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Sexual Violence in Private Space: Marital Rape in India

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SYNOPSIS

Marital rape, a harrowing facet of domestic violence, denotes non-consensual sexual intercourse within the confines of marriage. In India, where tradition and societal norms often cloak such violations in silence, the recognition and redressal of marital rape have been fraught with challenges.

The legal landscape regarding marital rape in India is intricate and regrettably lacking. The Indian Penal Code, drafted in the colonial era, still pertains to marital rape within a perplexing framework. It's a stark reality that the law, as it stands, does not unequivocally criminalize spousal sexual assault. The exception under Section 375, which excludes marital rape from the purview of rape laws, is an egregious oversight in the legal apparatus, perpetuating a grave injustice against victims.

Cultural attitudes further exacerbate this issue. The sanctity accorded to marriage often fosters a misguided notion that consent is implied, rendering the notion of marital rape inconceivable to some. Such deeply entrenched beliefs have contributed to the normalization and underreporting of these heinous acts. The repercussions of marital rape extend far beyond the physical violation; they sear the very fabric of trust and intimacy within marriages. Survivors grapple with profound trauma, their suffering compounded by societal stigmatization and a dearth of legal recourse.

Addressing this egregious gap in legislation demands a multifaceted approach. Advocacy efforts must strive to destigmatize discussions surrounding marital rape, fostering an environment where survivors feel empowered to seek help without fear of reprisal. Legal reforms are imperative to unequivocally criminalize marital rape, aligning legislative frameworks with international standards and upholding the fundamental right to bodily autonomy.

Education, too, plays a pivotal role in effecting societal change. By fostering a culture of consent and gender equality from an early age, future generations can be equipped with the tools to challenge harmful norms and foster healthierrelationships.

In essence, the issue of marital rape in India is a poignant reminder of the imperative to confront entrenched patriarchal structures and afford survivors the dignity and justice they unequivocally deserve. Only through concerted efforts to dismantle systemic barriers and effect cultural shifts can we aspire towards a society where every individual's bodily autonomy is revered and protected, irrespective of marital bonds.

ABSTRACT:

Marital rape refers to rape committed when the perpetrator is the victim's spouse[1]. The definition of rape remains the same, i.e. sexual intercourse or sexual penetration when there is lack of consent[2]. Therefore, an essential ingredient to prove the crime of rape is to prove the lack of consent. This burden to prove the lack of consent often rests on the victim. In some instances, as in the case of minors, it is presumed that consent does not exist as they are presumed by law to be incapable of consenting to such sexual acts[3]. On the other hand, there are also instances when consent is presumed to exist.

Historically, many legal systems have treated marital rape as an exception, hindering prosecution. While progress has been made in some jurisdictions, challenges persist in enforcing these laws due to social stigmas, under reporting, and the difficulty of proving non-consensual acts in private settings. This paper is particularly relevant in India, where marital rape remains a sensitive and controversial issue. It seeks to understand the concept of marital rape; analyze the legal framework surrounding it; examine relevant court cases; and advocate for the recognition of marital rape as a crime deserving punishment. In a world evolving towards greater gender equality and individual rights, addressing marital rape is a crucial step towards justice and the protection of all individuals within the institution of marriage.

Chapter I: Introduction 1.

1.1 Background:

The systematic violence against women in the private (and public) sphere in India is supported by patriarchal social norms and gender hierarchies. Many women are subjected to lifelong violence and the expression 'from the womb to the grave' reflects this. Several interlocutors mean that, inter alia, the sexual violence against women in the private sphere is accepted by both society and the State, where the perpetrator can be, for example, the woman's husband, her parents-in-law or other family members. Most of the women who fall victim to sexual violence lives in family environments that are deeply rooted in both patriarchal and customary practices that can be harmful to them. Women are in a submissive position to their husbands and other family members due to their widespread Socio-economic dependence. Women's fear of social exclusion and marginalization, as well as the lack of efficient responses regards sexual violence, creates a dead-end by locking them in into a continuing reality of sexual violence.1 The Indian Penal Code, 1860 (IPC) Section 375 both defines and criminalizes rape, however, provides for an Exception 2 that is not covered by the provision namely that sexual intercourse or sexual acts by a man with his own wife, the wife not being under 15 years of age, is not rape.' (Exception
2 Section 375 IPC, hereinafter referred to as the marital rape exception) Meaning that forced sexual intercourse within the marriage in India is excluded from being classified as rape. Marital rape defined as 'non-consensual intercourse with one's own spouse' constitutes for most politicians a sensitive issue, which is not only true for India but throughout the world. Although data brought out by the government gives expression that marital rape constitutes a reality in India, there is a hesitation among legislators to repeal the marital rape exception. The reason for this is that there is a perception that the conservative sections of society do not support a possible repeal of the marital rape exception and an expected subsequent counter-reaction from the electorates[4].

