

MARITAL RAPE: ABUSE OF POWER DYNAMICS WITHIN A RELATIONSHIP

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Session : 2022-2023

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LIST OF ABBREVIATIONS

AIR	ALL INDIA REPORTER
SC	SUPREME COURT
SCC	SUPREME COURT CASES
HC	HIGH COURT
SLP	SPECIAL LEAVE PETITION
WP	WRIT PETITION
CRLJ	CRIMINAL LAW JOURNAL
MISC.	MISCELLANEOUS
ORS.	OTHERS
SCR	SUPREME COURT REPORTS
NDLR	NOTRE DAME LAW REVIEW
IPC	INDIAN PENAL CODE
IEA	INDIAN EVIDENCE ACT
PHRA	THE PROTECTION OF HUMAN RIGHTS ACT
ICCPR	INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS
CEDAW	CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN
ICESCR	INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS
UNHRC	THE HUMAN RIGHTS COUNCIL

UDHR	UNIVERSAL DECLARATION ON HUMAN RIGHTS
ECOSOC	THE ECONOMIC AND SOCIAL COUNCIL
HMA	HINDU MARRIAGE ACT
HMGA	HINDU MINORITY AND GUARDIANSHIP ACT
CRPC	CODE OF CRIMINAL PROCEDURE
CPC	CODE OF CIVIL PROCEDURE
PWDVA	PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT
COI	CONSTITUTION OF INDIA
UK	UNITED KINGDOM
USA	UNITED STATES OF AMERICA
NGO	NON GOVERNMENT ORGANISATIONS
UN	UNITED NATIONS

CHAPTER 1

INTRODUCTION

“Woman is the companion of man, gifted with equal mental capacities. She has the right to participate in the minutest details in the activities of man, and she has an equal right of freedom and liberty with him. She is entitled to a supreme place in her own sphere of activity as man is in his. This ought to be the natural condition of things and not as a result only of learning to read and write. By sheer force of a vicious custom, even the most ignorant and worthless men have been enjoying a superiority over woman which they do not deserve and ought not to have. Many of our movements stop half way because of the condition of our women.”¹

One of the main obstacles to human advancements today is the legal subrogation of one sex to another, which should be replaced with a system of absolute equality that doesn't accept any privilege or power on one side or incapacity on the other.

None of the relationship between the perpetrator and the victim, rape is abhorrent. Marital rape is not a crime in India according to the legal system. Indian rape laws continue to ignore women's control over their bodies, unintentionally reinforcing the notion that they are still their husbands' and fathers' property and lack personal autonomy.

²In India, a marriage is seen as a religious and spiritual institution that plays a crucial role in family life. Because of this, the state is wary of upsetting this delicate balance. However, there have been numerous changes to Indian society during the past few decades. Women's role in society has evolved from being a housewife to being a man's property. The position of women is currently equal to men's in India, therefore this harsh law must be changed to reflect the times. Rape is a deathless humiliation and the gravest offence against human dignity, as the Supreme Court rightly stated.³

¹ M. K. Gandhi, Speeches and Writings. G. A. Natesan & Company, Madras, 1933.

² Tamannakhosla, marital rape in India: a radical feminist Perspective .38 mainstream \weekly 2014. 4. UN Human Rights Council, Report of the Special Rapporteur on violence against women, its causes and consequences, Addendum: Mission to India, Rashida Manjoo (A/HRC/26/38/Add.1)(2014) [7]–[8].

³ Indian woman : Yesterday and tomorrow ,India Today (April 28 2015)

In India, patriarchal societal norms and gender hierarchy encourage sexual violence against women in the private (and public) arena. The phrase "from the womb to the grave" refers to the fact that many women experience violence for the rest of their lives. Several interlocutors indicate, among other things, that sexual assault against women in the home, where the perpetrator may be the woman's husband, her in-laws or other family members, is tolerated by both society and the State. The majority of women who experience sexual assault reside in families with strong patriarchal and customary traditions that may be harmful to them. Because of their dependence on their spouses and other family members, women are in a subordinate position.

The Indian Penal Code, 1860 (IPC), Section 375 defines and criminalizes rape, but it also makes a provision for an Exception 2, which states that "sexual actions or intercourse by a man with his own wife, the wife not being under 15 years of age, is not rape."⁴

(Exception 2 Section 375 IPC, often known as the marital rape exception) This means that in India, forced sexual activity within a marriage is not considered to be rape. In India as well as other countries throughout the world, marital rape, which is defined as "non-consensual intercourse with one's own spouse," is a delicate subject for the majority of politicians. Legislators are reluctant to overturn the marital rape exception, despite facts released by the government expressing that marital rape is a reality in India.

This is due to the belief that conservative social groups oppose the possibility of repealing the marital rape exception and the anticipated backlash from voters that would follow. As a result, India's perspective on sexual abuse that takes place inside a marital house is that it is a private family affair and is not subject to scrutiny by public institutions like courts. Marital rape has been practiced for a very long time, and the biggest problem with it is that many victims don't realize they are being violated by their spouses and think their husbands are in charge of their family and have bound them to his will. In many nations, especially India, married couples experienced this position where the woman was subordinate to her husband and other family members. Sir Matthew Hale first discussed the history of marital immunity for rape prosecution in the Pleas of the Crown history from 1736. In which he stated, "*The husband cannot be guilty of self-committed rape against his lawful wife because by their joint married consent and contract the wife has given up herself in this type into her husband*

⁴ The Indian Penal Code, 1860 (IPC), Section 375

whom she cannot withdraw”⁵. Sir Matthew Hale's statement worked as a antecedent, and common laws were developed based on his book . In countries like ours, married males are protected from domestic violence . It is very very important to note that while these regulations and laws were altered in many former colonial nations, they were not altered in our nation and are still very intact today. According to majority of people living inside our country, marriage is a sacramental institution, and as such, it should be consummated and should behave in a way in the manner that makes the husband happy. ⁶

The primary and major issue with this statement is how an act can be regarded pious and sacred if it is performed against the wills of the women. Legislators ignored this fact, failing to recognize how the concept of sacrament institutions would be shattered if men were permitted to rape their wives. However, we cannot only blame legislators and lawmakers for the failure to achieve this goal. the latter of which specifies the penalty for rape, 1983. Thus, it was this Amendment that started the rape law reform movement

Providing immunity to the husband because at the time these laws were being written, men predominated in the nation and women were not treated equally. But because we now value women equally in our society, the legislation must be modified to safeguard the lives of women who are taken advantage of by their husbands.

1.1 Marital Rape’s Historic Aspects

Women are viewed as chattel and the property of men in older age groups. If a man is married to a woman, he is immune from society, and he is not punished for sexually abusing or raping his wife for an unspecified number of times without getting her agreement. Rape was historically regarded as a crime, but if it happened to a married woman by her spouse, the situation was different. A married guy considers it a privilege to have the legal authority to rape his wife. This can be inferred and tracked back to the remarks made by Sir Mathew Hale, the chief justice of England in the seventeenth century.

⁵A portrait of Sir Matthew Hale, chief justice of England between 1671 and 1676, published in the book Lodge’s British Portraits in 1823

⁶ A portrait of Sir Matthew Hale, chief justice of England between 1671 and 1676, published in the book Lodge’s British Portraits in 1823

He mentioned:"The husband cannot be held accountable for the rape that he performed against his legitimate wife since by their mutual agreement and contract, the wife gave her husband this kind of information that she is unable to take back.

The first documented occurrence involved a Massachusetts man who was accused of raping his wife in 1979. In this instance, he and his wife had separated and begun the divorce process. He broke into her house, attacked her violently, and engaged in sexual activity. The allegations of rape and burglary (he no longer resided there) were upheld by the appeals, but it was stated that the case was more about violence and did not invalidate the rule that barred a married lady from alleging rape.

Marital rape used to be exempt from charges. Once a man and woman were married, the law considered any sexual activity between them to be voluntary; but, if a man physically abused his wife, he might have been charged with assault rather than rape. The male may be charged with sodomy or deviant sexual assault in situations when the assault went beyond simple sexual contact. It was also impossible for a man to assert that his wife had raped him, and even an unmarried man could not assert rape because the victim of rape must be a woman.

This is because in patriarchal societies, traditional ideas about marriage and the dominance of males led to the violation of women's individual rights. However, from the 1960s through the 1970s, second wave feminism in particular challenged these ideas in the majority of western countries. This paved the way for a woman's individual right to be recognized.

1.2 Waves of Changes in Indian Rape Law

1.2.1 Events that have contributed to changes in Indian rape law

This dissertation shed light on three changes that have occurred in rape legislation since the passage of the IPC 1860. The fact that three judgements rendered by Indian courts have had an impact on their establishment is what unites the three of them.

❖ **Tukharam vs. State of Maharashtra**⁷

The Criminal Legislation (Amendment) Act 1983 was created as a result of protests against the Indian rape law that were sparked by the Supreme Court's decision in the Tukaram v. State of Maharashtra (Mathura case) case (Amendment Act 1983). The Amendment Act served as the tipping point for revising Sections 375 and 376 of the IPC, aftereffect of which was establishment of the rape penalty in 1983. Thus in this way, the rape law reform movement was launched as a result of this Amendment.

In the Mathura (Uttar Pradesh) rape case, Mathura, a young girl aged about sixteen years, managed to get away in order to wed her boyfriend Ashok. They were both summoned to the police station in March 1972 as a result of her brother Gama accusing Ashok of kidnapping him. Gama, Ashok, and his family were at the police station. Gamaa, Ashoka, and his behen were asked to leave the police station, While Mathura was asked to remain, his sister were asked to leave the station. When her family inquired about Mathura because they were worried that it was taking too long, they were told that she had already left the police station. Mathura told her family members that she had been raped by several police officers who had ties to the police station after leaving the police station a while later. The officers were exonerated by the Supreme Court.

The officials were exonerated by the Supreme Court. The Supreme Court of India agreed with the law enforcement officers' debates that the evidence failed to establish that she did not give her consent, which was one of the reasons for the acquittal along with medical records from doctors attesting to the fact that she had previously engaged in sexual activity and the fact that no injuries had been observed on her. Women's rights organizations criticized the Indian legal system's mishandling of rape victims as well as Indian society's disdain and ignorance toward rape in 1979, drawing particular attention to the Mathura case..

Aftermath of the Case:

The judgement led to massive protests from the side of activists, lawyers etc. There felt was a need of strong and necessary amendments to the existing legislation that encapsulates all the necessary blunders from the side of Courts.

