhist and Jain women have the lowest prevalence of sexual violence (3 and 4 percent) and Muslim women the highest (11 percent), followed by Hindu women (8 percent). Prevalence of sexual violence is somewhat higher for the scheduled castes (11 percent) and scheduled tribes (10 percent) than for women not belonging to the scheduled castes and tribes (7-9 percent). As with physical violence, prevalence is highest among women in the poorest wealth quintile (13 percent) and declines steadily with increasing wealth to a low of 4 percent among women in the highest quintile. Never married women who have experienced sexual violence have most often been abused by a relative (27 percent), a friend/acquaintance (23 percent), a boyfriend (19 percent), a stranger (16 percent), and a family friend (8 percent). Among women for whom the age at first sexual abuse is known, 371 were younger than 15 years when they were first abused. Almost half (47 percent) of this small number of women, say that their current husband was the perpetrator of the violence and 8 percent say that it was a former husband. Among women who first experienced sexual violence before age 15, significant proportions say that the violence was perpetrated by a relative (19 percent) or by a friend or acquaintance (10 percent). Among women who first experienced sexual violence after age 15, husbands are by far the most common perpetrators of sexual violence.

Spousal violence refers to violence perpetrated by partners in a marital union. Since spousal or intimate partner violence is the most common form of domestic violence for womenage 15-49, the National Family Health Survey collected detailed information on the different types of violence—physical, sexual, and emotional—experienced by women at the hands of their current or mostrecent husbands. Focusing on the most current/recent spouse permits a better understanding ofcurrent risk of spousal violence.

In this violence, ever-married women were asked about seven sets of acts of physical violenceby their current or most recent husband, two of sexual violence, and three of emotional violence.Although specific acts are labelled here as constituting physical, sexual, or emotional violence forpurposes of discussion, there is no implication that an act of physical violence will not entailemotional violence or that an act of sexual violence does not entail physical violence.

According to Yugantar Education Society Survey on domestic violence, one-tenth of 1250 respondent ts from all states together reported sexual abuse by their husbands. The extent of sexual abuse was more in urban areas as compared with rural areas. Similarly, the cases of sexual abuse as reported by respondents were more from upper class, higher middle class and middle class families as compared to lower class and below poverty line families. State wise reports disclosed that highest number of victims of sexual abuse was from Madhya Pradesh (about 16 per cent) followed by Maharashtra (about 14 per cent) and Gujarat (about 12 per cent). Only 3 per cent respondents from Chhattisgarh and 6 per cent from Andhra Pradesh reported sexual abuse by their husbands.[137]

Thus both these surveys show the extent of sexual violence in India, which includes marital rape. But the question which arises is whether the marital rape or sexual violence inside homes will come to an end or drastically reduce if the exception 2 of section 375 of the Indian Penal Code is deleted.

Keeping the reality of the Indian society in mind, some experts argue that even if the marital rape exemption clause is deleted, women will not walk out of the abuse marriages and file criminal charges against their husbands. It is not the exemption clause rather dependency of the women on her husband and the fear of retribution by the husband, which forces the Indian women to remain with abusive husbands.[138] In most of the other countries also, despite deletion of the exemption clause, very few women show the courage to file criminal cases against their husbands.

3.12 Conclusion

Indian law now affords husbands and wives separate and independent legal identities, and much jurisprudence in the modern era is explicitly concerned with the protection of women.

Therefore, it is high time that the legislature should take cognisance of this legal infirmity and bring marital rape within the purview of rape laws by eliminating Section 375 (Exception 2) of IPC.

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[137] *http://planningcommission.gov.in/reports/sereport/ser/stdy_demvio.pdf*, (accessed on 8th March, 2019)

[138] Flavia Agnes, 'Marital Rape- Why both sides have got it wrong", Times of India, 17th may, 2015

Chapter-4

STATUTORY PROVISIONS RELATINGTORAPE LAW IN INDIA

The term *statutory rape* generally refers to sexual intercourse by an adult with a person below a statutorily designated age known as the 'age of consent'. More particularly, it refers to sexual intercourse between an adult and a sexually mature minor past the age of puberty. Sexual relations with a prepubescent child, generically called *child sexual abuse* or *molestation*, are typically treated as more serious crimes.

Although statutory rape usually refers to adults engaging in sexual relations with minors under the age of consent,it is a generic term, and very few legislatures use the actual term in the language of statutes. As contrasted from other forms of rapes, in statutory rape, overt force or threat is usually not present. Statutory rape laws presume coercion, because a minor or mentally handicapped adult is legally incapable of giving consent to the act. Thus, a person may be convicted of statutory rape even if the perceived victim gave his/her consent, did not resist and/or mutually participated in the act. Furthermore, it is also not a defence that the alleged perpetrator was genuinely mistaken as to the minor's age.

Be that as it may, the predominant purpose of making such activity punishable is to prevent heinous cases of an adult taking sexual advantage of a minor. Thus, many jurisdictions prohibit allowing a juvenile to be tried as an adult under this law while some jurisdictions specify a minimum difference in age in order for the offence to be applicable. Under such terms, if the adult is, for instance, less than three years older than the minor, no offence has been committed or the penalty is far less severe. These are called "Romeo and Juliet" clauses.

Laws tend to vary in their definitions of statutory rape especially with respect to the range of proscribed sexual activities, gender of perpetrators as also the age of consent. While many jurisdictions criminalise only actual sexual intercourse between an adult and an underage individual, others tend to prohibit a wide range of sexual activities that may or may not involve penetration.

Similarly, while certain States restrict the category of potential perpetrators to adult males, others make room for the prosecution of adult females as well. Furthermore, while majority of the nations aim at prohibiting sexual relationships between adults

and minors in which either party is of the opposite sex, there are certain nations that permit the prosecution of adults engaging in sexual activities with a person of the same sex but below the age legally required to consent to the behaviour.

As regards the age of consent, in many jurisdictions the age of consent is interpreted to mean mental or functional age. As a result, victims can be of any chronological age if their mental age makes them unable to consent to a sexual act. Depending upon the policy preferences of various nations, the age of consent currently varies from 13 to 18 years. In some jurisdictions where the age of consent has been fixed at too low an age, the statutory rape laws may appear to overlap with the provisions under the special laws criminalising child sexual abuse.

4.1. THEORETICAL FOUNDATIONS OF STATUTORY RAPE LAWS

The theoretical foundations of the laws relating to statutory rape are diverse. Most common among them include the assumption that until a person reaches a certain age, that individual is incapable of consenting to sexual intercourse. He is considered deserving of special protection because he is especially vulnerable given his young age. Critics, however, argue that an age limit cannot be used as a basis to determine the ability to consent to sex, since a young teenager might possess enough social sense to make informed and mature decisions about sex, while some legal adults might never develop the ability to make mature choices about sex, as many mentally healthy individuals remain naive and easily manipulated throughout their lives.

Another argument advanced in favour of such a law is the one pertaining to adult hegemony. Minors are generally economically, socially and legally unequal to adults. By making it punishable for adults to engage in sexual liaisons with a minor, statutory rape laws aim to give the minor some form of protection against adults in a position of power over the youth.

A further rationale for statutory rape laws is ease of prosecution. On this basis, the rule is usually found in the form of a legal presumption and embodies a generally correct empirical basis in respect of the age specified in the rule. These laws relieve the prosecution of the burden to prove lack of consent. One justification for using presumptions is that they are time-saving devices in the law of evidence.Presumptionsembody generally accepted facts that do not require proof in the absence of evidence to the contrary.

4.2. POSITION OF INDIAN LAW

In India, till 2012, the age of consent was 16 and any sexual intercourse with a girl below 16 years of age was a crime irrespective of the fact whether she has consented to it or not. A fiction of law existed that all girls below the age of 16 are not capable of giving consent to sex. In 2012, Protection of Children from Sexual Offences Act, 2012 was passed, whereby the Parliament earmarked eighteen as the age of consent for the purposes of sexual offences, thereby achieving the result of criminalising all sexual activity whether consensual or non-consensual where one person is below the age of eighteen. Criminal Law Amendment Act, 2013 amended other Criminal Laws and increased the age of consent to eighteen even under section 375 of the Indian Penal Code. The common law principle laid down in the case of *R v Prince* is still applicable in India and the bonafide mistake of fact as to the age of the person is no defence. Ignorance of law is also no defence and a person cannot take the plea that he was not aware of the increase in the age of consent.

The consequence of the increase in the age of consent can be understood by the following example. Imagine a situation where an 18-year-old boy and a 17-year-old girl "make out" with mutual consent, and such making out involves touching of genitals/breasts. If prosecuted, the boy would be guilty of sexual assault. Worse still, he will be punished under Section 376(2) (h), which considers sexual assault of a person under 18 to be an aggravated act, and provides a minimum punishment of ten years. Since the Protection of Children from Sexual Offences Act is gender neutral, if the boy were also under 18, both of them can be prosecuted, though under the Juvenile Justice Act.[139]

This is not only an imaginary example and many such cases have been filed before the courts in India. It has been pointed out by researchers again and again that statutory rape cases under the Indian Penal Code are generally filed against young couples who have eloped. It is often used as a tool to control the sexual autonomy and marital choices of young women. There are several instances where the parents file cases of rape against the boys with whom their teenage daughters have eloped. Anyone who has even cursorily examined lower court judgments cannot fail to notice the sizeable number of cases termed "statutory rape" or "technical rape". These are cases where the girl elopes with her boyfriend and her parents file a case of rape to exert pressure on her to return, only to get her married to a boy of their choice against

[139]Mrinal Satish, 'Criminalising Romance', Indian Express, February12, 2013

her wishes. This tactic could be used only if the girl was around 16 years of age, but now it can be used even in cases where the girl is below 18 years of age. And in a dispute over age between the parents and the child, the law tends to lean in favour of the parents.

A discussion on "elopement" marriages brings to the fore the ways in which multiple social subordinations – caste, region, religion – intersect with patriarchy to contain the sexual choices of defiant young women within established social mores. The situation becomes precarious when an upper-caste girl elopes with a lower-caste boy, or when a Hindu girl falls in love with a Muslim boy, transgressing the boundaries of Hindu upper-caste dictates on "purity". In a strictly stratified society, ridden with prejudices against the lower castes and minorities, a young couple that dares to cross boundaries is severely punished.

At times, the price for choosing a partner is public humiliation or gruesome murder. The notion of women as the sexual property of their communities is so deeply ingrained that despite being aware that it is a case of voluntary elopement, the police collude with the fathers to protect patriarchal interests and community honour. Only if a girl is able to provide clear and unequivocal proof of her majority is she allowed to accompany her husband and cohabit with him. Or else the father's word regarding her age will be accepted and she will be sent back to his custody, and criminal charges will be pressed against the boy. In rare cases where girls vehemently refuse to return to the custody of their fathers, they are sent to state-run shelter homes. These girls are not automatically released on attaining majority. The husbands concerned would have to initiate legal proceedings for their release.