⁷1979 AIR 185, 1979 SCR (1) 810

a) Medical Test: According to Indian Evidence Act medical evidence is admissible in court under Section 45⁸, which allows opinions of medical expert to be used in judicial procedures. The Supreme Court, however, determined that because this is a sort of ‘opinion evidence,’ it should be considered a ‘poor and weak type of evidence.’ In criminal prosecutions, medical evidence has always been crucial. It tries to prove that either the accused was guilty of rape or that such evidence can be used to prove that the plaintiff’s testimonial was forged, proving that the victim was a bad person⁹. As an outcome, the sentence of the offender is lowered. As a result, the Evidence Act’s provision 155(4)¹⁰ was revoked.

In *Pratap Misra v. State of Orissa*¹¹, the victim was referred to as a “concubine” since she was in a relationship with a married man and later wedded him in a bigamous marriage. Three men raped her when she was on a vacation with her husband. The court, however, acquitted all three on the grounds that the victim had no visible injuries and thus must have given her consent. Furthermore, throughout intercourse, she had just wept rather than yell. The victim of gang rape miscarried after a few days, and the court stated that if the intercourse had been forced, she would have miscarried immediately rather than after a few days.

b) Testimony of the victim in the court: It is extremely difficult for the victim to establish the absence of consent, particularly in cases of incarcerated rape. The victim bears the burden of proof in proving that she was raped against her will. But then, under the Indian Evidence Act, Section 114A¹² was inserted, which provides that if victim denied the consent in any cases of rape, the court shall presume that she did not consent for the same and the burden of proof of will shift to the defendant¹³. The Supreme Court ignored the precedent set by Justice Krishna Iyer in *Nandini Satpathy*¹⁴, in which he criticised the practise of summoning ladies to the police station and declared it a serious breach of Section 160(1)¹⁵ of the CrPC.

⁸ Section 45 of Indian Evidence Act, 1872 (act 1 of 1872).

⁹ Samiksha Kandya, ‘Sentencing in Rape Cases in India: An Analysis’ (2021) 26 *Supremo Amicus* [411]

¹⁰ Section 155 of Indian Evidence Act, 1872 (act 1 of 1872)

¹¹ *Pratap Misra v. State of Orissa* (1977) 3 S.C.C. 41

¹² Section 114A of Indian Evidence Act, 1872 (act 1 of 1872)

¹³ Samiksha Kandya, ‘Sentencing in Rape Cases in India: An Analysis’ (2021) 26 *Supremo Amicus* [411]

¹⁴ *Nandini Satpathy v. P.L. Dani and Anr.*, (1978) 2 SCC 424

¹⁵ Section 160(1) of Criminal Procedure Code, 1973 (act 2 of 1973)

Concluding from above case we can say that despite the fact that India's rape laws have been revised over time, the number of rape cases continues to rise year after year. This act not only causes significant bodily harm to the victim, but it also has catastrophic psychological consequences such as PTSD, depression, flashbacks, sleep difficulties, and more. Improving the protection and security of women in the state would be one step toward eliminating this crime. More than strict rules to punish wrongdoers, men's attitudes and mentalities, such as those of the Supreme Court Judges in the Mathura Rape Case, need to be changed. A change brought about by the Amendment Act of 1983 is that officials in duty are now deemed to be committing an aggravated form of rape if they use their position to engage in sexual activity. Additionally, a fixed minimal penalty for the offence was adopted. Because the prosecutor's and victim's evidence was disregarded in the Mathura case, Section 114A of the Indian Evidence Act, 1872 (IEA) was established, shifting the burden of proof to the accused. A clause pertaining to marital rape that was included in the Amendment Act.

❖ **State through Reference vs Ram Singh & Ors.**

The public's response to the State through Reference vs. Ram Singh & Ors. (Delhi gangrape case) case influenced the subsequent wave of changes to Indian rape law, which ultimately resulted in the passing of the Criminal Law (Amendment) Act 2013. (Amendment Act 2013). The Dehligangrape case¹⁶ involves a 23-year-old student who was brutally assaulted, raped repeatedly, and battered by six men while riding home in a bus. A hefty metal object that had been repeatedly inserted and retrieved from her lower region was ripped out of her with such force that only 5% of her intestines were still present, as was discovered during a hospital examination. The girl passed away from her injuries in the hospital within two weeks. National outrage over the girl's crime resulted in the formation of the Verma Committee (Verma Committee) on the previous Chief Justice of India's behalf.

The Verma Committee was tasked with coming up with recommendations for revising and strengthening the laws pertaining to both rape and sexual assault. The Verma Committee suggested eliminating the provision for marital rape as one of its proposals. The argument supporting the suggestion is that a spouse should not be granted immunity from rape charges if he is married, hence the victim's relationship with the offender is irrelevant. The 2013 Amendment Act brought about a number of modifications to Indian

¹⁶Mukesh & Anr vs State For Nct Of Delhi & Ors CRIMINAL APPEAL NOS. 607-608 OF 2017 (arising out of S.L.P. (Criminal) Nos. 3119-3120 of 2014)

rape legislation. The definition of rape under Section 375 IPC has been expanded to include numerous types of penetration into a woman's or girls bodily parts. Prior to this modification, rape solely included the penetration of a man's penis through the vagina.

A seventh addendum was made, which states that the inability of the woman to consent also qualifies as justification for rape. The Verma Committee's recommendation to remove the exception for marital rape was not followed, despite the Amendment Act 2013 having changed the IPC. The reality is that unless there is a legal separation or the woman is under 15 years old, a man cannot be penalized for rape committed within the marriage.

❖ **Independent Thought vs. Union of India**¹⁷

With the passage of the Criminal Law (Amendment) Act 2018, India's rape laws underwent their most recent round of reform. The Supreme Court's 2017 decision in *Independent Thought v. Union of India*¹⁸ contributed to this development.

The protection of child-wives against marital rape is the subject of a public interest lawsuit brought by the non-governmental organization Independent Thought. This is because the exception for marital rape only covers wives who are raped by their husbands when they are under the age of 15. In this case, Madan B. Lokur and Deepak Gupta, two judges, argued that child-wives between the ages of 15 and 17 should not be covered by the marital rape exception. The Supreme Court determined that this exception makes a distinction between a girl kid who is not married and a girl child who is married, and that this distinction is both discriminatory and arbitrary. In this decision, the Supreme Court defended its stance that the age requirement for the marital rape exception should be raised from 15 to 18 years.

In this case, the Supreme Court ruled that making a distinction between a married female and an unmarried girl is incompatible with in particular Articles 15(3) and 21 of the Constitution of India (Constitution). Additionally, it was brought out that Article 14 of

¹⁷ Writ Petition (civil) no. 382 of 2013, (2017) 10 SCC 800

¹⁸ Writ Petition (civil) no. 382 of 2013

the Constitution guarantees everyone the same level of legal protection. Additionally, the Supreme Court notes that a husband who coerces his child-wife into having sexual relations is incompatible with the Constitution and the Protection of Human Rights Act, 1993 (PHRA), which ensure dignity and liberty as guaranteed rights. The Supreme Court also stressed the importance of a woman's right to self-determination with relation to her own body.

The Supreme Court also noted that there are discrepancies in the fact that married males cannot be tried for major rape crimes but can be tried for less serious sexual offences. The less serious offences for which a male can be tried include stalking, sexual harassment, insulting a woman's modesty, abusing a woman or using unlawful force against her with the goal to cause her to undress, and voyeurism. There are no exclusions for these less serious offences, whether they take place during a marriage or not. Contrary to rape, this is nevertheless considered a sexual offence of a more serious character notwithstanding the existence of the marital rape exception.

Section 3 of the Protection of Women from Domestic Violence Act of 2005 also guarantees the safety of women when they are victims of less serious offences (PWDVA)¹⁹. Finally, from a global standpoint, the Supreme Court made it clear that India is subject to legal duties, such as those imposed by the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

Thus, it can be said that the Amendment Act of 2018 made revisions to, for instance, Section 376 IPC. However, the Supreme Court's finding that the exception for marital rape results in a discriminating the marital rape exception has not been altered notwithstanding the distinction between a married female kid and an unmarried girl child and the fact that rape is a more serious type of sexual offence. This implies that India has decided not to change anything, meaning the exception still exists in the law.

The case of Independent Thought v. Union of India²⁰ is regarded as a historic decision that demonstrates the Supreme Court's desire to safeguard married girl children between

¹⁹Protection of Women from Domestic Violence Act of 2005,Section 3 .

²⁰Writ Petition (civil) no. 382 of 2013

the ages of 15 and 17 from marital rape, as demonstrated in the preceding sentence. It is possible to wonder whether this will open the door for the legal system to consider whether all married women, regardless of age, can be protected from marital rape.

1.3 Marital Rape Exception History in the Indian Context

Rape is a crime under section 375 of the Indian Penal Code (IPC). It is a broad definition that encompasses both sexual contact and other types of sexual penetration, like oral sex, as rape. ¹⁶ The application of this clause to sexual activities or sexual contact between a husband and wife is, however, disallowed under Exception 2. Therefore, if a husband rapes a woman, she has no legal recourse under Indian law.

Due to the Criminal Law (Amendment) Act of 2013, section 375 of the IPC has the following new language: "*Section 375: A man is said to commit "rape" if he— Penetrates his penis, to any extent, into the vagina, mouth, Urethra or anus of a woman or makes her to do so with him a woman's vagina, urethra, or anus, or induces her to do so with him or another person; inserts any object or body part, excluding the penis, into her vagina, urethra, or anus, or induces her to do so with him or another person; manipulates any part of a woman's body to cause penetration into her vagina, urethra, anus, or any other part of her body; or Applies his mouth to a woman's vagina, anus, or urethra, or compels a woman to do so with him or another, when the situation fits any of the following seven criteria:*

- ❖ *Against her will.*
- ❖ *Without her consent.*
- ❖ *With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.*
- ❖ *With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.*
- ❖ *With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome Substance, she is unable to understand the nature and consequences of that to which she gives consent.*
- ❖ *With or without her consent, when she is under eighteen years of age.*

❖ *When she is unable to communicate consent.*

Explanation 1.—*For the purposes of this section, “vagina” Shall also include labia major.*

Explanation 2.—*Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act: Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.*

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

Exception 2.—*Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape”²¹.*

Exception 2 of section 375 of the IPC (‘exception clause’) does not state any reason for the exclusion of sexual intercourse or sexual acts between a man and his wife from the purview of rape. Since consent is the main topic of this section, it is probable that when the victim and the offender are married, an unquestionable presumption of permission will apply. Given the respect that this institution has acquired in our culture, it is also possible that there was a legislative choice to exempt married relationships from the application of this clause. This is likely because there are parts of the IPC that do not apply to spouses. A specific type of marital rape, such as non-consensual sexual contact when the woman and husband are living separately due to judicial separation, is criminalized even though the law does not make marital rape a crime otherwise Sec 376B of the IPC states:

“Section 376B: Sexual intercourse by husband upon his wife during Separation: Anyone who engages in sexual activity with their own spouse while they are living apart, whether or not there is a separation decree in place, is subject to fines and imprisonment of either kind for a time that must not be less than two years but may reach seven years.