Hence the legal provision has become a weapon to control the expression of sexuality, and curb voluntary marriages, and is used to augment patriarchal parental power. Even though the criminal provisions of statutory rape appear to be protecting the minor girl, these provisions are concerned primarily with securing the rights of the parent or guardian over the minor girl against her lover or her husband. A young couple who exercises the choice gets trapped in family feuds, or caste and community hostilities. There are no exceptions in the laws on abduction and kidnapping that allow a minor to opt out of guardianship or to leave her parental home on any grounds. The use (and abuse) of police power at the instance of parents in marriages of choice is in direct opposition to women's autonomy, agency and free will.

4.3. JUDICIAL RESPONSES

Several judges have commented that many of the habeas corpus petitions filed for production of a girl in court are really cases to do with elopement. This is a serious concern for the courts as the judgments discussed below indicate.

In *Kokkula Suresh v. State of Andhra Pradesh*[140],the Andhra Pradesh HighCourt affirmed that the marriage of a minor girl is not a nullity. The courtfurther held that the husband is thenatural guardian of a married minor'sperson and property and he is entitledto her custody, thus restraining thefather from claiming legal custody ofhis daughter.

In *Ashok Kumar* v*State*,the Punjab and Haryana High Court commented that couples marrying out of love are chased by the police and relatives, accompanied by musclemen.[141] Often cases of rape and abduction are registered against the boy. At times, the couple faces the threat of being killed and such killings are termed "honour killings". Often the state is a mute spectator.

In *Payal Sharma alias Kamla Sharma* v *Superintendent, NariNiketan, Agra*,the Allahabad High Court rejected thefather's contention that the girl was aminor and instead accepted her contentionthat she was a major.[142]Further,the court declared that as a major shehad a right to go anywhere and livewith anyone. "In our opinion a man anda woman, even without getting marriedcan live together, if they wish. Thiscan be regarded as immoral by societybut it is not illegal. There is a differencebetween law and morality", the courtcommented. Since the girl had stated that her life was in danger, the court also ordered police protection to ensure her security.

In *JitenBouri*v *State of West Bengal*, the Calcutta High Court, while permitting a minor girl to join her husband, declared as follows,[143]

"Although the girl has not attained majority yet she has reached age of discretion to understand her own welfare which is a paramount consideration for grant of her custody. She may not have attained marriageable age as per the provisions of the Hindu Marriage Act but marriage in contravention of age can neither be void nor voidable…The girl has insisted that she wants to join her husband and does not wish to return to her father's place."

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[140] I (2009) DMC 646 AP
[141] I (2009) DMC 120 P&H
[142] AIR 2001 All 254
[143] II (2003) DMC 774

In *Vivek Kumar @ Sanju and Anjali @ Afsana*v *The State*,a case concerningthe elopement of a Muslim girl witha Hindu boy, the Delhi High Courtcommented,[144]

"There is no law which prohibits a girl under 18 years from falling in love...Neither falling in love with somebody is an offence under IPC or any other penal law. Desiring to marry her love is also not an offence....However, this (to wait to marry till she is a major) is possible only when the house of her parents where she is living has congenial atmosphere and she is allowed to live in peace in that house and wait for attaining age of majority…When the daughter confided in her father that she was in love and wanted to marry her lover, the response of the father created a fear in the mind of the girl. Her father slapped her and told her that her action would malign the family and bring danger to the religion. He even threatened to kill her or marry her off to some rich person. When once such a threat is given to a girl around 17 years of age, who is in love, she has a right to protect her person and feelings against such onslaught, even if the onslaught is from her own parents. Right to life and liberty as guaranteed by the Constitution is equally available to minors. A father has no right to forcibly marry off his daughter, against her wishes. Neither does he have the right to kill her, because she intends to marry out of her religion. If a girl around 17 years of age runs away from her parents' house to save herself from the onslaught of her father and joins her lover, it is no offence either on the part of the girl or on the part of the boy with whom she ran away to get married."

These judgments serve as a benchmark for the liberal interpretation of the constitutional provisions of equality and individual freedom. At times, our judges, with a concern for social justice, have resolved the issue by resorting to the basic principles of human rights, and saved minor girls from the wrath of their parents and from state-run "protective homes". The only way they could do so was by holding these marriages to be valid and by allowing the girls to cohabit with their partners of choice.

More recently, some amount of concern and sympathy for these consenting couples has also been expressed at the end of judges. Ruling on Seema and Sameer's case in October 2013, Additional Sessions Judge Dharmesh Sharma said, "The instant case racks up a perennial problem being faced by all of us on the judicial side: what should be the judicial response to elopement cases like the instant one... This life drama is

[144]Crl M C No 3073-74/2006, decided on 23 February 2007

enacted, played and repeated everyday in the Police Stations and Courts..." Of the case before him, Judge Sharma noted, "This case is a teenage love drama where our dysfunctional cruel society and the justice system have separated the two love birds and have taught them a bitter lesson."

4.4. CONSEQUENCES OF INCREASE IN THE AGE OF CONSENT FROM 16 TO 18 YEARS

The first major issue with the Act is that it grossly ignores the social realities of the Indian society. With rapidly changing contemporary attitudes in urban India, social sensibilities have seen a paradigm shift in adolescent sexual curiosities leading to increased experimentation. A detailed report by the Indian Institute of Population Studies states that among those people who reported pre-marital romantic partnership, 42 percent of men and 26 percent of women admitted to engaging in sex with their partners with a sizeable number being under the age of 18. Therefore criminalising sex between adolescents in a society where it is quite prevalent would lead to making thousands of men susceptible to rape cases wherever the issue of lack of consent comes up. Such instances were seen in the United States where the age of consent was increased to 18 in certain states. It was noted that almost 41% of the total rape cases were false. It must also be stressed that 16 to 18 are the ages when adolescents undergo many hormonal changes, so any case where there is a fallout between a couple and the girl accuses her partner of rape, the minor boy would be left with no legal recourse at all. It is these crucial issues which our lawmakers have overlooked. They have sought to criminalise a phenomenon which could be very aptly described as being an essential part of 'growing up'. Thus in outlawing such an act, the legislators who seek to occupy a "conservative higher moral ground" actually encourage moral policing which could further lead to harassment of the youth.

The logic which has driven the particular provision seems to be that such legislation could possibly deter young people from engaging in sexual activity. A close perusal of the ground situation would however indicate otherwise. With limited regard to legislations and more exposure of cable television and Internet, youngsters are becoming more aware of their sexuality and they do not hesitate in indulging in sexual relationships before the age of 18. By falling prey to moral prejudices the lawmakers of this country have failed to acknowledge the fact that sexual exploration and activity

start in a child's life much before entering into a marital relationship. Thus, this inconsistency between the legal provisions and societal configuration leads to lackadaisical implementation of the law. The legislators ought to realise that moral values cannot be engrossed through legal provisions. In fact in Sandeep Paswan's case the court had observed that, *"Good virtues cannot be inculcated and good conscience cannot be imbibed in a child by legal provisions. It would be better and wiser to leave this job to parents and school teachers. Children need to be imparted sex education in the schools*." This observation echoes the concerns of many, who believe that this provision would not only lack conformity with social realities but could also become detrimental to the youth rather than being of any assistance to them.

Besides, in a majority of statutory rape cases that reached high courts and the Supreme Court in the last 25 years, courts sentenced young men convicted of statutory rape to terms below the minimum sentence. Courts have clearly signalled that criminalising even penetrative acts between young couples of the same age deserves to be treated differently than cases involving sexual predators. Unfortunately, the cabinet does not seem to have got the message. The result is that paedophiles and young lovers are in the same boat.

In the aftermath of the Nirbhaya gang rape incident of December 16, 2012, *The Hindu* conducted a six-month investigation starting from January, 2013, whereby it analysed all cases involving sexual assault that came before Delhi's six district courts in 2013 – nearly 600 of them in all. *The Hindu* also interviewed judges who hear rape cases, public prosecutors who argue them, police officers who work on the cases, complainants, accused and their families, and women's rights activists and lawyers and what emerged was a complex picture of the nature of sexual assault in the capital, a city that has come to be known as India's "rape capital". Among the key findings was that a third of all the cases heard during one year dealt with consenting couples whose parents had accused the boy of rape.

Of the 460 cases that were fully argued before the courts, the largest category (189 cases) dealt with cases involving or allegedly involving consenting couples. The majority of these - 174 of these 189 cases - involved couples who seemed to have eloped, after which parents, usually of the girl, filed complaints of abduction and rape with the police. In two-thirds (107) of these cases, the woman "complainant" deposed

consistently before the police, doctors, magistrate, district judge and under cross-examination that she had eloped and had sexual relations - and in most cases got married and sometimes had children - with the accused because she was in love with him.

In case after case among these 107, girls deposed about the suffering they faced at the hands of their parents - beatings, confinement, threats, being forced to undergo medical examinations, being forced to undergo abortions, even as they plead before the court they be allowed to stay with their husbands. A large number involved inter-caste and inter-religious couples.

The reason these cases came before the courts was because the girls in most of these cases were between the ages of 15 and 18, and the court was called upon to decide if they were minors. In ten of these cases, the court agreed that the relationship was consensual and that the couple got 'married' but convicted the boy anyway as the girl was a minor.

In most of the remaining 67 cases involving alleged elopement, the girl deposed in at least one instance - either in the initial FIR, or during her medical examination, or in her statement to the magistrate - that she was in love with the accused and went away with him of her own will. However, in court she supported her parents' and prosecution's case.

Such changes in testimony in addition to incriminating evidence including photos of the wedding, letters exchanged and no reports of any alarm raised by the girl during train journeys or in hotels during the alleged elopement made convictions rare in these cases as well.

As regards the pre-trial phase, *The Hindu* found that police stations followed an informal script to record sexual assault cases. In cases of alleged elopement, the complainant was almost always named as being 14 years old in the FIR. This automatically made her partner liable to be accused of abduction and rape and any marriage ruled invalid, Moreover, poorly educated parents were often unaware of the exact age of their daughters, one officer added.

To make the case sound as if the girl was abducted and did not go with the boy with her consent, an element of intoxication is added to the FIR, usually a "cold drink laced with a sedative".

The problem with these "scripted FIRs" is that none of this stands in court. In almost all of the 174 cases of elopement, the complainant was ruled to not be a minor by the court; only 10 cases resulted in statutory rape convictions. Further on not one of 583 cases examined by The Hindu was the police able to produce any proof of intoxication.

As a result of the sheer number of such cases, in off-the-record conversation with *The Hindu* at the least, both cops and judges said they tended to be sceptical of cases in which the complainant and the accused are romantically involved.

The Hindu's investigation of district court judgements on sexual assault indicates that a great distance is travelled between the FIR and the court judgement and at both ends of the process, risks are building. At the first instance, relying on FIRs for data on sexual assault or a framework for sexual assault in India may be unreliable. Moreover, media articles relating to a number of the cases looked at by *The Hindu* indicated that the media reports the FIR nearly verbatim without contacting the accused, and rarely follows up except in high-profile cases.

Accounts gathered from complainants, lawyers and judges reveal that the protestations of women that they had consented to the act or eloped with the accused are disregarded so that provisions relating to statutory rape and abduction can be invoked to appease angry parents. Conviction is indeed inevitable if the girls involved are below the statutory age of consent. While some sympathetic judges used to exercise their discretion to hand down mild sentences, the much-strengthened penal law applicable since last year has made longer prison terms inevitable for statutory rape. This places a question mark on the wisdom of recent legislation raising the age of consent from 16 to 18, thereby criminalising teenage sexual activity. There is no balancing provision to distinguish sexual abuse of a minor, which ought to be dealt with sternly, from consensual sex between couples of a proximate age group.

4.5. COMPARATIVE POSITION OF INDIAN LAW WITH RESPECT TO OTHER COUNTRIES

The problem which is being faced in India is not unique and several other countries has faced such problems in the past and many of them have found some solutions to tackle with them. Some of the countries have brought amendments in their law so as to insulate young persons, who engage in teenage sex from being punished as

criminal. Thus, having a look at the position of law in other countries will enlighten us and help us in finding solutions of similar problem in our country.

4.5.1. THE UNITED KINGDOM

The legal framework of the Sexual Offences Act 2003 differentiates between sexual contact with children under 13, and sexual contact with those at least 13 but under 16.[145]

Sexual penetration of a child under 13 is termed *Rape of a child under 13*, an offence created by section 5 (1) of the Act, which reads:

- Rape of a child under 13

  A person commits an offence if—

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

  (b) the other person is under 13.

The Explanatory Notes read: "Whether or not the child consented to this act is irrelevant".[146] The term 'rape' therefore is used only with regard to children under 13 - consensual sexual penetration of a child above 13 but under 16 is defined as 'Sexual activity with a child', and punished less severely (section 9, which requires the perpetrator to be 18 or over). A minor can also be guilty for sexual contact with another minor (section 13), but the Explanatory Notes state that decisions whether to prosecute in cases where both parties are minors are to be taken on a case by case basis.[147] The Crown Prosecution guidelines state "[I]t is not in the public interest to prosecute children who are of the same or similar age and understanding that engage in sexual activity, where the activity is truly consensual for both parties and there are no aggravating features, such as coercion or corruption."[148]

4.5.2. NORTHERN IRELAND

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[145] Sexual Offences Act 2003, *http://www.legislation.gov.uk/ukpga/2003/42/contents* (last visited March 7, 2019)

[146] Sexual Offences Act 2003, *http://www.legislation.gov.uk/ukpga/2003/42/notes/division/5/1/5* (last visited March 7, 2019)

[147] Sexual Offences Act 2003, *http://www.legislation.gov.uk/ukpga/2003/42/notes/division/5/1/13* (last visited March 7, 2019)

[148] CPS. Rape and Sexual Offences: Chapter 2: Sexual Offences Act 2003 - Principal Offences, and Sexual Offences Act 1956 - Most commonly charged offences, *http://www.cps.gov.uk/legal/p_to_r/rape_and_sexual_offences/soa_2003_and_soa_1956/#a26* (last visited March 7, 2019)

Northern Ireland follows a similar legal framework, under the Sexual Offences (Northern Ireland) Order 2008.[149] This Act overhauled the sexual offences laws in Northern Ireland, and fixed the age of consent at 16 in line with the rest of the UK; prior to this Act it was 17.

The term statutory rape is not used in the legislation but it is the term that is commonly used for unlawful sexual contact with a person aged under 17 years.[150] Until June 2006, charges for this offence were brought under the Criminal Law (Amendment) Act 1935. In the case of *CC* v *Ireland, the Attorney General and the Director of Public Prosecutions*,[151] the Supreme Court held that Section 1 of the Criminal Law (Amendment) Act 1935 Act was unconstitutional. The Supreme Court unanimously declared unconstitutional the law under which any man is automatically guilty of a crime if he has sex with a girl under 15. The court made its decision on several grounds, including the failure to allow the defence that a genuine mistake had been made about a girl's age.

The Supreme Court agreed that the section offered absolutely no defence once the act of sexual intercourse was established. Mr Justice Hardiman said that once a man had sex with a girl whom he honestly believed to be over the relevant age, a mentally innocent person is criminalised. To criminalise in such a serious way a person who is mentally innocent inflicts a grave injury on that person's dignity and sense of worth, he said. He further added that the right of an accused not to be convicted of a true criminal offence in the absence of intent was done away with by this Act.

The effect of the Supreme Court decision is that Section 1 of the 1935 Act is no longer a part of the Act. The rest of the Act was not affected. A new Act, the Criminal Law (Sexual Offences) Act 2006 was passed to replace the unconstitutional provisions in the 1935 Act. It also repealed and replaced Section 2 of the 1935 Act. The original 1935 Act has now been amended many times.

4.5.3. SCOTLAND

In Scotland, the Sexual Offences (Scotland) Act 2009 also fixes an age of consent of 16, and is also two tiered, treating children under 13 differently than children 13-16.

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[149] The Sexual Offences (Northern Ireland) Order 2008, *http://www.legislation.gov.uk/nisi/2008/1769/contents* (last visited March 7, 2019)

[150] Citizens Information, The law on sexual offences in Ireland,*http://www.citizensinformation.ie/en/justice/criminal_law/criminal_offences/law_on_sex_offences_in_irelani.htm*l (last visited March 7, 2019)

[151] [2006] IESC 33

Section 18, *Rape of a young child*, applies to children under 13.[152] Before the enactment of this Act, Scotland had very few statutory sexual offenses, with most of its sexual legislation being defined at common law, which was increasingly seen as a problem.[153] The creation of a two tier age limit was deemed very important during the drafting of the Act.[154]

4.5.4. U.S.A.

In the U.S., statutory rape laws vary by states. A common misconception about statutory rape is that state codes define a single age at which an individual can legally consent to sex. Only 12 states have a *single age of consent*, below which an individual cannot consent to sexual intercourse under any circumstances, and above which it is legal to engage in sexual intercourse with another person above the age of consent. For example, in Massachusetts, the age of consent is 16 years.

In the remaining 39 states, other factors come into play: age differentials, minimum age of the victim, and minimum age of the defendant. Each is described below.

Minimum age requirement[155]: In 27 states that do not have a single age of consent, statutes specify the age below which an individual cannot legally engage in sexual intercourse regardless of the age of the defendant. The minimum age requirements in these states range from 10 to 16 years of age. The legality of sexual intercourse with an individual who is above the minimum age requirement and below the age of consent is dependent on the difference in ages between the two parties and/or the age of the defendant. For example, in New Jersey, the age of consent is 16, but individuals who are at least 13 years of age can legally engage in sexual activities if the defendant is less than 4 years older than the victim.

Age differential[156]: If the victim is above the minimum age and below the age of consent, the age differential is the maximum difference in age between the victim and the defendant where an individual can legally consent to sexual intercourse. In 27 states, the legality of engaging in sexual intercourse with minors is, at least in some circumstances, based on the difference in age between the two. In 12 of these states,

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[152] Sexual Offences (Scotland) Act 2009, *http://www.legislation.gov.uk/asp/2009/9/section/18* (last visited March 8, 2019)

[153] *See* SCOTTISH LAW COMMISSION, REPORT ON RAPE AND OTHER SEXUAL OFFENCES 2 (2007).

[154] *Id.* at 63-66.

[155] U.S. Dept. of Health & Human Services, Statutory Rape: A Guide to State Laws and Reporting Requirements,*http://aspe.hhs.gov/hsp/08/sr/statelaws/summary.shtml#_ftnref24* (last visited March 8, 2019).

[156] *Ibid*

the legality is based *solely* on the difference between the ages of the two parties. For example, in the District of Columbia it is illegal to engage in sexual intercourse with someone who is under the age of consent (16) if the defendant is 4 or more years older than the victim.

Minimum age of defendant in order to prosecute[157]: This is the age below which an individual cannot be prosecuted for engaging in sexual activities with minors. 16 states set age thresholds for defendants, below which individuals cannot be prosecuted for engaging in sexual intercourse with minors. For example, in Nevada, the age of consent is 16; however, sexual intercourse with someone who is under 16 years of age is illegal only if the defendant is at least 18 years of age (the age at which the defendant can be prosecuted).

States that set a minimum age of the defendant also tend to have minimum age requirements for the victim. Often, the age of the defendant is only relevant if the victim is above the minimum age requirement. For example, in Ohio, sexual intercourse with someone under 13 years of age is illegal regardless of the age of the defendant. However, if the victim is above this minimum age requirement (13) and below the age of consent (16), it is only illegal to engage in sexual intercourse with that individual if the defendant is at least 18 years of age.

Some states define minimum age thresholds for defendants *and* age differentials. For example, in North Carolina, the age of consent is 16 years. Sexual intercourse with someone who is under the age of consent is only illegal if the defendant is: (1) at least 4 years older than the victim *and* (2) at least 12 years of age (the age at which the defendant can be prosecuted).

It is worth noting here thatmost states do not have laws that specifically use the term "statutory rape;" only five include the offense of statutory rape.[158]More often, state statutes include a variety of offences addressing voluntary sexual activity involving minors. In New Jersey, for example, sexual activities involving minors is addressed in three offenses: criminal sexual contact, sexual assault, and aggravated sexual assault.

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[157] *Id.*

[158] The Georgia, Mississippi, Missouri, North Carolina, and Tennessee statutes include the offence of statutory rape. The situation in which an act would be considered statutory rape differs by state. The crime of statutory rape in North Carolina is also referred to as "sexual offense of person who is 13, 14, or 15 years old." In addition to the five states listed, the Pennsylvania statutes include the offense of "statutory sexual assault." Similarly, "statutory sexual seduction" is a crime in Nevada.

The ages of the victim and the defendant as well as the nature of the sexual activity dictate under which offence the conduct falls.

In some cases, provisions addressing statutory rape are embedded in rape or sexual assault laws that typically apply to violent offences. For example, New Hampshire defines "felonious sexual assault" as voluntary sexual penetration with someone who is at least 13 years of age and under 16 years of age, as well as acts involving the use of physical force irrespective of the age of either party. Other states have separate offences specifically concerned with sexual crimes involving a minor. For example, Alaska's statute includes four offenses that deal specifically with the sexual abuse of a minor.

State statutes also use a variety of terms when referring to sexual acts (e.g., sexual intercourse, sexual penetration, sexual contact, indecent contact), and the definitions of these terms are not always consistent across states.

Understanding the different terms used in a state statute is especially important in those states where an individual may be able to legally consent to one type of sexual activity but not another. For example, Alabama's laws regarding the legality of sexual activities with individuals who are under 16 years of age and more than 12 years of age differ depending on the nature of the activities. In cases involving *sexual intercourse*, defendants over 16 years of age who are at least 2 years older than the victim are guilty of rape in the second degree. However, *sexual contact* is only illegal in cases where the defendant is at least 19 years of age.