²¹section 375 of the IPC { Criminal Law (Amendment) Act of 2013 }

***Explanation** - As used in this section, "sexual intercourse" refers to any of the behaviors' listed in Section 375's clauses (a) through (d).²²This section states that, contrary to the situation here, where the husband and wife do not live together, permission is not presumed under section 375 of the IPC. Living together creates a presumption that the woman has given her approval for the husband to engage in sexual activity. It is possible to speculate on this, and a review of the legislative debates and reports of the Law Commission of India (the "Law Commission") Understanding the circumstances behind marital rape helps us comprehend India's exception to the rule. The 42nd Law Commission Report was the first to address this topic.²³ The significance of this study is limited to understanding the lens through which the Statute Commission viewed the law because it has been altered at various points in time since this report was published sees rape in marriage. This study offered two crucial recommendations. First, it stated that the exemption clause could not be used when a husband and wife were legally separated. Although this was a commendable idea, it wasn't clear why it was made. "In such a circumstance, the marriage officially continues, and if the husband engages in sexual activity with her against her will or her consent, he cannot be charged with the crime of rape," it was said in the document. It doesn't seem right.*

It makes no mention of why this is incorrect. It means that consent cannot be assumed when a husband and wife do not live together but is presumed when they do. The second recommendation in this report was in regards to non-consensual sex between females between the ages of twelve and fifteen. It was said that the punishment for such offences needed to be classified differently and preferably not as rape. This was due to the fact that, prior to the most recent changes to the IPC, rape by a husband when the woman was between the ages of twelve and fifteen had a separate sentence. The second option is distinguished by its unwillingness to categorise marital rape as rape, at best as a lesser sexual misdemeanour.

²²section 375 of the IPC

²³Law Commission of India Report No. 42- Indian Penal Code-1971

In conclusion, this article brought attention to the distinction between marital rape and other rape, with the former being considered as less serious, and how the presumption of consent applies when a husband and wife live together. However, it made no comments regarding the exception clause itself, including whether it should be kept or removed. The 172nd Law Commission Report's exception clause's legality was a direct concern for the Law Commission.²⁴

Arguments about the legality of the exception clause itself were presented in this case during the consultation rounds. It was contended that there was no justification for rape to be exempt from the application of the law when other acts of domestic violence by a husband toward his wife were made illegal. This argument was rejected by the Law Commission because it believed that making marital rape a crime would result in "*excessive interference with the institution of marriage.*" This article clarifies how marital rape and the sacredness of the marriage institution interact.

In 2012, a committee assembled under Justice J.S. Verma (Retd.) argued for the criminalization of marital rape, signaling a change in the tone of prior discussions. This committee was established in response to the widespread movement to improve the criminal justice system's ability to handle cases of severe sexual assault against women. In 2012, the committee issued its "Report of the Committee on Amendments to Criminal Law" (also known as the "*Jagdish Sharan Verma Report*").²⁵ The report made the recommendation that marital rape should be made a crime.²⁶ This was suggested in two different ways. The initial recommendation was to simply remove the exception clause. The second idea was that the law should expressly indicate that a spouse or other comparable connection is not a legal defense for the accused, is not important when establishing whether permission was given, and is not a mitigating circumstance when it comes to sentence. This study discussed how the antiquated idea that women were the property of men and gave their irrevocable agreement to their husband's sexual desires led to the immunity offered in cases when the perpetrator is the victim's spouse. It noted

²⁴ Law Commission of India Report No. 172- Review of Rape Laws- 2000

²⁵ Jagdish Sharan Verma committee report

²⁶ Jagdish Sharan Verma committee Report on amendment to criminal law 2012,p-62.

that this immunity had been removed in a number of jurisdictions and that such an exception provision was incompatible with the modern idea of marriages between equals.

The Criminal Law Amendment Bill, 2012 (the "Amendment Bill, 2012") was created in response to this. The term "rape" was changed to "sexual assault" in this bill in an effort to broaden its application, but there was no provision to make marital rape illegal.²⁷ The recommendations made in the Jagdish Sharan Verma Report were not taken into consideration by the Amendment Bill, 2012. In its 167th session, the Parliament's Standing Committee on Home Affairs This Amendment Bill, 2012 was examined in the Standing Committee Report, which also coordinated public consultations. It was proposed here that 375 be appropriately changed to remove the exclusion clause. The Standing Committee, however, declined to accept this advice. First, according to the Standing Committee Report, doing so would put "the entire family system under greater stress and the committee may perhaps be inflicting more injustice." Second, the Committee argued that adequate remedies already existed because the family could handle such problems on its own and because a criminal law remedy was available. Through the notion of cruelty as defined by IPC section 498A through the definition of cruelty as it is described in IPC section 498A. The Ministry of Home Affairs recently, in 2015, reaffirmed its position in response to a Member of Parliament's proposed measure that sought to criminalise marital rape. It was "considered that the idea of marital rape, as understood internationally, cannot be adequately applied in the Indian context," according to the press statement the "mind-set of the culture to see the marriage as sacrament" was one of the explanations offered for this. Notably, a private bill on this subject was introduced in December 2015. The Home Minister mentioned that the Law Commission was taking this into consideration during the discussion that followed. and no decision would be made until the report was out. His mention of the IPC's existing "cruelty" remedy stood out in particular from the rest of his remarks. Regarding the marital rape exception and whether the government intended to make it a crime, the Home Minister was questioned once more in 2016. The Home Minister responded once again that that the Law Commission had begun investigating into the issue and that the

²⁷ Sir Matthew Hale. History of the Pleas of the Crown, 1 Hale PC (1736) ,J.S. Verma committee Report on amendment to criminal law 2012 ,p-113.

Permanent Committee of the Parliament had rejected making it a criminal offense, so no action had been made to do so. The judiciary shares this position on criminalizing rape of The petitioner contended that the provisions of the IPC are against Article 14 as it leads to unreasonable classificationspouses in addition to the legislative department of the government. Despite the fact that section 375's exception clause has never been used, There have been cases where courts have simply dodged this issue by dismissing petitions to strike down this exemption clause or have openly maintained it.

Otherwise, avoided addressing the issue of whether a husband had raped his wife by using the exception clause. There are three main themes in the arguments against criminalising marital rape when examining the justifications put out by the Government and the analysis done by various Law Commission studies.

The first is with relation to the intention of safeguarding the institution of marriage and, thus, refraining from tampering with it in order to maintain the institution's sacredness. Both the IPC and the Law Commission findings demonstrate this. The second discusses the existing legal options that a woman may use to seek redress, including 498A of the IPC, the Protection of Women from Domestic Violence Act, 2005 (the "PWDVA, 2005"), and many other private laws governing marriage and divorce. This is done in an effort to make the argument that criminalizing marital rape is not urgent because women already have access to adequate resources. The third focuses on Indian cultural norms and highlights how these values should prevent us from making marital rape a crime.

Conclusion of the case:

In case of Independent thought union of India (2017) the supreme court of India defines that what constitutes the offence of rape as follows:

Any sexual intercourse with a woman against her will, without her coercion , misrepresentation or fraud or at the time when she has been intoxicated or duped, or is of unsound mental health and In any case, if she is younger than 18". One of the exceptions to the aforementioned provision specifies that when a man engages in sexual activity with his own wife and is beyond the age of 18, it is not considered rape. It is evident from the definition above that the main protection for women from rape in marriage is the age restriction; for example, if sexual contact is made with a

wife who is 15 years old, it is regarded as marital rape, but after that age is reached, it is not. It is not even thought to be offensive.

When we examine the background of the spouse's exemption from marital rape numerous hypotheses, we discovered, support the IPC's exception clause. According to the implicit consent hypothesis, marriage is a contract and the wife's assent to having sex with her husband is assumed when she enters it. According to the unity idea, men and women become one unit after marriage, making it impossible for a husband to rape his own wife. The wife becomes her husband's property upon marriage, and he is free to claim and use that property whenever he pleases, according to the property theory, which is a different theory. A private circle is established after marriage, and according to the privacy and reconciliation idea, the law should not get involved in a husband and wife's personal affairs.

These kinds of arguments form the foundation of the current exception to the criminal law regarding marital rape. The patriarchal aspect of Indian society, which maintains that "men are the breadwinners" and that women must rely on their husbands for financial support, is another historical factor that accounts for the exception. Although India is making progress toward favorable legal reforms for women, more needs to be done to ensure social and legal transformation. One of the reasons why the horror of marital rape is behind the sacredness of marriage is because Indian laws are lagging behind and there is a great deal of societal stigma associated with it. Therefore, the idea that "rape is rape" regardless of ties between the victim and perpetrator serves to defend women's human rights and give them security against marital rape.

CHAPTER 2

REVIEW OF LETRATURE

According to Dr. Dasarathi Bhuyan, sex writing uses the phrase "women empowerment" as well. The term is used in connection with two broad faculties, namely general and particular. In a broad sense, it alludes to encouraging women to act naturally subordinate by granting them access to every opportunity and position that they were previously denied due to their gender.

Richard Gelles conducted study to better understand marital rape in his 1977 book "power, Sex and Violence: the Case of Marital Rape."

"For Better or Worse: The Case of Marital Rape" by Mark A. Whatley, published in 1993, examines the cause, incidence, and society perceptions of marital rape. The author's investigation of the various legal definitions and restrictions on marital rape in the various US states. The impacts of marital rape on women, as well as how society views marital rape and its victims, have all been thoroughly researched by the author. The status of marital offences as crimes in various courts and the current trend around them are discussed in this essay.²⁸

"Marital Rape: History, Research, and Practice," by Bennice A. and Resick P. Reviews the state of marital rape, beginning with its history of being acquitted, the harm it caused to the victims, and a study of the relevant research that has been done. It aims to address the seriousness of marital rape and the effects consequences suffered by the victims.