More often though, all of the acts will be illegal (with the same age requirements), but the severity of the punishment will differ based on the type of sexual activity. In Kentucky for example, sexual activities with children under 12 years of age are illegal regardless of the age of the defendant. If the activities amount to *sexual contact*, the defendant is guilty of first degree *sexual abuse* (a Class D felony); if they amount to *sexual intercourse*, the defendant is guilty of first degree *rape* (a Class A felony).

Depending on the state, defendants may be exempt from prosecution if they are married to the victim. In some states, marriage is a defence to all of the crimes listed (e.g., Alaska, District of Columbia, West Virginia); other states exclude some of the more aggravated offenses from this exemption (e.g., Arkansas, Louisiana,

Mississippi).[159] In a few states, the criminal statutes identify age limits for the marriage exemptions.[160]

4.5.5. CANADA

The Criminal Law in Canada is federal and is contained, for the most part, in the Criminal Code. Canada's Criminal Code has no specific "rape" provision. Instead, it defines assault and provides for a specific punishment for "sexual assault". In defining "assault", the Code includes physical contact and threats. The provision reads:

265. (1) A person commits an assault when—

(a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;

(b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or

(c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.

(2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.

Interestingly, the definition 'appears' to include threats of sexual assault as a sexual assault itself.[161] This suggests a person could be convicted of sexual assault without physically touching the victim if they make a threat of sexual assault.[162]

On May 1, 2008 the age of consent to sexual activity changed in Canada. The new law has raised the legal age of consent from 14 years of age to 16 years of age. The reason for the increase in age is to broaden protection laws for young teens that are at

[159]In Arkansas, marriage is a defence to 2nd, 3rd, and 4th degree sexual assault but not rape.

[160] In South Carolina, the spousal exemption does not apply to marriages entered into by a male under 16 years of age or a female under 14 years of age.

[161]*Sexual Assault Criminal Process, Canada*,http://www.sexassault.ca/criminalprocess.htm (last visited March 9, 2019)

[162]*Ibid*

risk of being exploited by adults.[163] This age of consent is however subject to the following exception:

The age of consent is 18 years if the relationship is exploitative of the youth. According to the Department of Justice Canada, exploitative sexual activity refers to "sexual activity involving prostitution, pornography or where there is a relationship of trust, authority, dependency or any other situation that is otherwise exploitative of a young person".

So that youth aren't criminalized for similar age sexual activity there are also two other exceptions:

Peer Group Exception: A 14 or 15 year old can consent to sexual activity with an older person as long as that person is *less than five years older* and there is no relationship of trust, authority or dependency or any other relationship exploitative of the young person.

Close in Age Exception: A 12 or 13 year old can consent to sexual activity with another young person who is *less than two years older* and with whom there is no relationship of trust, authority or dependency or any other relationship of exploitative nature.

4.6 Conclusion:

An overview of the crimes clearly indicates that most of the crimes against women cut across all barriers of religion, caste or social strata. Education and economic independence rarely increases the moral courage of the victim to fight against the crimes especially those crimes which have a social stigma attached to them. The gender biasness, the patriarchal society, poorly developed shelter, lack of space, lack of awareness, lack of time by the loved ones, defective government policies, capitalist kind of society etc. are factors which contribute to the crimes against women. This is indicative of society s weakness to protect those who for various inherent reasons are not able to protect themselves fully and also the fact that we have males among us who are worse than beasts. It is slur on the noble values and institutions, which the society so loudly extols. The sexual offences particularly rape are a standing insult not only to sacred institutions of marriage, sisterhood and motherhood but also to the

[163]Age of Consent for Sexual Activity, available at *http://www.healthunit.org/sexual/school/resources/Age%20of%20Consent.pdf* (last visited March 9, 2019).

whole humanity. In rape, the victim is destroyed and left alive to face the consequences of the destruction every single day. She has to live her death every single hour, single minute and single second of her life. The process of law is lengthy, cumbersome and expensive. Delayed trials due to the heavy back-log of cases and the other delaying tactics of the offender dilute the case, proofs disappear, and it reduces the chances of victim getting justice. Rape is a very complex phenomenon which itself has multiple factors involved in the justice delivery process. For the prevention and control of this evil a combined, coordinated and concerted efforts are required on the part of police, judiciary, NGOs and common people at large.

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Chapter-5

UNNATURAL OFFENCES AND THE LAW IN INDIA

Section 377 of the Indian Penal Code defines and prescribes punishment for unnatural offences. This section, as the title suggests, refers to sexual intercourse, which were considered unnatural more than 100 years ago. It corresponds to anti-sodomy laws that were prevalent in Victorian England. The term carnal intercourse refers to sexual intercourse between two men, or in other words homosexual relationship. Since penetration is an essential ingredient of the offence, it does not bring within its purview lesbian or sexual relationship between two women. It may be pointed out that anti-sodomy laws stand repealed today in the parent country, in England and in many other countries of the world like Australia, south Africa and so on. Even in India, there is a long standing demand from various quarters to repeal this section and thus it has become the subject matter of this research. Before having any further discussion on the desirability of this section, let us first have a look upon the ambit and scope of this section.

5.1. SCOPE AND AMBIT OF SECTION 377

Section 377 states whosoever has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life or for imprisonment of either description for a term which may extend to ten years and shall also be liable for fine. Explanation to this section states that penetration is sufficient to constitute carnal intercourse necessary to the offence described in this section. This section deals with unnatural carnal intercourse against the order of nature. It consists of penetration per anus. Consent of the parties here is immaterial and the party consenting is equally liable as an abetter. The unnatural offences discussed under this section are sodomy and bestiality.

The word sodomy generally denotes intercourse per anus by a man with a man or with a woman or with animal. Sodomy may be either homosexual or heterosexual. In case the parties are of same sex, it will be termed as homosexual and if the parties are of opposite sex, it will be called as heterosexual. Consent unlike rape is not a defence to the charge. The person effecting the intercourse is known as the agent and the other party as patient

Bestiality means the sexual intercourse either by a man or by a woman carried out in any way with a beast (animal) or bird. The section is wide enough to include a woman as well. Hence, a woman is also liable for committing unnatural offence under this section. However, the section is not attracted if the act is done either by a man or a woman worth an inanimate object.

5.1.1. INGREDIENTS

The section requires proof of the following conditions to hold a person liable for the offence i.e.-

(i) The accused must have carnal intercourse with a man, woman or an animal,

(ii) The act was against the order of nature;

(iii)The act was done voluntarily by the accused;

(iv)There was proof of penetration.

5.1.2. PUNISHMENT

The section carries as severe a punishment as that of rape. The punishment may extend to imprisonment for life or imprisonment up to ten years and fine. At one time in England 'unnatural offence', (i.e. beggary) was a capital offence and the offender was burnt alive.[164]

5.2. HISTORICAL BACKGROUND

The criminalization of unnatural offences is argued by many to be a British legacy, which most of the common law countries including India inherited. The veracity of this claim needs to be tested and thus it becomes important for us to have a look upon the brief history of these offences. We will first of all have a look on the Laws operating in ancient India in this regard. Then, we will have a look upon the History of these offences in England and how it was introduced to modern India.

5.2.1. ANCIENT INDIA

Even in Ancient India, the Law prohibited unnatural carnal intercourse. According to Manu, a man is guilty of unnatural offence in the following circumstances:-

When he has sexual relations with beast, another man, a woman in her monthly courses, at improper place and time or when he enters her carnally in places other than female organs and when he emits his semen in water.

[164] K.D. Gaur, "Textbook on the Indian Penal Code", Fourth Edition, Universal Law Publishing Co. Pvt. Ltd., New Delhi (2012)

In such cases, Manu required the guilty to take guilty his bath with clothes on and perform various expiatory penances. It really appears strange that Manu, who is a strong upholder of the highest standard of sex morality, does not prescribe legal punishment in cases of unnatural offences. He rather treats them simply as religious offences and prescribes only religious expiations or simple bath for persons guilty of these offences.[165] Most of his succeeding law givers like Kautilya, Yajnavalakaya, Narada and Visnu prescribe legal punishments for these offences but the punishment prescribed by them is light and mostly of pecuniary nature. Thus, we find that in ancient India, the Law was not very strict with regard to unnatural offences and the strict laws against unnatural offences were mostly a British legacy, which we inherited. Thus, it becomes important to have a look at the History of these offences in England.

5.2.2. ENGLAND

The first records of sodomy as a crime at Common Law in England were chronicled in the Fleta, 1290, and later in the Britton, 1300. Both texts prescribed that sodomites should be burnt alive. Such offences were dealt with by the ecclesiastical Courts. The Buggery Act 1533, formally an Act for the punishment of the vice of Buggerie, was an Act of the Parliament of England that was passed during the reign of Henry VIII. It was the country's first civil sodomy law. The Act defined buggery as an unnatural sexual act against the will of God and man and prescribed capital punishment for commission of the offence. This Act was later defined by the Courts to include only anal penetration and bestiality. The Act remained in force until its repeal in 1828.

The Buggery Act of 1533 was re-enacted in 1563 by Queen Elizabeth I, after which it became the charter for the subsequent criminalisation of sodomy in the British Colonies. Oral-genital sexual acts were removed from the definition of buggery in 1817.

The Act was repealed by Section 1 of the Offences against the Person Act 1828 and by Section 125 of the Criminal Law (India) Act 1828 (c.74). It was replaced by Section 15 of the Offences against the Person Act 1828, and section 63 of the Criminal Law (India) Act 1828, which provided that buggery would continue to be a capital offence. With the enactment of the Offences against the Person Act 1861

[165] Ram Mohan Das, 'Crime and Punishment in Ancient India (with a particular reference to the manusmriti)", Kanchan Publications, Bodh Gaya (1982)

buggery was no longer a capital offence in England and Wales. It was punished with imprisonment from 10 years to life.

5.2.3. MODERN INDIA

The offence of sodomy was introduced in India on 25.7.1828 through theAct for Improving the Administration of Criminal Justice in the East Indies(9.George.IV).Chapter LXXIV Clause LXIII "Sodomy" – "And it be enacted, that everyperson convicted of the abominable crime of buggery committed with eithermankind or with any animal, shall suffer death as a felon"

In 1837, a Draft Penal Code was prepared which included: Clauses 361 –"Whoever intending to gratify unnatural lust, touches for that purpose any personor any animal or is by his own consent touched by any person for the purpose ofgratifying unnatural lust, shall be punished with imprisonment of either descriptionfor a term which may extend to fourteen years, and must not be less than twoyears"; and Clause 362 - "Whoever intending to gratify unnatural lust, touches forthat purpose any person without that person's free and intelligent consent, shall bepunished with imprisonment of either description for a term which may extend tolife and must not be less than seven years, and shall also be liable to fine."

In Note M of the Introductory Report of Lord Macaulay to the Draft Code these clauses were left to his Lordship in Council without comment observing that: "Clauses 361 and 362 relate to an odious class of offences respecting which it is desirable that as little as possible be said. We leave without comment to the judgment of his Lordship in Council the two Clauses which we have provided for these offences. We are unwilling to insert, either in the text, or in the notes, anything which could have given rise to public discussion on this revolting subject;

as we are decidedly of the opinion that the injury which would be done to the morals of the community by such discussion would far more than compensate for any benefits which might be derived from legislative measures framed with the greatest precision."

However, in Report of the Commissioner's Vol XXVIII it was observed that the clauses and the absence of comments had created "a most improper ambiguity". Some members noted that the existing law on the subject is dead letter and also that the said offence had been omitted in revised statutes of Massachusetts and French Penal Code unless the sufferer is below 10 years of age.

The IPC along with Section 377 as it exists today was passed by the Legislative Council and the Governor General assented to it on 6.10.1860. The understating of acts which fall within the ambit of Section 377 has changed from non-procreative [166]to imitative of sexual intercourse[167] to sexual perversity[168].There has been a long standing demand to decriminalise homosexuality all over the world. In 1954, a historical report was submitted by the Wolfenden Committee on this issue. Thus, it becomes important to have a look on the report of this Committee.

5.3. THE WOLFENDEN COMMITTEE REPORT

The move for the changes in the Law relating to homosexuality in the U.K. was triggered in 1954 when the home Secretary appointed the Committee on Homo Sexual Offences and Prostitution, headed by Sir John F. Wolfenden to recommend reforms in the law relating to homosexuality and prostitution.

The Wolfenden Committee drew heavily upon two traditional 'liberal' concepts in its approach to the problem at hand. It adopted the Benthamite principle that there are 'changing concepts of taste and morality' i.e. a positive belief that morality changes with time and within different cultures. It also relied upon Millsian doctrine that legal intervention in private life is only ever justified in order to prevent harm to others.

John Stuart Mill in his *Onliberty*, delving into the nature and limits of the state power that can be legitimately exercised in a civilized society ever and individual against his will, observed,

"The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will is to prevent harm to others. His own good, either physical or moral is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or persuading him, or entreating him, but not for compelling him or visiting him with any evil in case he does otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to someone else. The only part of the conduct of anyone for

[166]*KhanuvEmperor* AIR 1925 Sind 286
[167]*LohanaVasantlalvState*AIR 1968 Guj 352
[168]*FazalRab* v *State of Bihar* AIR 1963, Mihir v. Orissa 1991 Cri LJ 488

which he is amenable to society is that which concerns other. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.

The Wolfenden Committee, seeking support from the Mill's thesis, argued, in its report submitted in September 1957 to the home secretary, that the purpose of criminal law is: (i) to protect individuals from 'offensive and injurious' matters, (ii) to protect them from 'corruption and corruption', and (iii) to 'preserve public order and decency'. Based on this functional premise of criminal law, it formulated operational orbit of the criminal law in the area of homosexuality. Articulating its 'own formulation of the function of criminal law' relating to homosexuality and prostitution, the Committee observed,

"Its function, as we see it, I to preserve public order and decency, to protect the citizens what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others…It is not, in our view, the function of criminal law to intervene in the private lives of citizens or to seek to enforce any particular pattern or behavior further than is necessary to carry out the purpose we have outlined. It follows that we do not believe it to be a function of the law to attempt to cover all the fields of sexual behavior. Certain forms of criminal behavior are regarded by many as sinful, morally wrong, or objectionable for reasons of conscience, or of religious or cultural tradition; and such actions may be reprobated on these grounds."[169]

Placing reliance on its formulation of the function orbit of criminal law, the Committee argued that consensual homosexual act between consenting adults in private does not fit into theoretical as well as operation paradigm of criminal law as it is neither 'offensive or injurious to others nor does it involve 'exploitation and corruption' of a 'especially vulnerable, 'weak' or inexperienced 'individual. A consensual homosexual act in between private harms no one. It merely falls in the sphere of private immorality. The Committee, almost, in a tone similar to that of John Stuart Mill, stressed that society and the law needs to give importance to individual freedom of choice and action in matters of private morality. Criminal law, therefore, has not to equate crime with sin. The Committee asserted that 'there must remain realm of private morality and immorality which is, in brief and crude terms, not the

[169] K.I. Vibhute, 'Consensual Homosexuality and the Indian Penal Code: Some Reflections on Interplay of Law and Morality' 51 JIlI (2009)

law's business. It is not the business of criminal law to enter into the domain of private lives of citizens and to enforce standards of morality in sexual behaviour by going beyond its (criminal law) legitimate purposes. Such a legislative restriction, in its perception, amounts to an unauthorized intervention in the individuals' free choice of sexual enjoyment and privacy. The committee stressed that it is not proper for the law to concern itself with what a man does in private unless it can be shown to be so contrary to the public good that the law ought to intervene in its function as the guardian of the public good '. The committee, therefore, asserted that homosexuality behaviour between consenting adults in private should be kept outside the purview of criminal law. It does not have any business to enter into 'a realm of private morality. The Committee, with only one dissenter, recommended that homosexual behaviour between consenting adults in private should no longer be a criminal offence' but the Home Secretary did not accept the recommendation of the Wolfenden Committee

5.4. HART- DEVLIN DEBATE

Lord Patrick Devlin, in the second Maacabaean lecture in Jurisprudence delivered in British academy on march 18,1959 after the Wolfenden committee report came out in September 1957, assailed the Mill's thesis and the Wolfenden committee's formulation of criminal la vis-a vis private morality. He observed: "What has hitherto been accepted as the basis of the criminal law and that is that are certain standards of behavior or moral principals which society requires to be observed; and the breach of them is an offence not merely against the person who is injured but against society as a whole. If the criminal law were to be reformed so as to eliminate from it everything that was not designed to preserve order and decency or to protect citizens including the protection of youth from corruption, it would overturn a fundamental principle. It would also end a number of specific crimes. Euthanasia or the killing of another at his own request, suicide, attempted suicide and suicide pacts, duelling abortion, incest between brother and sister , are all acts which can be done in private and without offence to others and need not involve the corruption or exploitation of others. Many people think that the law on some of these subjects is in need of reform, but no one hitherto has gone so far as to suggests that they should all be left outside the criminal law as matters of private morality. They can be brought within it only as a matter of moral principal. It must be remembered also that although there is much immorality

that is not punished by the law, there is none that is condoned by the law. I think it is clear that the criminal law as we know it is based upon moral principal."[170]

With convincing reasons and apt concrete examples, he argued that society, not an individual, has the right to pass judgments in the matter of morals and it has the right to use criminal law to enforce those moral judgments. Asserting that 'society means a community of ideas; without shared ideas in politics, morals and ethics no society can exist', he argued that some kind of shared morality, i.e., some common agreement about what is right and what is wrong, which operates as one of the 'invisible' bonds that keep the society intact, is necessary for the social existence. If social mores, i.e., ideas about the way its members should behave and govern their lives, are not enforced, the society, he argued, will 'disintegrate' from within. The loosening of moral bonds is often the first stage of disintegration. He therefore argued that criminal law has legitimate claim not only to speak about morality and immorality but is also concerned with immorality. The society has a right to preserve, through the weapon of criminal law and its sanctions, its moral code for the social existence.

He argued that 'the suppression of vice is as much the law's business as the suppression of subversive activities. If society hates homosexuality, it is justified in outlawing it. Society has right to punish homosexuality if its members strongly disapprove it, even though it has no effect that can be deemed injurious to others. He asserted that in a number of crimes criminal law's function is simply to enforce a moral principal and nothing else'. He also failed to see any 'theoretical limits' on the state's power to legislate against immorality.'

Professor HLA Hart, however in a series of lectures delivered at Stanford University in 1962, addressed the question of the enforcement of morals through criminal law. In the course of his lectures, he disapproved Lord Devlin's thesis that 'enforcement of morals' through criminal law is necessary for the preservation of society and the society has right to do so. He argued that it is indeed absurd to believe that everything that society views profoundly immoral and disgusting threatens the social existence. It depends upon the 'nature' and characteristics of the society and of moral principals it wants to preserve. Supporting the Wolfenden Committee's stand, he argued that the Lord Devlin's assertion that the immorality jeopardizes or weakens society, in the

[170] Patrick Devlin, 'The Enforcement of Morals' , Oxford University Press, 1965 quoted in K.I. Vibhute, 'Consensual Homosexuality and the Indian Penal Code: Some Reflections on Interplay of Law and Morality' 51 JIll (2009)

absence of empirical evidence is a mere a priori assumption. Prof. HLA Hart argued that Lord Devlin has failed to demonstrate with empiricism, that deviation from accepted sexual moral, even by adults in private, is something that threatens the existence of society. It is of course clear and one of the oldest insights of political theory he observed that society could not exist without a morality which mirrored and supplemented the law's proscription of conduct injurious to other but there is again no evidence to support and much to refute, the theory that those who deviate from conventional sexual morality or in other ways hostile to society. It is indeed absurd, he emphasised, to enforce any deviation from society's shared morality merely on the apprehension that such a deviation threatens the social existence. [171]

Prof. H.L.A Hart, with assertion equal to that of Lord Devlin, claimed that criminal law has nothing to do with morals and it in fact, has to hands off when it comes to the enforcement of the moral or immoral principles. He asserted that no one should think even when popular morality is supported by an overwhelming majority or marked by wider spread intolerance, indignation and disgust that loyalty to democratic principles require him to admit that its imposition on minority is justified.

The Devlin- Hart debate over the legal enforcement of morality, which emerged into familiar arguments-the legal moralism and the harm to other principle, is not merely of academic interest. It indeed leads to two conflicting paradigms and justification for criminalization of homosexuality including homosexual acts between consenting adults in private. The first theoretical paradigms allows and justifies legislative interference against homosexuality the moment it is perceived as immoral no other justification, except immorality per se, for legislative interference in the so called sexual autonomy is necessary. While the later approach does not allow legislature to legislate against homosexuality merely on the ground that it is 'immoral' or society condemns it. It can legislate against homosexuality, if it in a convincing way causes harm to others, is injurious, or offensive to others, or leads to exploitation or corruption of others.

However, it is difficult to say, with precision, as to whether the law against homosexuality articulated in section 377 of the penal code is premised on the legal moralism, advocated by Stephen J (and Lord Devlin) or the harm to others' principle propounded by John Stuart Mill (and Prof. HLA Hart).

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[171] *Ibid*

5.5. REPORTS OF THECOMMISSION OF INDIA

The Fifth and the Fourteenth Law Commission of India headed by former judges of Supreme court of India and composed of well known experts in law which on reference from the government of India respectively in the later half (1971) and at the end of twentieth century (1997) undertook a comprehensive review of IPC, however, did not delve deep into the complex interplay of morals vis-à-vis legal intervention against adult consensual homosexual behaviour in private. The fifth law commission took note of the stand of the Wolfenden committee that consensual homosexuality between consenting adults in private being a matter of private immorality, be decriminalized, as it not the law's business to enter into the matters of private immorality. Recalling the inconclusive end of the debate sparked off by the Wolfenden committee, the fifth law commission believed that disapproval of homosexuality by the Indian community justifies the section 377, the law against homosexuality, in the penal code.