Dr. Bhavesh Gupta, India's present legal system regarding marital rape and the need for change In issue 16-32 of Galgotias, a journal for legal studies, a piece was published. The author of this article thinks that it is morally unacceptable for women to have sex with their husbands against their wills, consent, or health in a civilised society. The author underlines that there is no excuse for the exemption of marital

²⁸ M A Whatley :Department of Psychology, California State University, Fullerton.

rape in today's society. The author claims that criminalising marital rape is a critical step in transforming how women experience sex abuse in marriage.²⁹

Md. Zishan Khan's 2018 article, "(marital rape and consent): Analysing Marital rape in India," analyses Section 375 of the IPC and the various arguments made in favour of and against the numerous petitions that were filed with the Delhi High Court with a request that the Exception (2) clause be removed.

Tan Cheng Han (1989): "marriage Rape - Removing the Husband's legal Amnesty" examines both historical and contemporary arguments in support of giving spouses who commit marital rape immunity. However, it suggests that the immunity be totally removed or at least somewhat adjusted because it is unfair to the younger generation.

A thorough work that is among the first to present marital rape in the perspective of culture and law of many countries is "Marital Rape: Marriage and Social Change in Global Context" by Kersti Yelo and M. Gabriela Torres (2016). The book is the result of an interdisciplinary, global study project in which a team of academics worked together to better understand the preconceived ideas surrounding marriage, the sexually developing concept of marital rape, and the concept of consent. The idea of intimacy as understood by women from various cultures is also researched, as is how they perceive sexual abuse and violence.

Diana E.H. Russel's 1982 book, "Rape in Marriage," provides a thorough examination of marital rape occurrences, the prevalence of marital rape, its relationship to abuse, its effects, and its character. The effects on victims and reasons behind husbands who rape their wives are also discussed in the book.

The essay "Marital Rape: A Legalized Sin" by Angali Shrivastava, Devanshuain, and AyanHazara (2013) discusses the history, evolution, and impact of marital rape in India and other nations. By not making marital rape a crime, it also focuses on

²⁹ Bhavesh Gupta And Meenu Gupta, (2013),Marital Rape : Current Legal Frame work in india and the need for change, Galgotias Journal Of Legal Studies, 16-32

demonstrating the two-sidedness of the patriarchal society. The concept of consent in India and the psychological repercussions experienced by a victim of marital rape as a crime—both of which are illegal and immoral—were also examined in the study.

(1983) Irene Hanson Friez The author of this dissertation investigated the causes and effects of marital rape and spoke with over 300 women in an effort to uncover the solutions to some of the fundamental questions surrounding marital rape, such as: What actions should be considered rape in the case of a husband and wife? There are many more questions, such as whether married women accept forced sex as a marital responsibility.

Sue Lees (1997), "Ruling Passion: Sexual Violence, Reputation, and the Law," in "Reputation and the Law: This book examines how power operates through institutional and social processes that support the legalization of male aggression based on considerations and discussions with children and a number of rape and murder proceedings.

IOSR Journal of Humanities and Social Sciences, Critical Analysis on Marital Rape and its Legal Implications by Rashed Ahmad, 2016. Marital rape, according to the essay's author, is a form of non-consensual sex in which the victim's spouse is the perpetrator. Prior to recently, it was mostly ignored, but it is increasingly getting criminalized and is no longer forbidden by international agreements. The author has concentrated on societal problems that are widespread. The author is now looking at the factors and other circumstances that lead men to rape their wives.

Kusum yadav (2016), "Marital Rape Stigma over Conjugal Rights -A Socio Legal Study," aims to uncover the societal challenges faced by women who are raising their voices in opposition to the subject of rape within a marriage and to conduct study on the legality of marital rape in India. The author draws attention to the issue of how a husband can be guilty of rape if he is merely exercising his conjugal rights without marital rape being recognised as a crime; as a result, she concentrates on the urgent necessity to criminalise marital rape. The author goes on to say that the acknowledgement of a spouse's right to have sex with another person does not give a husband permission to rape his wife.

The literature review shows that there is a clear gap in the literature on marital rape as violence in India and the need to criminalise it. Therefore, there is a need for thorough investigation into this contentious issue in the Indian context as well as for thorough legal responses to marital rape issues.

CHAPTER 3

RESEARCH METHODOLOGY

3.1 Objectives of Research

- ❖ Researching the definition of marital rape in India and what constitutes it.
- ❖ To ascertain the scope of India's marital rape study.
- ❖ To assess the prevalence of marital rape in India; To look at the judiciary's and parliament's perspectives on marital rape in India; and to decide what steps should be taken to combat it.
- ❖ To comprehend the justification behind India's decision to not criminalise marital rape.
- ❖ Why to better comprehend why marital rape is not considered a crime in India.
- ❖ A proposal for a course of action to strengthen the legislation around marital rape.

3.2 Research Question

- ❖ What does "consent" mean in the context of marital rape?
- ❖ Why The reasons why marital rape is not a crime in India.
- ❖ Why The reasons why it is vital to make marital rape a crime.
- ❖ What are various international and national measures to combat marital rape?
- ❖ Why marital rape should be made independent offence in India.

3.3 Hypothesis

Rape is a traumatic, horrible, and abhorrent crime that can happen inside or outside of a marriage, but there is no particular legal penalty for marital rape except in case where wife is of age less than 15 years but recently in year 2017 Thehonourable supreme court increased the age to 18 years. Marital rape is a threat that cannot be adequately addressed by the IPC, the Domestic Violence Act, or other personal law laws as they currently

stand. As a result, a new offence must be established through appropriate legislation, and reforms to personal law will follow.

3.4 Method of the Study

First off, it should be noted that the sort of question that needs to be answered determines the strategy that should be used.

The researcher employed the doctrinal research technique and acquired information from a range of secondary sources, including articles, journals, and books, in order to meet the goal of the study. Additional citations from the important rulings on this subject are taken. Internet was one of the additional sources used by the researcher.

3.5 Scope of the Study

The researcher is conducting a thorough investigation into the issue of marital rape by connecting it to women's basic human rights. For the benefit of women's empowerment, the researcher hopes to contribute to changing the legal system to make marital rape a crime. The study of numerous rape laws in various legislatures has been conducted for this research report.

CHAPTER 4

ANALYZE THE CLAUSE IN THE LIGHT OF CONSTITUTION OF INDIA

The exception clause in criminal law regarding The rape prevents married women from exercising their constitutionally protected human rights. More specifically, it involves a violation of, for instance, Articles 14, which provides equality before the law and Article 15, which forbids discrimination based solely on a person's gender and Article 21, which protects their right to life and personal freedom.

4.1 Violation of article 14

Article 14³⁰ the Indian Constitution states “The state shall not deny to any person equality before law or the equal protection of the laws within the territory of India prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.”

Article 14 which states equality before the law and equal protection of law does not give equal protection to all women in this scenario. The India penal code, when drafted in the 1860s, did not accept a married woman as an independent legal entity and was always stated as an entity within the husband’s possession. In providing this the exception 2 of section 375 does not punish the husband for the act of rape with his wife but the husbands when they have sexual intercourse with their wives who are at the age of 15 or below. Thus the law clearly discrimination between married the age 15. Exception 2³¹, by not giving punishment encourages doing any sexual act if they are a major and married, thus Article 14 of the Constitution is violated.

In the petition filed by in the Delhi High Court by the RIT foundation and the All India Democratic Women’s Association³² , the petitioner contented that the provision of IPC are

³⁰Article 14, Constitution of India.

³¹Section 375, Indian Penal Code -1860.

³²1989 AIR 1280, 1989 SCR (2) 66 ,All India Democratic Women'S ... vs Union Of India & Ors on 17 March, 1989

against article 14 as they lead to unreasonable classification .According to the rape laws in India rape victims are classification into three categories.

- ❖ *Rape by the stranger. These are covered under Sections 375 and 376 of the IPC.*
- ❖ *Married but judicially separated and living separately from her husband: They are protected under section 376B of the in case they are victims of rape committed by their husbands.*³³
- ❖ *Married and living with her husband: these categories of women are not covered under any section of IPC. Further the exception (2) of section 375 of the IPC, in essence, provides immunity to husbands for raping their wife who are above 18 years of age.*
- ❖ *Clearly, the above classification is not justifiable as it provides protection to the victims of category 1 & 2 but has no provisions for victims of category 3. The petitioner contended that the provisions of the IPC are against Article 14 as it leads to unreasonable classification.*³⁴

4.2. Prohibition of discrimination on the ground of sex

The second guarantee of the Constitution's equality provisions is included in Article 15, which calls on the State to prevent discrimination on the basis of any factor other than, say, sex. This promise, which is spelled out in Article 15(1), has grown significantly in recent years. The idea of "sex plus," or distinction based on sex in addition to other factors, has evolved. According to the critics, it is obvious that the marital rape exception breaches Article 15.³⁵ when the anti-stereotyping principle, the anti-discrimination phrase, and the language of dignity are all used.

The anti-stereotyping principle is centred on the criticism that discriminatory treatment cannot be justified by presumptions based on custom or culture regarding the roles that should be played by different sexes or the industries they should work in. 89 They further point out that the Supreme Court recognised the right of self-identification for transgender

³³Section 376 B .

³⁴akanksha , marital rape <https://www.livelaw.in/marital-rape-married-married-seperated>

³⁵ ibid

people in *National Legal Services Authority v. Union of India*, where the same principle was later approved. The Supreme Court determines in this instance that As stated in the Constitution, sex is not a factor that should be used to discriminate against anyone. Furthermore, individuals should not be subjected to indirect or direct discrimination because of simplistic and stereotyped views of binary genders (i.e., male and female).³⁶ In *Navtej Johar v. Union of India*³⁷, it was acknowledged that the anti-stereotype represents a factor in determining compatibility with Article 15 in light of the two decisions illustrated in the preceding two paragraphs. According to the ruling in *Air India v. Nargesh Meerza*, female air hostesses were prohibited from getting married within the first four years of their work since it would be advantageous for family planning and marriage. However, the anti-stereotyping principle was used to challenge this viewpoint in *Navtej Johar v. Union of India*. According to the Supreme Court, the It is discriminatory to assume that only women are responsible for marriage fulfilment and family planning. In *Air India v. Nargesh Meerza*, the Supreme Court applied the non-discrimination principle in Article 15(1) and determined that a regulation is only unconstitutional if it exclusively discriminates on the basis of sex. The opposition claims that rigid adherence to this judgement may result in prejudice towards groups of people who identify with more than one identity. This is because grouping two groups of people based on sex along with another characteristic, such economic status and sex, creates a classification that can withstand court scrutiny. However, the critics contend that this decision's implications have *Navtej Johar v. Union of India*³⁸, the Supreme Court's ruling, has hopefully had an impact. In that case, the Supreme Court held that there is a difference between sexual behaviour that is permissible and improper, which is based solely on a social heteronormative order, criminalising relationships between people of the same sex as being unnatural. This was accomplished by attacking the *Air India v. Nargesh Meerza* case's³⁹ limiting view of what constitutes discrimination, contending that the existence of such a view prevents the clause from having its intended

³⁶Article 15, Constitution of India.