The Fifth Law Commission was of the opinion that it is a very controversial field and thus the only safe guide is what would be acceptable to the society and since an overwhelming majority disapproves this act, its retention is justified. But the Law Commission felt that the punishment is very harsh and recommended the same to be lowered down. While the fourteenth law commission preferred to endorse the proposals for reform suggested by the fifth law commission and to add a few more suggestions to it without examining immoral contours of the anti-homosexuality law.

However the Law Commission in its 172nd report recommended the deletion of section 377. The Law Commission was of the view that the changes recommended by it in section 375 will cover all the useful purposes for which section 377 are used. The only area that will be left will be bestiality and law should not be concerned with that offence.

5.6. POSITION IN OTHER COUNTRIES

For a complete understanding of this provision it is important to be informed about the fact that there is a growth in the gay and lesbian rights movement the world over. Gay and lesbian rights activists have challenged successfully the hitherto socially prevalent stance that a homosexual or lesbian relationship is unnatural or against the law of nature. Many countries have now repealed anti-sodomy laws as being discriminatory and in violation of human rights. Despite the still prevalent social

censure of gay and lesbian relationships, there is a growing yet grudging recognition of the fact that the same sex desire or in other words homosexuality, has to be recognised as an alternate sexuality, which existed and exists in every community and every society, irrespective of region, race, caste or community. Even if there are few prosecutions under this section, it is not uncommon for persons practicing homosexuality to be persecuted, harassed and socially ostracised. It is argued that as sexual minorities, their rights should also be protected.

South Africa is the first country in the world which has expressly guaranteed protection to sexual minorities or homosexuals and lesbians. The south African constitution which was adopted on 10 December 1996, has specifically provided that no person shall be unfairly discriminated against directly or indirectly….on one or more of the following grounds, in particular, race, gender, sex, sexual orientation….or language. The term sexual orientation has been added to specifically safeguard the interests of homosexuals and lesbians.

While South Africa is the only country to make an express provision making sexual orientation a prohibited ground of discrimination in other countries too, courts have read into the existing laws protection against such discrimination. The European Commission of Human rights has held that the anti sodomy laws of Ireland[172], Great Britain[173] and Cyprus[174] violated the right to privacy guaranteed under Article 8 of the European Charter of Human Rights.

In the United States of America, the Hawaiian Supreme Court in *Boehr v Levin*[175]has held that prohibition of same sex marriage violated the clause on non- discrimination on the basis of sex. Similarly the Canadian Supreme Court has held that spousal benefits should be applicable to gay and lesbian couples as well. The Law of the State of Ontario, which defined spouse as heterosexual only, was held to be unconstitutional[176].

In *Toonen*v *Australia*[177], the Human Rights Commission of the United Nations went a step further than the European Commission of Human Rights. Nicholas Toonen, a gay rights activist was a resident of the Australian state of Tasmania. He challenged the

[172]*Norris* v *Ireland* 13 Eur Ct HR 149 (1981)
[173]*Dudgeon* v *Great Britain* 4 Eur Ct HR 149 (1981)
[174]*Modinos* v *Cyprus* 16 Eur Ct HR (1993)
[175] 852 P 2d at 144
[176]*MV* v *H Guardian* 22 May 1999
[177] V Suresh & D Nagasaila, 'PSA Pillai's Criminal Law', Ninth Edition, Lexis NexisButterworhts(2007)

Anti- Sodomy Laws of Tasmania as being violative of Articles 2(1), 17 and 26 of the International Covenant on Civil and Political Rights. His contention was accepted by the Human Rights Committee, which held that the anti-sodomy laws violated the right to privacy guaranteed under Article 17 and the rights against discrimination on the ground of sex. The Human Rights Committee also held that the term sex included sexual orientation.

Viewed in the backdrop of these International developments, section 377 of the Indian Penal Code seems to be outdated and moral of a bygone era. In keeping with International trends in Jurisprudence and legal discourse, it is important that our law is also brought in line with International standards and the section be repealed.

5.7. JUDICIAL RESPONSE

5.7.1. NAZ FOUNDATION V GOVT OF NCT OF DELHI[178]

In 2001 the NAZ Foundation – a non-governmental organisation working in the field of HIV/AIDS intervention and prevention – filed a writ petition before the Delhi High Court seeking a declaration that Section 377, to the extent that it penalised sexual acts in private between consenting adults, violated the India Constitution, specifically, Articles 14 (equality before the law), 15 (non-discrimination), 19(1)(a)-(d) (freedom of speech, assembly, association and movement) and 21 (right to life and personal liberty). The Naz Foundation argued that the law had a discriminatory effect because it was predominantly used against homosexual conduct, thereby criminalising activity practiced more often by homosexual men and women. This was said to jeopardise HIV/AIDS prevention methods by driving homosexual men and other sexual minorities underground. It was further argued that, as private consensual relations were protected under Article 21 of the Constitution, Section 377 was invalid as there was no compelling state interest to justify the curtailment of a fundamental freedom. The Naz Foundation also argued that Section 377 violated Article 14 on two grounds: first, because it was unreasonable and arbitrary to criminalise non-procreative sexual relations, and secondly, because the legislative objective of penalising "unnatural" acts had no rational nexus with the classification between procreative and non-procreative sexual acts.

[178]Naz Foundation v Government of NCT of Delhi, 160 Delhi Law Times 277 (Delhi High Court, 2009)

In 2004, the High Court dismissed the writ petition on the grounds that only purely academic issues had been submitted which could not be examined by the court. It did the same in relation to a subsequent review petition. The NAZ Foundation challenged both orders and the writ petition was remitted for a fresh decision in 2006.

In its 2009 decision, the High Court found in favour of the NAZ Foundation and accepted its arguments that consensual same-sex sexual relations between adults should be decriminalised, holding that such criminalisation was in contravention of the Constitutional rights to life and personal liberty, equality before the law and non-discrimination. In reaching its decision, whilst the court placed a great deal of emphasis on domestic judgments, the court also relied on comparative law in reaching its decision, referring to judgements from various jurisdictions including the European Court of Human Rights, the United Kingdom, the Republic of Ireland, South Africa and the USA. The court also relied upon a number of progressive international legal frameworks including the Yogyakarta Principles and the 2008 Declaration of Principles of Equality produced by the Equal Rights Trust as well as a number of reports and documents demonstrating the discriminatory effect of Section 377. In its reasoning, the High Court stated that Section 377 "grossly violates [homosexual individuals'] right to privacy and liberty embodied in Article 21 insofar as it criminalises consensual acts between adults in private". The court also held that:

*"*Section 377 criminalises the acts of sexual minorities, particularly men who have sex with men. It disproportionately affects them solely on the basis of their sexual orientation. The provision runs counter to the constitutional values and the notion of human dignity which is considered to be the cornerstone of our Constitution*".*[179]

5.7.2.SURESH KUMAR KAUSHALVNAZ FOUNDATION[180]

The decision of the Delhi High Court was not appealed in the Supreme Court of India by the Union of India but several other persons preferred to file appeal against the decision of the High Court before the Supreme Court. The case attracted a large number of interveners. Interveners supporting the Appellants included organisations and individuals who have stated that they had an interest in protecting the moral, cultural and religious values of Indian society. Interveners for the Respondents were

[179]*Naz Foundation* v *Government of NCT of Delhi,* 160 Delhi Law Times 277 (Delhi High Court, 2009)
[180] Suresh Kumar Koushal&Anr. v Naz Foundation &Ors., available at: http://judis.nic.in/supremecourt/imgs1.aspx?filename=41070, (accessed on 18 Feb, 2019)

composed of individuals and organisations arguing that Section 377 caused harm to the LGBT community and homosexual men in particular.

The panel of two Supreme Court judges deciding the case allowed the appeal and overturned the High Court's previous decision, finding its declaration to be "legally unsustainable". The Supreme Court ultimately found that Section 377 IPC does not violate the Constitution and dismissed the writ petition filed by the Respondents. Regarding its power to rule on the constitutionality of a law, the Supreme Court acknowledged that it and the High Court are empowered to declare as void any law, whether enacted prior to the enactment of the Constitution or after. However, it noted that there is a presumption of constitutionality in favour of all laws, including pre-constitutional laws, as the Parliament is deemed to act for the benefit of the people. The Court noted that the doctrine of severability seeks to enable unconstitutional portions of laws to be severed from the constitutional elements of the law in question with the remainder retained and that, alternatively, that Court has the option of "reading down" a law to prevent it from being rendered unconstitutional, whilst refraining from changing the essence of the law. With regard to Section 377 the court observed that whilst it and the High Court were able to review the constitutionality of the law, and were able to strike it down to the extent of its inconsistency with the Constitution, the analysis must be guided by the presumption of constitutionality and the courts must exercise self-restraint.

The court concluded that unless a clear constitutional violation was proved, the court was not empowered to invalidate the law. The Supreme Court drew attention to the large number of amendments to the Indian Penal Code since its adoption in 1860, totalling around 30 amendments. The court recalled that Section 377, along with the rest of the statute, was originally passed in 1860. In explaining the development of Section 377, the court referenced numerous section 377 related cases dating back as far as the nineteenth century. The court noted that the previous cases referenced all related to non-consensual situations and that no uniform test could be ascertained from them to classify acts would fall under Section 377. Rather, the court stated that acts can only be determined with reference to the act itself and the circumstances in which it is executed. Despite this, the court stated that in light of the legislative history of Section 377, it would still apply to same-sex couples irrespective of age and consent. The Court nevertheless maintained that:

"Section 377 does not criminalise a particular people or identity or orientation. It merely identifies certain acts which if committed would constitute an offence. Such a prohibition regulates sexual conduct regardless of gender identity and orientation".

Regarding whether the High Court was justified in entertaining the challenge to Section 377 despite the Naz Foundation not having laid a factual foundation to support its challenge, the Supreme Court stated that the party had "miserably failed" to provide the particulars of the discriminatory attitude exhibited by state agencies towards sexual minorities and of their consequent denial of basic human rights. The Court held that the details provided to the High Court were thus "wholly insufficient for recording a finding that homosexuals, gays, etc., are being subjected to discriminatory treatment".

In determining the application of Article 14 of the Constitution to the constitutionality of Section 377, the Supreme Court quoted from *Re: Special Courts Bill*, 1987 (1979) 1 SCC 380, which set out the scope of Article 14, including the principle that legislation need not treat all people exactly the same, but that "all persons *similarly circumstanced* shall be treated alike both in privileges conferred and liabilities imposed" (emphasis added). Further, the State had "the power of determining who should be regarded as a class for purposes of legislation and in relation to a law enacted on a particular subject" provided that such classification was not "arbitrary" but rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation". With little analysis, the court held that:"Those who indulge in carnal intercourse in the ordinary course and those who indulge in canal intercourse against the order of nature constitute *different classes*and the people falling in the latter category cannot claim that Section 377 suffers from the vice of arbitrariness and irrational classification".