³⁷ writ petition (criminal) no. 76 of 2016 with writ petition (civil) no. 572 of 2016 writ petition (criminal) no. 88 of 2018 writ petition (criminal) no. 100 of 2018 writ petition (criminal) no. 101 of 2018 writ petition (criminal) no. 121 of 2018.

³⁸*Navtej Singh Johar vs Union Of India Ministry Of Law And ...* on 6 September, 2018

³⁹*Air India Etc. vs Nergesh Meerza & Ors. Etc.* on 28 August, 1981, 1981 AIR 1829, 1982 SCR (1) 438

impact. The Supreme Court argued that discrimination against a class founded on and perpetuating preconceptions that are incompatible with the principles of Article 15(1) does not survive a constitutional scrutiny when it comes to the issue of determining the true content of the Article's guarantee. In addition, the Supreme Court emphasized that discrimination based on a stereotyped view of sexes, whether it occurs directly or indirectly, cannot be distinguished from that which is forbidden by Article 15 on the basis of sex alone. Invoking the anti-stereotype principle, the Supreme Court recognized that discrimination based on sex is intersectional. The critics contend that discrimination is caused not only by gender but also by Assumptions of gender roles that appear innocent put restrictions on the development of fundamental rights. Conception of human dignity has not been established within constitutional adjudication, and the argument for this is that concept has neither been neither defined nor applied uniformly in any jurisdiction, which they argue also can be seen in right based judgments issued by the Supreme Court.

In its initial rulings, the Supreme Court upheld a dignity-perspective of individual freedom and the right to life, outlining a number of prerequisites for leading a life of dignity⁴⁰. Along with Article 21, dignity has also been mentioned in the equality provision of Article 14 and the freedoms under Article 19. It's crucial to emphasise that the Supreme Court has firmly established that rape is an assault on one's dignity. 60 On the other hand, the critics point out that the Supreme Court has never explicitly addressed the component of dignity that forms the basis for these fundamental rights. However, the critics contend that respect for human dignity respects both individual autonomy and the need for equality as a fundamental principle. Neomi Rao defines inherent dignity, or dignity as an intrinsic value, as the recognition of each person's value.⁴¹ Therefore, everyone has the same right to respect, up to a certain degree and on an equal basis, simply by virtue of being a person, and everyone has an innate right to dignity, regardless of any outside influences. Each person's right to freedom of action and free will is also based on their sense of dignity. It can therefore be a prerequisite for gaining personal autonomy, but it is not autonomy in and of itself. According to Reva Seigel, for instance, it is evident that sex discrimination denies both the autonomy and the

⁴⁰Article 21, Constitution of India

⁴¹Three Concepts of Dignity in Constitutional Law Journals NDLR_ALL NDLR Vol. 86 Iss. 1 (2013)

dignity aspect of equality⁴². *Naz Foundation v. NCT of Delhi*⁴³ corroborated the analysis that arose in *NavtejJohar v. Union of India*, however the Supreme Court did not reach a similar conclusion in that case. The critics point out that this could allow the Supreme Court to follow a similar viewpoint, inferring that the marital rape exception is unconstitutional due to its discriminatory nature. Further, they contend that when husbands force their wives to engage in forced sexual activity, assigning gender roles to women based on their marital status violates their autonomy and dignity. The critics note that the Supreme Court has already ruled in *Joseph Shine v. Union of India*⁴⁴ that the conventional belief that a woman's sexuality belongs to a man is incompatible with both equal citizenship and dignity. They contend that the exception for marital rape disregards married women's bodily and mental integrity, denying them the same value as other people in similar circumstances. Furthermore, it robs women of their autonomy in decision-making, which in and of itself is a violation of women's dignity. As a result, the Critics contend that such discrimination violates Article 15(1) of the Constitution because it denies women's autonomy and dignity because of their married status. 62

4.3 Violation of Article 21.

Article 21 of the Indian constitution is broken by exception 2 of section 375. In accordance with Article 21 of the Constitution, everyone has the right to life and personal freedom. The right to privacy, dignity, a healthy environment, and other rights are also included. In numerous decisions, including *Suchitasrivastava v. Chandigarh Administration*⁴⁵, the supreme court has declared that Article 21's right to personal liberty also includes the right to make decisions about one's sexual conduct.. The Supreme Court of India also recognised the right to privacy as a basic right in the case of *K.S. Puttaswamy v. Union*⁴⁶. As a result, any forced sexual impulses violate their right to privacy, which is a fundamental freedom. Therefore, exception 2 infringes on both the right to privacy and the right to lead a healthy

⁴²Emory Law Journal, Vol. 56, No. 4, 2007 ,Yale Law School, Public Law Working Paper No. 139

⁴³ WP(C) No.7455/2001

⁴⁴WRIT PETITION (CRIMINAL) NO. 194 OF 2017,Joseph Shine vs Union Of India on 27 September, 2018

⁴⁵CIVIL APPEAL NO.5845 OF 2009(Arising out of S.L.P. (C) No. 17985 of 2009) {(2009) 14 SCR 989, (2009) 9 SCC 1 }

⁴⁶Justice K.S.Puttaswamy (Retd) vs Union Of India on 26 September, 2018((2017) 10 SCC 1)

and respectable life. Their wife's physical and emotional healths are harmed by the husband's forced sexual contact. Thus, the law disobeys articles 14 and 21.⁴⁷

❖ **The right to protection of life and personal liberty**

The critics contend that all rapes violate the three core tenants of human existence—dignity, integrity, and autonomy—and as such, violate Article 21, which protects the right to life and personal liberty. 109 They mention that in the cases of *Navtej Johar v. Union of India* and *Puttaswamy v. Union of India*, The Supreme Court has made clear in its rulings that Article 21 incorporates the concepts of bodily integrity, autonomy, and dignity. Thus, they imply that married women who are subject to the marital rape exception are denied the right to a life of dignity as well as the rights to bodily integrity and autonomy, both of which fall under the category of personal liberty.⁴⁸

❖ **The right to live a life with dignity**

Article 21 guarantees not just the protection of life and limb but also a guarantee of a dignified existence.⁴⁹

According to the critics, Article 21's language of dignity has been expanded to enhance and include more statements of liberty that are articulated in less tangible terms, as opposed to instances where the idea of a respectable level of living has been defined as requiring several requirements, one of which is dignity. They use two examples to illustrate this. Human dignity was recognised as a privacy nuance in *Puttaswamy v. Union of India*, which was then construed as a component of liberty.⁵⁰ In *Navtej Johar v. Union of India*, the right to liberty was interpreted as being expanded with dignity. The critics draw the conclusion that humiliating women in this manner violates their right to live dignified lives as guaranteed by Article 21 of the Constitution. Two noteworthy points can be emphasised. The woman is first made aware of a dreadful crime by her spouse. Second, despite the fact that she is the victim,

⁴⁷The Constitution (30) Article 15(1); *Naz Foundation vs Government* (107); *Navtej Johar vs Union of India* (91); *Joseph Shine v Union of India* (85) [213] (Chandrachud J); *Tarfadar and Ghosh* (n 2) 225

⁴⁸. The Constitution (30) Article 21; The IPC (2) Section 375 Exception 2; *Tarfadar and Ghosh* (n 2) 226–27.

⁴⁹The Constitution (30) Article 21; *Francis Coralie Mullin vs The Administrator* (102) [7]–[8]

⁵⁰(2017) 10 SCC 1)

society's unwillingness to stand behind her creates the perception that she committed a crime. As a result, the woman is exposed in two ways: first, by her rapist husband, and second, by the society that does nothing to intervene.

❖ **Autonomy and bodily integrity as related concepts to liberty**

By asserting that bodily integrity is a component of liberty under Article 21 and citing other examples where the courts viewed sexual abuse as a breach of Article 21, the critics shed light on *Puttaswamy v. Union of India*⁵¹. Body integrity was regarded as part of a woman's right, for instance, to decline sexual advances. Therefore, in the eyes of the Critics, it appears that the Supreme Court linked physical integrity to the idea of "control over one's person" and that it is a component of liberty.

Since the woman's bodily integrity is compromised and her husband now has power over her body, the critics argue that this has implications for marital rape because the married woman cannot exercise her right to liberty under Article 21. The critics emphasise that there are two components that are essential to personal autonomy: first, her right to sexual autonomy and second, her right against others interfering with her sexual choices. In the case of *State of Maharashtra v. Madhukar Narayan Mardikar*, sexual autonomy was at issue. In regards to whether the woman's virtue could affect her right. According to the Supreme Court, a lady of "easy virtue" has the same right to privacy as other women; this right cannot be violated, and if it is, she is entitled to self-defense. She is entitled to legal protection just like any other woman.⁶⁸ It is odd, then, that a Supreme Court in the current era needs to decide how to distinguish between a woman of light virtue and non-easy virtue. The Critics emphasises the significance of intimate decisions, decisional autonomy, and choice privacy in the right to privacy. The foundation of each person's own personal space is their right to privacy, which gives them the freedom to exercise their individual autonomy and make private and intimate decisions.

4.4 Conclusion of chapter

Thus in this chapter we can see that the consequences of non criminalization of rape. That the married women are not provided with their basic rights which are enshrined under article 14, 15 and 21 of constitution of India .which talks about basic fundamental rights for every one

⁵¹ (2017) 10 SCC 1)

irrespective marriage or non married. As India is signatory of various international treaties based on human rights, protection of women rights and discrimination against the women etc. it must be followed by legislature and may be taken a step forward for protection dignity of women.

CHAPTER 5

JUDICIAL PERSPECTIVE ON THE MARITAL RAPE: ATTITUDE OF THE COURT

From long time the argument on marital rape in India has been going on. Among 30 countries India also yet to criminalize marital rape. Physical and sexual violence by spouse are common among women's. The data states that one of three women is victims. According to UN women.

The attitudes of courts towards the issue of criminalization of marital rape are differing in recent trends. There are batch of petitions in Delhi high court challenging the existing laws that exempting the husbands being prosecuted for non consensual sexual relationship with their wives. The division bench was headed by justice shakdher .stated that "it would be tragic if a married woman's call for justice is not heard even after 162 years" he favored the striking down of marital rape as the exception is under rape law is based on intelligible differentia and it must be unconstitutional.

The Delhi high court split verdict on marital rape is further challenged in Supreme Court on 9 September. The court reached on split thoughts that with one judge advocating for scrapping of law which allows me for forced marital sex on their wives, while the other judge is on different view.

All India democratic women's association (AIDWA) submitted a plea asking about Supreme Court to determine the legal issues related to marital rape. These are:

- ❖ They contested that on present law of rape violates article 14, 15 and article 21 on constitution of India. As a result over exemption two of sec 375 of IPC millions of woman's have been assaulted legally.
- ❖ The partner of victim is being shielded by this discriminative provision.
- ❖ They further emphasis on protection of woman who are raped by her husband's same as legal protection of other rape survivors.

- ❖ Also contended that IPC was pre constitutional law, there is no presumption that it is valid, supreme court in Joseph shine v union of India and in one other case upheld this, “despite of recommendation of verma committee report the parliament chose not to amend the MRE .it clears that the supreme court’s assessment of its constitutionality and the provisions continues to have presumption of constitutionality.
- ❖ The appeal also emphasized on due to this exception several victims of marital rape daily endure mental physical and emotional trauma.
- ❖ The appeal requested a stay of the marital rape section 375(2) based on these justifications.

5.1 Attitude of Courts on Marital Rape Prior to this PIL

In 2015, the supreme court refuse to entertain a Delhi women’s plea to declare the marital rape a criminal offence, by saying that. ‘ it is not possible to change the existing law for one person”. She was victim of rape by her husband and he repeatedly resorted to sexual violence, but her position was helpless because of lack of legal provision. While sticking down the adultery as an offence under IPC in 2018 , the apex court touch upon the contours of marital rape by stating that. ‘curtailing the sexual autonomy of women or presuming the lack of consent once enter in marital status is antithetical to constitutional values. It was recognize by Gujarat high court in NimesbhaiDesai Vs State Of Gujarat that, marital rape is disgraceful offence which scarred the trust and confidence of institution of marriage and also accepted the women’s suffering due to non criminalization of the offence.⁵³

❖ Right to live with human dignity

There are no cases in which apex court has decided that right to live with human dignity is fundamental right and it under the ambit of article 21 .In Francis Coralline Muin vs Union Territory of Delhi⁵⁴ the supreme court in held in catena of cases that right to live with human dignity is a standout amongst most fundamental component of the right to life which perceives

⁵² <https://www.aidwaonline.org/aidwa-statement-split-verdict-delhi-high-court-regarding-criminalization-marital-rape-case>

⁵³018 SCC OnLine Guj 732, [104] 62

⁵⁴[1981] SC 802

the independence of person. And an offence of rape abuses the right to life and right to live with human dignity of victim of crime.

Also in the chairman of railway board vs Chandrima Das⁵⁵ the apex court opined that rape is not merely an offence under IPC but it is a crime against society as a whole. In Bodhisattwa Gautam v Subra Chakraborty the apex court held that rape is than a demonstration of hostility gone for corrupting and mortifying the ladies. So any law which damages the women's sentiment to live with dignity and allows the give spouse permission to non-consensual intercourse is unlawful⁵⁶

❖ **Right to sexual privacy**

There are a number of cases like Kharak Singh v State of UP⁵⁷; Neera Mathur v LIC⁵⁸, State of Maharashtra v Madhukar Narayan Mardikar⁵⁹ and Vishakha v State of Rajasthan⁶⁰ the supreme court extends the right of privacy as right to be allowed to sit unbothered and not aggravated. It was held that every woman is entitled to her sexual privacy and it is not open to violate her privacy as and whenever she wished. Right of privacy also extends to working environment. All these rights are equally distributed along with married women too, subsequently by decriminalizing marital rape, the marital exception teaching damages this right of privacy of wedded lady and are consequently illegal.

❖ **Right of bodily Self determination**

This right is not specially mentioned in the constitution of India but it comes under the ambit of article 21 i.e. right to life and personal liberty. Likewise sexual relationship is stand out amongst individual decisions that the woman holds for her. even in the marital relationship having

⁵⁵ AIR 1973 SC 2720 , (1973) 2 SCC 696

⁵⁶ AIR 1996 SC 922

⁵⁷ AIR 1964 SCR (1) 332

⁵⁸ AIR 1992 SC 392

⁵⁹ AIR 1991 SC 207

⁶⁰ AIR (1997) 6 SCC 241

physical relationships kind of act in which consent of both is important but the law tries to take away the privilege of communicating and repudiating such assent by denying the woman her protected right of self-assurance.

5.2 Why Marital Rape is Still Legal in India

Despite of fact that there are number of writs and PILs flooded in different high courts and in Apex court by NGOs, civil society organization and individuals for criminalization of marital rape and also for scrapping of exception (2) of sec 375 of IPC, which protects the man who rape their wives .various countries makes the law for criminalizing marital rape but in India it is still pending only because of non seriousness of Courts and union governments. There are some arguments by Courts that why this offence is not criminalizing yet. They as follows:

5.2.1 Fact no 1: Destroy the Indian culture

Former chief justice of India Dipak Mishra in august 2019 said that by criminalizing marital rape in India it will create absolute anarchy in families and our country is sustaining itself only because of family platform which upholds the family values. Deccan Herald quoted Mishra as saying. The reason for this argument is that, the Indian culture, social customs and religious beliefs are combined with staggering illiteracy which creates an environment wherein marital rape cannot be criminalized and people aren't ready for it.

The government is arguing that since a from olden times majority of people of India were uneducated, poor, illiterate conservative and religious - unlike western countries –they believe that wife is dutifully consent to her husband forever. If in such circumstances, they criminalize marital rape, the institution of marriage will break because women will stand up to their rapist husband and they have to seek justice and protection.

5.2.2 Fact no 2: Perpetual consent is implied after marriage.

If we goes to dated back we find that the authors like Matthew Hale of England writes that ‘ the husband is not guilty of rape his wife , for their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband which her husband cannot retract. William Blackstone in 1753 also not recognizing marital rape he defended the common law doctrine of curviture. One of the eminent jurists Blackstone contended that by

marriage, the husband and wife are being or legal existences of the women is suspected during the marriage...”

In Indian context once a woman married to a man she hands over never ending, implied consent to her husband for sexual intercourse. But even British law moves England wales in 1991 as marriage is a partnership of equals and wife is no longer considered the subservient chattel of the husband”. In India law remains the same regarding marital rape.

5.2.3 Fact no. 3: Women will misuse the law against marital rape.

It is general problem that when any new law come in to existence, people misuse it blindly so the union government said when the marital rape is criminalized it become easy tool to harass husbands. The argument related to misuse of women centric law enacted to protect women in India including the protection of women from Domestic violence Act and Section 498A of the IPC , which criminalizes physical and mental cruelty against the women by her husband or his family,

5.3 Steps towards modification of criminal law

Reports of laws commission

42 law commission report, 1971: In 1971 the topic related to marital rape taken up first time by the commission, recommended that need for excluding marital rape as an exemption given in the Section 375 by recommending insertion of sec 376A, criminalizing sexual intercourse with minor wife. However it wasn't accepted.⁶¹

172 law commission report, 2000: This law commission report is outcome of PIL by 'sakshi'an NGO working for women concerning issues, the PIL was related to direction on definition of 'sexual intercourse' as contained in section 375 of IPC. Supreme court directed for making reviews on existing rape laws in the light of increasing data of custodial rape against the women and sexual abuse against youngsters both male and female.

This committee recommended the slight change rape law by stating any forced sexual intercourse by husband upon in wife should be treated as criminal offence like physical

⁶¹Law commission of India, Report 42,1972, 16.115 p-277

violence. They recommend to scrap the exception (2) of section 375 of IPC. But the report stated that. *‘We are not satisfied that this Exception should be recommended to be deleted since that may amount to excessive interference with the marital relationship’*.

Justice verma committee 2013:- This committee was formed after hue and cry on Delhi Rape case. In which a young woman was brutally raped. In December 2012. The committee recommended many changes in criminal law and also suggested law related to marital rape, which were rejected by government in 2013, the suggestions are

1. The exception for marital rape is removed.
2. The law must crystal clear that – marriage is not valid defense in offence of rape, other is during the enquiry of rape the relationship between victim and perpetrator is not taken into consideration. Last is the marriage is not regarded as mitigating factor for justifying lower sentence for rape.

5.4 Conclusion

Criminal law in India is discriminative in nature that, it does not consider marital rape as a crime if committed on wives above the age of 18 years. It clearly shows that if women married to any man she ends up losing the right to exercise control over her sexual autonomy. Although the IPC and other domestic provide remedies against marital rape but it is insufficient and inadequate.

Thus the above mention committee reports must be considered by parliament in the interest of justice, many women are suffering from marital rape in daily basis but due to lack of law they are not reaching to justice. There is need to reform the law as it becomes toothless tiger.

So far as concerning other domestic laws like Hindu marriage Act, or special marriage Act or Muslim personal law deals with the cruelty from the perverse conduct of husband, resultantly cruelty is the basis of divorce which may be filed by women but when it comes to the sexual violence or forceful sexual conduct by the husband against her wife and making marital rape new ground of divorce, the legislature is keep mum.

Rape is serious crime against any women either married or unmarried, this offence does not become less heinous if conducted by husband, but it is more serious when the rape is done by husband upon his wife.. Because the women are not secure in her home as well, each and

every second she is under the threat of rape. So the time comes to legislate the law against marital rape.

CHAPTER 6

INTERNATIONAL PROSPECTIVE OF MARITAL RAPE

6.1 International Conventions and Charter

With the international conventions and deceleration we can discuss some instruments by highlighting the need to discard the marital rape exemption.

❖ The Charter of United Nations

The preamble of charter of UN shows faith in equality between men and women, human rights and dignity of every people.