In reviewing the reading down of the Section 377 by the High Court, the Supreme Court stated that the High Court had overlooked the fact that "a miniscule fraction of the country's population constitute lesbians, gays, bisexuals or transgenders" and that over the last 150 years, fewer than 200 persons had been prosecuted under Section 377, concluding from this that "this cannot be made sound basis for declaring that section *ultra vires* the provisions of Articles 14, 15 and 21 of the Constitution." The

court also regarded the discriminatory treatment complained of by the Naz Foundation as a result of Section 377 as being neither mandated nor condoned by the provision itself and the fact that the police authorities and others misuse.

Section 377 was *not a reflection* of the *vires* of the provision but instead may simply be a relevant factor for Parliament to consider whilst judging whether to amend Section 377.

Regarding the application of Article 21 of the Constitution, the Supreme Court stated that the law must be competently legislated whilst also being just, fair and reasonable, which give rise to notions of legitimate state interest and the principle of proportionality. The court specifically noted that the right to live with dignity had been recognised as a part of Article 21. In assessing the High Court's ruling that Section 377 violated the right to privacy, autonomy and dignity, the Supreme Court spent little time analysing the application of Article 21 to Section 377, instead criticising the High Court for relying too extensively upon judgments from other jurisdictions in its anxiety to protect the "so-called rights of LGBTQIA+ persons". It concluded that "Section 377 does not suffer from the vice of unconstitutionality" with no further elaboration. The judges noted that whilst the court found that Section 377 was not unconstitutional, the legislature was still free to consider the desirability and propriety of deleting or amending the provision."[181]

5.7.3. NAVTEJ SINGH JOHAR V UNION OF INDIA[182]

The Supreme Court of India unanimously held that Section 377 of the Indian Penal Code, 1860, which criminalized 'carnal intercourse against the order of nature', was unconstitutional in so far as it criminalized consensual sexual conduct between adults of the same sex. The petition, filed by dancer Navtej Singh Johar, challenged Section 377 of the Penal Code on the ground that it violated the constitutional rights to privacy, freedom of expression, equality, human dignity and protection from discrimination. The Court reasoned that discrimination on the basis of sexual orientation was violative of the right to equality, that criminalizing consensual sex

[181] *Suresh Kumar Koushal&Anr.*v*Naz Foundation &Ors.*, available at *http://judis.nic.in/supremecourt/imgs1.aspx?filename=410*

[182] 2018 SCC Online Bom 6956

between adults in private was violative of the right to privacy, that sexual orientation forms an inherent part of self-identity and denying the same would be violative of the right to life, and that fundamental rights cannot be denied on the ground that they only affect a minuscule section of the population.

The central issue of the case was the constitutional validity of Section 377 of the Indian Penal Code, 1860 insofar as it applied to the consensual sexual conduct of adults of the same sex in private. Section 377 was titled 'Unnatural Offences' and stated that "hoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

The issue in the case originated in 2009 when the Delhi High Court, in the case of *Naz Foundation v. Govt. of N.C.T. of Delhi*, held Section 377 to be unconstitutional, in so far as it pertained to consensual sexual conduct between two adults of the same sex. In 2014, a two-judge bench of the Supreme Court, in the case of *Suresh Kumar Koushal v. Naz Foundation*, overturned the Delhi HC decision and granted Section 377 "the stamp of approval". When the petition in the present case was filed in 2016 challenging the 2014 decision, a three-judge bench of the Supreme Court opined that a larger bench must answer the issues raised. As a result, a five-judge bench heard the matter.

The Petitioner in the present case, Navtej Singh Johar, a dancer who identified as part of the LGBT community, filed a Writ Petition in the Supreme Court in 2016 seeking recognition of the right to sexuality, right to sexual autonomy and right to choice of sexual partner to be part of the right to life guaranteed by Art. 21 of the Constitution of India (Constitution). Furthermore, he sought a declaration that Section 377 was unconstitutional. The Petitioner also argued that Section 377 was violative of Art. 14 of the Constitution (Right to Equality Before the Law) because it was vague in the sense that it did not define "carnal intercourse against the order of nature". There was no intelligible differentia or reasonable classification between natural and unnatural consensual sex. Among other things, the Petitioner further argued that:

(i) Section 377 was violative of Art. 15 of the Constitution (Protection from Discrimination) since it discriminated on the basis of the sex of a person's sexual partner,

(ii) Section 377 had a "chilling effect" on Article 19 (Freedom of Expression) since it denied the right to express one's sexual identity through speech and choice of romantic/sexual partner, and

(iii)Section 377 violated the right to privacy as it subjected LGBT people to the fear that they would be humiliated or shunned because of "a certain choice or manner of living."

The Respondent in the case was the Union of India. Along with the Petitioner and Respondent, certain non-governmental organizations, religious bodies and other representative bodies also filed applications to intervene in the case.

The Union of India submitted that it left the question of the constitutional validity of Section 377 (as it applied to consenting adults of the same sex) to the "wisdom of the Court". Some interveners argued against the Petitioner, submitting that the right to privacy was not unbridled, that such acts were derogatory to the "constitutional concept of dignity" that such acts would increase the prevalence of HIV/AIDS in society, and that declaring Section 377 unconstitutional would be detrimental to the institution of marriage and that it may violate Art. 25 of the Constitution (Freedom of Conscience and Propagation of Religion).

The five-judge bench of the Indian Supreme Court (Court) unanimously held that Section 377 of the Indian Penal Code, 1860, insofar as it applied to consensual sexual conduct between adults in private, was unconstitutional. With this, the Court overruled its decision in Suresh *Koushal v. Naz Foundation*[183] that had upheld the constitutionality of Section 377.

The Court relied upon its decision in *National Legal Services Authority v. Union of India*[184]to reiterate that gender identity is intrinsic to one's personality and denying the same would be violative of one's dignity. The Court relied upon its decision in *K.S. Puttaswamy v. Union of India*[185] and held that denying the LGBT community its right to privacy on the ground that they form a minority of the population would be violative of their fundamental rights. It held that Section 377 amounts to an unreasonable restriction on the right to freedom to expression since consensual carnal intercourse in private "does not in any way harm public decency or morality" and if it

[183] , (2014) 1 SCC 1
[184](2014) 5 SCC 438
[185] (2017) 10 SCC 1

continues to be on the statute books, it would cause a chilling effect that would "violate the privacy right under Art. 19(1)(a)". The Court affirmed that that "intimacy between consenting adults of the same sex is beyond the legitimate interests of the state" and sodomy laws violate the right to equality under Art. 14 and Art. 15 of the Constitution by targeting a segment of the population for their sexual orientation. Further, the Court also relied upon its decisions in *ShafinJahan v. Asokan K.M.*[186] and *Shakti Vahini v. Union of India*[187] to reaffirm that an adult's right to "choose a life partner of his/her choice" is a facet of individual liberty.

Chief Justice Misra (on behalf of himself and J. Khanwilkar) relied on the principles of transformative constitutionalism and progressive realization of rights to hold that the constitution must guide the society's transformation from an archaic to a pragmatic society where fundamental rights are fiercely guarded. He further stated, "constitutional morality would prevail over social morality" to ensure that human rights of LGBT individuals are protected, regardless of whether such rights have the approval of a majoritarian government.

J. Nariman in his opinion analyzed the legislative history of Section 377 to conclude that since the rationale for Section 377, namely Victorian morality, "has long gone" there was no reason for the continuance of the law. He concluded his opinion by imposing an obligation on the Union of India to take all measures to publicize the judgment so as to eliminate the stigma faced by the LGBT community in society. He also directed government and police officials to be sensitized to the plight of the community so as to ensure favorable treatment for them.

J. Chandrachud in his opinion recognized that though Section 377 was facially neutral, its "effect was to efface identities" of the LGBT community. He stated that, if Section 377 continues to prevail, the LGBT community will be marginalized from health services and the "prevalence of HIV will exacerbate". He stated that not only must the law not discriminate against same-sex relationships, it must take positive steps to achieve equal protection and to grant the community "equal citizenship in all its manifestations".

J. Malhotra affirmed that homosexuality is "not an aberration but a variation of sexuality". She stated that the right to privacy does not only include the right to be left alone but also extends to "spatial and decisional privacy". She concluded her opinion

[186] 2018 (5) SCALE 422
[187] (2018) 7 SCC 192

by stating that history owes an apology to members of the LGBT community and their families for the delay in providing redress for the ignominy and ostracism that they have suffered through the centuries.

5.8 Conclusion

As already stated above, the language of the section 377 is very vague and arbitrary. It is impossible to determine what the order of nature is and what is not. In view of such vagueness, homosexuality has also been treated as against the order of nature. The judgement given by the Delhi High Court in Naz foundation case was a very laudable judgement. I would suggest reforms on the line of Delhi High Court judgement but with a different reasoning. Delhi High Court judgement essentially ruled out that parts of section 377 are unconstitutional as they violate articles 14, 15 and 21 of the constitution. The Delhi High Court never stated that homosexuality is not against the order of nature; it rather stated that section 377 violates the fundamental rights of same sex adults who have consensual relationship. I would suggest that section 377 should be struck down as a whole as the term order of nature is very arbitrary and vague and its meaning is not capable of being made certain. In cases of sexual acts such as paedophilia and bestiality, new provisions should be enacted. The scope of Section 375 should be enlarged so as to include sexual assaults against both boys and girls and the meaning of penetration should be enlarged so as to include forms of penetration other than penile vaginal. In the case of minors, section 377 is ineffective as penetration is required to constitute offence under it. Parliament has however enacted Protection of Children from Sexual Offences Act, 2012 which also covers sexual abuse against children.

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Chapter-6
CONCLUSION AND SUGGESTION

In the present research work, an attempt was made to critically analyse the Law relating to Sexual Offences in India. With this aim, first of all the historical evolution of the rape laws in India was looked into by the researcher. Then the changes brought about by the Criminal Law Amendment Act, 2013 and Criminal Law Amendment Act, 2018was analysed and it was found that the definition of the term 'rape' has been widened to include non-penile and non-vaginal penetration. It is indeed a welcome step and the Parliament has really done a commendable work by accepting the long standing demand of the academicians and activists in this regard. The punishments prescribed for various sexual offences have also been increased by this Amendment but the increase in the punishment has not been able to deter persons from committing these heinous offences in the last two years. Thus, it is humbly submitted that it is not the severity of the Punishment but the surety of the punishment, which can have a deterrent effect. The government should work in that direction. The researcher cannot delve deep into this issue as this work is especially with reference to Marital Rape and Statutory Rape.

If any reasonable prudent person is asked what rape is, he will answer that non consensual sex is rape and consensual sex is not rape but the Law in India at times gives a different view. At present, non-consensual vaginal sex by a husband with his wife (above 15 years of age and not living separately) is not considered rape whereas consensual anal or oral sex between a husband and wife is an offence under section 377 of the Indian Penal Code and both of them will be liable (husband as the offender and the wife as the abettor). It is really surprising. Thus, a careful analysis was done with regard to the Marital Rape and the Law in India, with a special focus on the issue whether exception 2 to section 375 deleted by Criminal Law Amendment Act, 2018. For that purpose, the present position of the law was carefully analysed, the History of the same was traced and attempts made in the direction of criminalization of marital rape in India were thoroughly discussed.

The provisions of law with regard to non- consensual sexual intercourse with a wife living separately (at present contained in section 376 B) has also been analysed and it was found out that the provisions has been amended and not only the wife living

under a decree of separation or under any custom or usage but also the wife living separately due to any reason whatsoever is now covered under this section.

In certain cases of marital rape, victim can bring a criminal charge against the husband under section 498A provided the forcible sex by her husband is of such nature that it is likely to drive her to commit suicide or causes grave injury or danger to her life, limb or physical or mental health. It was found that there is wide ignorance about the both the legal remedies available to victim of marital rape not only among the common people but also in the legal circles. Thus, it is suggested that these remedies need to be popularised so that there is some solace available to a victim of marital rape.

Most of the Historical arguments in favour of the marital rape exemption clause like Implied Consent Theory, Unity or Wife as Property theory and Narrow Constructionist Theory were either found to be obsolete or not applicable in Indian context. The modern arguments against the criminalisation of marital rape like Marital privacy Theory, Marital Reconciliation Theory, Less Harmful Theory and Lack of Evidentiary Proof or Chances of False Accusation Theory have been ably rebutted by their critics.

Though the researcher is not convinced with the argument that this provision of law has potential of gross misuse as in almost all the countries, wherever marital rape has been criminalised, the problem is not the misuse rather the non-use, there appears to be no harm in having a provision similar to section 198B of the Criminal Procedure Code putting a bar on the cognizance by the court except upon the prima facie satisfaction by the court that facts of the case constitute the ingredients of this offence. Educational reforms should be undertaken so that everyone is aware that marriage should not be regarded as extinguishing the legal and sexual autonomy of the wife. Mass media should also spread this message and awareness programmes should also be conducted by government and non-governmental bodies. These steps are as important as the legal reforms as they have the potential to bring social reforms and to make our society really egalitarian. With this note, let us move towards our Conclusion with regard to the next issue i.e. with respect to statutory rape.

At several points of time, the provisions of the Protection of Children from Sexual Offences Act, 2012 came to the notice of this researcher and it was felt that this gender neutral piece of legislation is really worth being appreciated specially for the

child friendly procedures prescribed under this Act. But on careful scrutiny, the fact which came to light was that this Act was the first legislation to enhance the age of consent from 16 to 18 and the Criminal Law Amendment Act, 2013 merely confirmed this change.

One of the objectives of this research was to critically evaluate the consequences of increase in the age of consent from 16 to 18. The research conducted by the Hindu reveals that one third of the rape cases decided by the trial courts in Delhi were the cases of consensual sex between young boys and girls. Since the girls in most of these cases were of 16 to 18 years old, the boys (who were also of similar age or few years older) were convicted of the charges of statutory rape even in the cases, where the girls admitted their consent before the court. Majlis Foundation also claims that its research in Mumbai reached similar conclusions. Earlier the Proviso to section 376 of the Indian Penal Code was resorted to by the judges who would sentence the young boys for a term less than the minimum specified but the Criminal Law Amendment Act, 2013 removed this Proviso. Now the courts cannot take a lenient view in such cases and the young boys will have to undergo imprisonment for a minimum of seven years.

This proves our fourth hypothesis that the increase in the age of consent is going to have devastating consequences and now the question was to find out how to insulate such young boys and girls from being punished as criminals. The Comparative analysis of the position of law in other countries provided some probable solutions. It is submitted that our laws needs to be suitably amended and on the lines of Canada, peer group exceptions and close in age exceptions should be inserted in our laws as well. If this amendment is made, there will be no need to decrease the age of consent from eighteen to sixteen.

It is to be noted that these suggestion are not made with an intention to promote premarital sex rather with the sole intention to insulate the young lovers, who engage in consensual sex, from being punished as criminals. It is also submitted that the recommendation of the Law Commission in its Forty Second Report (made way back in 1971) should be accepted and bonafide mistake of fact as to the age of the person in such cases should be made a defence in India. This defence is available in Ireland and there appears to be no compelling reasons why the same defence should not be made available in India as well.

Despite the criticism of Dr. R.C. Nigam of ignorance of law being no defence in India, it is not suggested that the same should be made a defence even in the cases of statutory rape as it is feared that it will open a Pandora box but it is submitted that the provisions of law (especially when a new law is made or a major amendment is brought), which concerns the common man should be popularized.

The interactions with young boys and girls revealed that there is wide ignorance as to the provisions relating to the provisions of statutory rape. Even many law students of the age group 17 to 25 expressed their ignorance of the increase in the age of consent. Thus, it is suggested that these and similar other legal provisions should be made a part of the school curriculum and common people should also be made aware through awareness programmes and mass media. It will have several other positive benefits associated with it.

The next question for inquiry was with regard to section 377, the most hotly debated legal provision of the Indian Penal Code. It has always been a controversial section as it criminalised homosexuality. In recent years, lots of developments have occurred in this direction. Delhi High Court decriminalised homosexuality in 2009 but the Supreme Court recriminalized it in 2013 and again criminalised in 2018. Thus, it became an important issue for our research. First of all the extent and scope of this section was analysed and then an attempt was made to trace the Historical background of this section. It was found that in Ancient India, the unnatural offences were merely considered as religious offences. Manu prescribed bath or some other religious penance for the same. Certain other Smritikaras prescribed very light punishment for these offences. Thus, this provision of law in essences is found to be a British legacy, inherited by India and though British repealed such legal provisions.

The report of the Wolfenden Committee and the Devlin- Hart Debate on this issue was also looked into. It was found that the Wolfenden Committee Report, John Stuart Mill and HLA Hart support the decriminalisation of homosexuality. The reasons cited by them also appear to be very strong. The researcher finds the arguments given by the HLA Hart that any act should not be considered to be a crime unless it causes harm to others to be more convincing than the arguments given by Devlin. An attempt was also made to look into the recommendation of the Law commission on this issue. It was found that though the Law Commission of India earlier endorsed its retention,

it has changed its view and recommended the deletion of this section in its 172nd report.

Then the judgment of Delhi High Court in Naz Foundation's case and that of the Supreme Court in Suresh Kumar Kaushal's case were comparatively analysed and it is submitted that the reasoning given by the Delhi High Court appears to be stronger than the reasons cited by the Supreme Court. Several issues raised by the Delhi High Court were not even discussed by the Supreme Court. It relied on the absence of statistics to believe that section 377 is not being used to harass the sexual minorities. It also stated that the persons belonging to gay, lesbian, bisexuals and transgender constitute a miniscule fraction of country's population. It is again submitted that the entire concept of human rights evolved to protect the right of minorities, no matter how many they may be in number; they cannot be deprived of their human rights. In *Navtej Singh Johar v Union of India* SC held that section 377 of IPC is unconstitutional.

In another case, the Supreme Court has itself endorsed the plight of the persons belonging to these categories and underscored how section 377 was being used for their harassment. Though these observations did not constitute the ratio of that case, the court threw light upon the plight of the sexual minorities in India. The commitments which the Indian Constitution makes to its citizens and the obligations imposed on India by the International Human Rights instruments make it obligatory that homosexuality be decriminalised in India. Even the Supreme Court in Suresh Kaushal's case has given the Parliament liberty to repeal or amend Section 377 as it thinks fit. Thus, it is submitted that this section need not be repealed completely rather a proviso should be added to exclude the act of consensual sex between two adults in private from within its purview.

But that will not be enough, it is also very important that the attempts should be made so that alternative sexuality becomes acceptable to the society at large. India has a long history of tolerance towards other cultures. The same tolerance can be developed towards alternative sexuality also if proper steps are taken in this direction. Mass media, awareness campaigns and education reforms can be very powerful in bringing change in the attitude of the society towards homosexuals, bisexuals and transgenders.

6.3. SUGGESTIONS

After analyzing all the chapters the rescarcher has sumned up the ……and recommendation as fallows:-

1. The Law relating to Sexual Offences in India requires immediate reforms especially with regard to the issues of Marital Rape and Statutory Rape.
2. The remedies available to the victims of marital rape under the present Indian Law i.e. under Protection of Women from Domestic Violence Act, 2005 and under section 498A of the Indian Penal Code should be popularized through mass media and awareness programmes. Information in this regard should also be made available in the school textbooks.
3. Arguments in favour of and against the criminalisation of marital rape were carefully analysed and it was found that the arguments in favour of the criminalisation of marital rape outweigh the arguments against the criminalisation of marital rape.
4. A provision similar to section 198B of the Criminal Procedure Code putting a bar on the cognizance of the court except upon the prima facie satisfaction by the court that facts of the case constitute the ingredients of this offence may be inserted for all the cases of Marital Rape as well.
5. Educational reforms should be undertaken so that everyone is aware that marriage should not be regarded as extinguishing the legal and sexual autonomy of the wife. Mass media should also spread this message and awareness programmes should also be conducted by government and non-governmental bodies.
6. This research found that the increase in the Age of Consent from 16 to 18 vide Protection of Children from Sexual Offences Act, 2012 and Criminal Law (Amendment) Act, 2013 has started showing disastrous consequences as young love is branded as an offence. To insulate young boys and girls from being punished as criminals, it is submitted that our laws needs to be suitably amended and on the lines of Canada, peer group exceptions and close in age exceptions should be inserted in our laws as well.
7. It is also submitted that the recommendation of the Law Commission in its Forty Second Report (made way back in 1971) should be accepted and

bonafide mistake of fact as to the age of the person in the cases of statutory rape should be made a defence in India.

8. It is not suggested that the ignorance of law should be made a defence even in the cases of statutory rape as it is feared that it will open a Pandora box but it is submitted that the provisions of law (especially when a new law is made or a major amendment is brought), which concerns the common man should be popularized by making them a part of school curriculum and by launching mass media campaigns and legal awareness campaigns. Audio-visual methods should be utilized for these purposes so that the awareness campaigns remain interesting.
9. It is submitted that section 377 need not be repealed completely rather a proviso should be added to exclude the act of consensual sex between two adults in private from within its purview.
10. The attempts should be made so that alternative sexuality becomes acceptable to the society at large. Mass media, awareness campaigns and education reforms can play a very powerful role in bringing change in the attitude of the society towards homosexuals, bisexuals and transgenders.

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