Provisions of UN Charter shows that every individual posses some basic rights thus, UN Charter through international cooperation aims to preserve the purpose of equality, and dignity of people where by no discriminations is caused. General Assembly under the UN Charter is provided with the responsibility of research and study on international cooperation making the recommendations for realization of human rights by eliminating the discrimination on the ground of religion, race, sex or language. It states that without distinction on various grounds, only international respect for is promoted. Again article 55 and 56 provide that separate action for full filament of goals and UN members take pledge to join in. ECOSOC also works for recommendation and protection of human Rights by establishing commissions on different areas of study on protection of human rights and discrimination on different grounds..⁶²

UN Charter clearly states the importance of human rights. And it is important that such right must be protected and respected in true sense by abolishing the activities and practices like marital rape which go against the individual right.

❖ Universal declaration of human rights 1948

In 1948 UDHR was adopted. It consist of Articles and all are related to various kinds of human rights and provided with the protection thereof 21 Articles related to civil and political rights and remaining 6 articles are related to economic and social rights. India is also a

⁶² <https://www.un.org/en/about-us/un-charter>

signatory of UDHR. The provisions of constitution also consonant to UDHR. Article 1 states that-all persons are born equal and with rights and dignity. It says that everyone is entitled to all freedom and rights provided in declaration.”Race, colour, language, religion, political, or other opinion, national or social origin, property, birth or other status.”Are immaterial. Right to life, liberty and security is ensured by UDHR. There are some articles like equality before law, equal protection of law and protection against the discrimination are consonant with article 14 and 15 of the constitution of India.⁶³

Article 16 of UDHR states about right with respect to marriage be provided to both the parties equally while the marriage is subsisting or at the time of dissolution. From above UDHR article it conclude that the rape in marriage clearly violates right to life, inflicts torture, infringes the principle of equality , affects security and liberty of a person. Thus, the marital rape in marriage clearly derogates the principle enunciated in UDHR. Although the UDHR is non binding nature but it shows that India well understands about human rights when the Constitution was adopted. The declaration is followed in light and spirit by India taking into account the aim and objective of Declaration so, India must curb discrimination which marital rape results into.

❖ **International covenant on civil and political rights 1966.**

ICCPR consists of 53 Articles and with six parts .article 3 ensures that state parties have undertaken to strive for the principle of equality among men and women by ensuring equal enjoyment of civil and political rights. Article 4 ensures that in case emergency state parties cannot suspend certain human rights like right to life, freedom from inhuman or degrading treatment. the reorganize the right to life of every human being. Equality before law and equal protection ensure by ICCPR. ICCPR aims to prevent discrimination and distinction among people on different grounds including sex⁶⁴.

India rectified ICCPR on March 27 1979, by discussing the various provisions of ICCPR we conclude that it is necessary that the practice of marital rape be renounced to ensure dignity and safeguard life of women.

❖ **Convention on the elimination of All forms of discrimination against women 1979.**

⁶³ <https://www.ohchr.org/en/press-releases/2018/11>

⁶⁴ <https://www.coe.int/en/web/compass/the-international-covenant-on-civil-and-political-rights>

On Dec 18, 1979 the General Assembly adopted CEDAW. Another name for it is the "international bill of rights for women." It defines "discrimination against women" as any differentiation, exclusion, or restriction based on sex that interferes with the exercise of such rights. The parties amending the treaty acknowledge the equality principle and denounce and eliminate discrimination against women. Additionally, appropriate legislation must be created in order to achieve equality and stop prejudice through fair courts. Additionally, state parties are calling for the abolition of laws, customs, and behaviors that discriminate against women. The convention must ensure the growth of women by taking the necessary actions in social, cultural, and economic spheres. Additionally, stereotyped acts like marital rape need to stop. Part III of the ICCPR mandates that state parties take action to end all forms of discrimination against women in areas such as education, employment, healthcare, and economic and social life. It also mentions the creation of appropriate laws and regulations to end discrimination in marriage and family matters.

The Supreme Court ruled in *Apparel Export Promotion Council vs. A.K. Chopra* that international agreements like CEDAW and the Beijing Declaration bind the states and mandate that laws be gender-sensitive. And the fundamental idea behind these instruments must be taken into account when it comes to domestic laws.

India likewise ratified the pact, however an examination of its terms reveals that it is in violation of universally recognized human rights. Because marital rape is purposefully excluded from the IPC under exception (2) of section 375, this violates CEDAW's definition of discrimination. Due to the fact that the spouse's rape was only justified in light of the women's marital status. Married women are thus denied the protection promised to unmarried women. Rape is rape, and both married and unmarried women who commit it must face the same punishment. According to Gr. 19 (General Recommendation) of the Declaration, acts of physical, psychological, or sexual assault or harm against women are considered to be discrimination against women. The right to the best possible level of physical and mental health is included in GR-19's list of human rights and fundamental freedoms. Here, the relationship between violence and liberty demonstrates that rape violates a woman's fundamental rights and harms her bodily and emotional health whether it is committed by a spouse or not.

GR-35 also specifically mentions marital rape, and this general recommendation update GR-19 states that marital rape is rape based on the absence of freely provided consent and takes coercive tactics into account. Optional protocol to CEDAW is not signed by India, this optional protocol provides with establishment of committee responsible for monitoring of

state parties' complies with the convention, as India is not signatory it barred the committees from taking action even if any act violates CEDAW occur within its jurisdiction.

Thus, there is need to improve laws and legislations in furtherance of preventing discrimination against women as India is still backward in preventing discrimination against women. And it seems that India is being violated the provisions of declaration by not recognizing marital rape as an act of criminal nature and by non criminalization of marital rape. It goes against the principles recommended by CEDAW.

❖ **International covenant on Economic, Social and Cultural Rights 1966.**

The rights enunciated under ICESCR are corresponding to the Directive Principle of the State Policy under Indian Constitution. As article 1 of this convention recognize the right to self determination⁶⁵, and Article 3 ensures the enjoyment of economic, social and cultural rights thus eliminating discrimination.⁶⁶

6.2 Declaration on the elimination of violence against women 1993.

By realizing the need to provide the rights to women the UN general assembly adopted this declaration on Dec 20, 1993. This declaration aims to realization of rights to women embodied in various international covenants and declarations including CEDAW. This declaration defines the violence against the women as follows:-

Any act of violence which is gender based harm i.e physical, sexual, and psychological in nature is caused. Even the threats to cause such acts constitute violence against women.

This state that marital is rape also kind of violence against women. This declaration also provides that state parties should punish the matters against relating to violence against women and sanction must be developed by state parties. Although the declaration is not binding in nature but it acknowledges that India must recognize the need to end violence and discrimination against women. And also this declaration was adopted to ensure proper implementation of CEDAW to which India is also a signatory. This requires curbing the violence against the women.

⁶⁵ ICESCR Article 1(1)- All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

⁶⁶ ICESCR Article 3 -The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

6.3 Marital Rape Laws In Different Countries

Some countries have criminalized the marital rape while others still refuse to do so on the belief that this is impossible and it would be hammer on the sacred institution of marriage.

Marital rape is be prosecuted in at least 104 states according to UN General Secretary, among them 32 countries made marital rape as specific offence,

Poland first to make marital rape as criminal offence in 1932. Australia after the second wave of feminism in 1976 was first common law country to criminalize marital rape and also reform other laws. Since from 1980s many countries have criminalized the marital rape like, Ireland, Isreal, and Ghana South Africa etc.

New York ,the court of appeal abolish the exception of marital immunity from the Code in 1984, and all 50 states of the United States have made marital law rape a crime.

Nepal also criminalize the marital rape in 2002.

Other countries are:

- **England:** Under the British common law husbands were exempted from prosecution for raping their wives based on the understanding that marriage means implied consent to sex.

According to haes concept of marriage- marriage implied perpetual, un retractable consent to sex, and other belief behind the marital rape exception it was based on notion that after marriage a women become the property /chattel of her husband , and that when two people together marry they become one, and it is not possible to rape his partner. ,

The scenario was changed on 23 October when a unanimous judgment by five Law Lords declared that a husband from a charge of his wife's rape formed no part of English Law.''

That judgment was welcomed by judiciary as well as various commentators

- **USA:** Marriage ...while not amounting to a legal waiver of the woman's right to say no, does imply a kind of generalized consent that distinguish some of the crime of rape from parallel behavior by a husband retaining the spousal exclusion avoids this unwarranted intrusion of the penal law into life of the family.
- **South Korea:** The supreme court in earlier 1970s take a view that there could not be marital rape between husband and wife, but this thought is changed in recent times and lower and higher court have criminalize the sex without wife, consent.

Korean society had stood behind the concept of a spouse's conjugal rights to sexual intercourse with each other.⁶⁹ Some people feel that it is not justified on the part of the state to meddle in the intimate sexual life of married couples.⁷⁰

The Korean Supreme Court interpreted the meaning of 'ganeum' as referring to sexual intercourse in general and therefore by such interpretation wives would be included among the women protected by rape laws.⁶⁷

India is still bound by the years old IPC, which was drafted by Sir Thomas Macaulay. Many provisions become outdated but still remain the same. When we compare IPC with other countries like UK and USA criminal law we can see that India is backward in terms of providing justice to married women when it comes to the victim of marital rape. We are still lagging behind in social issues as many developed and developing countries enacted or reform the existing criminal law for criminalization of marital rape but India is although one of the leading countries in different areas but in this area it is backward.

India is also a signatory of various international conventions and declarations which prohibit against women on the basis of their marital status. This defines the discrimination against women and also acknowledges that all signatory states must follow the principles of international instruments in domestic laws. So, India being a signatory to these instruments should to these provisions and bring in its domestic law a legislation dealing with marital rape.

6.4 Criminalization of marital rape

When we look at the data of sexual violence in India, it depicts the picture against the mind set of Indian society which states that marriage is sacred and marital rape does not happen in it. According to the National Family Health Survey, nearly one third of all married women aged between 15-49 are subjected to physical, sexual and emotional violence by their spouse. 84% of women are said that the perpetrators are their current husband. About 7% of women named their former husbands as the offender. Most of the women are suffered with serious injuries like physical assault and bruises because of being raped by their husbands.

⁶⁷ english.hani.co.kr/arti/english_edition/e_national/587926 By Kim Won-chul, staff reporter

Violence against the women is a manifestation of historic power play struggles between women and man, it has been rightly said that the worth of a country can be judged from the position that it given to women. As stated by Susan Antony.”The day will come when men will recognize women as his peer, not only at the fireside, but in councils of the nation .then, and not until then, will there be the perfect comradeship , the ideal union between the sexes that shall result in the highest development of the race.”⁶⁸ women have never been given importance in India; their position is still not what it should have been. Woman’s who are victims of marital rape are hesitating to complaint about that because of absence of any provision related marital rape in India. As the situation shows that marital rape is not a crime in India and neither the judiciary nor the legislature does any effort to protect them from being sexually harassed by their husband.

Offences inside the institution of marriage assault and rape deprives the women from their basic fundamental rights like right to privacy ,right to live with dignity ,right to bodily integrity. And due to repeated sexual and physical violence woman looses their reproductive, sexual and mental health in control.

It important to have basic right to all men and women irrespective of their marital status. By criminalizing marital rape married women also enjoy the basic human right and it also give sense of security protection against most heinous crime. Crminalization of marital rape make the women empowered by having the right to say “no” when they do not interested in sexual intercourse and also criminalization of marital rape will provide legal remedies for seeking justice.

Criminalization marital rape will provided with positive impact on society and also give equal status to men and women in terms of granting basic human rights. It will be a step forward in the way of woman empowerment.

⁶⁸ The status of woman, past, present, and future. By: Anthony, Susan B.

6.5 Rebuttals of Arguments opposes the criminalization of marital rape

Indian government give some arguments for support of not criminalize the marital rape

❖ Marital rape is uncommon in Indian society

Rebuttal: Marital rape is not like it is unfamiliar or it is not known in society but the problem is that it is under reported crime. According to national family health survey only 1.4 % of the marital rape victim resorted to police or lawyers also according to study done by an NGO one of the seven married women are subjected marital rape. And due lack of provisions related to marital rape the crime are not reported by victim woman .when there will be law against the crime people approach that to protect their basic rights. As because “A crime is crime in every sense no matter the number”. Thus we can say that arguments are opposing the real data about the problem of marital rape.

❖ Difficulty in proving marital rape and criminalizing only increases the litigation and burden on judiciary.

Rebuttal: this argument is unreasoned there are crimes like dowry death, cruelty. Which also happens within the domain of marriage and is difficult to prove but there are proper laws against those crimes likewise marital rape is also remedied.

❖ Misuse of law by women.

Rebuttal: there are number of laws in the country and each and every law has some potential to be misused, it is duty of court to determine the veracity of the claims. And also police has duty to do a proper investigation of case. There are no of numbers of false cases reported every year it is duty of criminal justices system to remedy the problem of false cases. Thus it is no reason for non criminalization of marital rape. Various countries have already criminalizes marital rape and we can look into their investigation procedure and try to improve our system.

❖ Implied consent in marriage

Rebuttal: presumption of implied consent of sexual intercourse after marriage is old concept at that time women was considered to be property of man. The implied consent theory was proposed by Hale .since the society is dynamic and everything subjected to change by development and change in social scenario the status of women is also change..Recent judgments of Supreme Court also depict the changing mind of courts. Even justice

Chandrachurna has stated that “there is a right to say no after marriage ‘the consent for sexual intercourse does not mean that the consent for forceful intercourse.

❖ **Criminalization of marriage mar destroys the institution of marriage and preventing any reconciliation:**

Rebuttal: if in any marriage trust and respect are destroyed by action of rape of his own wife, how it could be preserve .attempt to protect such marriages. Although the objective of matrimonial laws are to protect the marriage but basic objective of law and judicial system is to provide justice to victim and punish the offender. Thus this argument is baseless because this denying the justice to the victim and also promotes forced cohabitation. And leave the victim in worse condition.

❖ **Rape by husband is not culturally possible**

Rebuttal: - this argument is very weak kind of reason of non criminalization of rape because all offences like murder theft burglary is not our culture these are punishable.

6.6 Conclusion

In this chapter we analyze that the government gives the arguments for non criminalization of marital rape are baseless and weak in present circumstances of society. Also the data provided by national health survey and other registered NGOs are depicts about the extent of marital rape.It is important for legislative bodies, government and judiciary to understand the impact or consequences of marital and the aftermath like mental and physical health troubles faced by victims. Indian government largely ignoring the voice of women by non criminalizing the marital rape. It is high time to reform old aged criminal laws and recognize such kind of offences.

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India is also signatory of various international conventions and declarations which prohibits against women on the basis of their mutual status. This defines the discrimination against women and also acknowledges that all signatory states must follow the principles of international instruments in domestic laws. So, India being signatory those instruments should to these provisions and bring in its domestic law a legislation dealing with marital rape.

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CHAPTER 7

CONCLUSION AND SUGGESTIONS

7.1 Conclusion

India is forward to promote and secure women's rights by introducing national laws and become a State Party to international human rights instruments .But on the other hand, when it comes to married women's rights, there is a lack of rape law, which has result of the marital rape exception in Indian criminal laws. The reason behind the marital rape exception is rooted and protected by patriarchal society. In patriarchal society it was belief that the after marriage woman's has implied consent for sexual intercourse. And perception is that a husband owns the woman's sexuality,

The marriage is a holy institution that Indian society seeks to protect and exclude from outside intrusion, which is why the exception for marital rape is still in place. By analysing, for instance, ministerial pronouncements, it is clear that rape within marriage is impossible and that, even if it did occur, it would be impossible to legislate against due to issues like illiteracy, poverty, and the possibility of married women abusing the legal system. To potentially change something so firmly ingrained, the Indian legal system needs hierarchical communication where government representatives take a stand and the lawmaker is willing to consider an alternative viewpoint, such as classifying marital rape as a crime. The institution of marriage holds a superior position in relation to married women's human rights, depriving them of the opportunity to enjoy the same rights as unmarried women. Marital status categorization of women is artificial and cannot be used to determine whether or not rape should be considered a crime. Regardless of a woman's marital status, the rape law should exist to define the crime, establish the punishment, and protect the victim. It is impossible to escape asking why an Indian marriage, when compared to other marriages around the world, is so exceptional that it can be justifiably declared a lawless area by granting a man legal immunity for raping his wife. The argument that a married woman has recourse to other laws to seek justice when she is the victim of rape by her husband is debatable because neither the IPC, the HMA, nor the PWDVA allow a raped married woman to report her husband to the police. The only options for the raped married lady are to establish that another, less serious sexual crime has been perpetrated against her or to seek a civil law resolution

because marital rape is not recognised as a crime. Additionally, Section 122 IEA forbids the woman from providing information so long as her husband is not accused of a crime against her, placing her in a hopeless situation. Additionally, keeping the exception for marital rape runs counter to the IPC itself because husbands can be held accountable for marital rape.sexual offences that are less serious. It might also be questioned as to how the legislator can continue to hold that the marital rape exception cannot be abolished when it is plainly in conflict with the Constitution, the PHRA, the CEDAW, the ICCPR, the ICESCR, and the UDHR. The purpose of laws is to protect people's rights, however if you are raped by your spouse while married, you do not have the right to enjoy basic human rights since the conventional patriarchal perspective of a married woman within marriage takes precedence. Despite the legislature's resistance to classifying marital rape as a crime, it is evident that the issue is a persistent one in India. This is supported by the case of *Nimeshbhai Bharatbhai Desai v. State of Gujarat*⁶⁹, in which the High Court noted that a sizable portion of married females bore the burden of marital rape's non-criminalization. Thus, the hesitation to criminalise marital rape seems to be a political issue contaminated by a patriarchal perspective, according to which the wife in a marriage is seen as being submissive to the husband. The conservative segments of society are adamant that the marital rape exception cannot be eliminated, despite the waves of improvements in rape law, as well as examples of violent rape cases and the Verma Committee's proposal to do so As a result, it may be said that India must take legal action in order to acknowledge that married women have access to all of their human rights. However, it can be argued that it is not impossible because, for instance, India has the legal authority to demand change. It is currently impossible to predict what India will need to do to address this issue because it clearly has a wide range of complex components. However, eliminating the exception for marital rape and making it a crime could be an important first step.

7.2 Suggestions

On the basis of above study, marital rape seems as legally pampered offence which invalidate the element of consent of women. And some extent denial of basic rights

⁶⁹ *Nimesh bhai Bharat bhai Desai v. State of Gujrat* 2018 SCC OnLine Guj 732, [104] 62

guaranteed by constitution and human rights protected by international instruments. The following suggestions are have been made to improve the situation of women.

1. Having non consensual sex is not a marital obligation because the issue of marital rape is wide today, government should conduct the surveys and also comprehensive study on this field. And taking the responses of married women of all ages on sexual harassment faced by particularly their husbands, consequently on the basis of studies, surveys and with help of lawmakers criminalizing the wrongful act and spreading the strict message that having non consensual sexual relation(without the consent of wife) with the wife is no more marital obligation.
2. Sections 375 of IPC is only a criminal law which defines the term rape but the exception (2) make loophole, which create a hindrance in protection of women privacy and right to hold her body. So it should be deleted and further it is added that 'relationship of the victim is no more defense in offence of rape 'and the punishment for same should be more stringent.
3. The term 'consent' must be define in very strict and refine way, consent must be expressive but not implies one in case rape. And it must be properly investigated.
4. Need to improve and reform criminal procedure in area of complaint and legal aids to poor and uneducated women fearlessly, it must have special provision of those women who are totally dependent upon her husband for their life. Because of dependency they have fear of leaving by husband consequently lead to live poor life.
5. Changes and reform in personal laws dealing with marriages: marital rape must be ground of divorce because if the married women are not safe even if in her spouse hand how they can be presumed to safe anywhere else. This shall be validate and reaffirm the gravity of the offence and its consequences.
6. Awareness seminar and camps to conducted by government and added bodies; it is not only responsibility of government but the legal fraternity includes judges, lawyers, law students, NGOs working for women right and police officials need to accept the reality of marital rape. If education is not imparted to the people who will be dealing with the offence passing a law will not be of any use. The old and patriarchal mindset towards marriage and its obligation is only be change through educating and awaking common people and make them aware of impact of marital rape.
7. Women should be aware and educated and must be encourage to speak about if they are victim of such crimes according to wolfgang & Schaffe "A person who silently

bears the violence is also equally wrong” so, every women must aware educate about their basic rights.

8. At last it is conclude that change is not come overnight, lots of efforts, protest and complaints are made by the whistle blowers. Reformation of criminal is on the way. As justice D.Y Chandrachud held that ‘married women can make her own sexual choices. By marrying, she has not consented to refrain from sexual relations outside marriage the permission of her husband. A husband is not the owner of his wife’s sexuality’
9. To be human involves the ability to fulfill sexual desires in the pursuit of happiness. This statement shows that the traditional mindset of judiciary is also change so, there is lacuna always exists for every law but that shouldn’t restrain the criminalization of marital rape.

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