It is of relevance to point out that it was highlighted by Gujarat High Court in **Nimeshbhai**

Bharatbhai Desai vs State of Gujarat, that there is a prevalence of marital rape in India. It was expressed that it constitutes a shameful act that undermines trust in the institution of marriage, and that a large part of the married female population bears the burden of non-crimnalisation. It was presented in this case that **there are generally three types of marital rape prevailing in the Indian society. The first constitutes 'battering rape', where the wife endures both sexual and physical violence through various approaches within the marital relationship. It may constitute of a physically violent episode which is followed by rape, this as the husband wants to compensate for the violent act by forcing his wife to have sexual intercourse without her consent or that the husband beats his wife during the sexual intercourse. This is the most common form of marital rape. The second constitutes rape with the use of force, where the man uses the degree of violence that he deems necessary, beating his wife may not constitute a characteristic but when the woman refuses to have sexual intercourse with her husband it can be relevant. The third constitutes 'obsessive rape' also called sadistic rape, which encompasses perverse sexual acts which are usually of a violent nature and/or assaults**

[4] The IPC (n 2) Section 375; International Institute for Population Sciences, 'National Family Health Survey (NFHS-4) 2015-16: India' (National Family Health Survey)(2017) 565–71 accessed 19 May 2021; Tarafder and Ghosh (n 2) 203–04; Raquel Kennedy Bergen and Elizabeth Barnhill, 'Marital Rape: New Research and Directions' (The National Online Resource Centre on Violence Against Women, 2006) accessed 19 May 2021; Swarupa Dutt, 'Why marital rape should be criminalized' (Rediff.com, 12 September 2017) accessed 19 May 2021; Roli Srivastava, 'Marital Rape: the statistics show how real it is' (The Hindu, 13 June 2016) accessed 19 May 2021; Anoo Bhuyan, 'Government Denies Marital Rape Occurs, National Survey Shows 5.4% of Married Women Are Victims' (The Wire, 12 January 2018) accessed 19 May 2021; Chhavi Sachdev, 'Rape is a Crime in India – But There are Exceptions' (National Public Radio, 13 April 2016) accessed 19 May 2021.

constituting brutal torture. Thus, in this case, it was explained more specifically that by marital rape is meant that a husband forces his wife to have non-consensual sexual intercourse which is obtained through violence, physical violence or threats of violence or that the wife does not have the possibility to give her consent. It is thus a non-consensual violent act in the form of a husband's perversion towards his wife where she is sexually and physically abused[5].

1.2 Purpose and problem:

The purpose of the thesis is to shed light on the marital rape exception and examine the pitfall that the exception creates in Indian rape law, and what effect it has on married women's enjoyment of their human rights in India. This is done with the use of internal glasses with the focus seen

through both national and international legislation. To retaining respectively repealing the marital rape exception are two perspectives that are highlighted. The purpose raises the following questions:

1. What is the reason behind that marital rape is not criminalized in India?
2. Seen to the fact that the marital rape exception excludes marital rape from criminalization, is it possible that this pitfall that has arisen in Indian rape law, due to the exception, can be covered by other national legal instruments such as:

- the Indian Penal Code, 1860? - the Hindu Marriage Act, 1955? - the Protection of Women from Domestic Violence Act, 2005?

3. Is the marital rape exception consistent in relation to the Indian Penal Code, 1860 itself?
4. Is the marital rape exception compatible with the following national legal instruments: - the Protection of Human Rights Act, 1993? - the Constitution of India?
5. Is the marital rape exception compatible with the following international human rights instruments: - the Convention on the Elimination on All Forms of Discrimination against Women? - the International Covenant on Civil and Political Rights? - the International Covenant on Economic, Social and Cultural Rights? - the Universal Declaration of Human Rights?

1.3 Delimitation:

Firstly, it should be emphasized that marital rape is illuminated from a general perspective, and that it is not limited to any of the three types of marital rape exemplified in section 1.1. This is because the thesis sheds light on the concept of marital rape and not deepens in the different types of marital rape. Secondly, in the thesis is not presented an exhaustive list of arguments from the perspectives of retaining respectively repealing the marital rape exception. Due to space constraints and lack of time the author is required to make a selection. In addition, it is important to clarify that the focus of the thesis is to shed light from the perspective of repealing the marital rape exception, this is due to thatit is interesting to challenge current legislation.

1.4 Method and material :

Initially, it can be pointed out that the choice of method is governed by the type of question which is to be answered. It is required that two methods are used in this thesis in answering its questions. The legal dogmatic method is an adequate method for establishing applicable law, furthermore, it is also adequate to combine it with the analytical method as it gives the ability and

freedom to criticize applicable law. It has been identified by Claes Sandgren that it is common for jurisprudence works (in Swedish 'rättsvetenskapliga framställningar') are expressed as being dogmatic, however, he believes that it is common for the author to fail to explain why that is so. Sandgren believes that the reason for this may be that there is a consensus in the legal academy onwhat legal dogmatic is.

Chapter II: Waves of changes in Indian rape law

2.1 Events that have contributed to changes in Indian rape law :

Changes have been made in rape law since the establishment of IPC 1860, this thesis shed light on three of them. The common denominator for all three of them is that three judgements issued by the Indian courts have had an effect on their establishment.17 2.1.1 Tukharam vs State of Maharashtra The Indian Supreme Court's (Supreme Court) judgment in Thukaram vs State of Maharashtra (Mathura case) triggered protests in the society that pushed for changes to be made in Indian rape law, this resulted in the Criminal Law (Amendment) Act 1983 (Amendment Act 1983). The breaking point for amending Section 375 and Section 376 IPC, in which the latter states the punishment for rape, came with the Amendment Act 1983. It was thus this Amendment that opened the waves of change in rape law[6]. The Mathura case is about Mathura, a 16-year-old girl, who had escaped to marry her boyfriend Ashok. In March 1972, they were both called to the police station due to that her brother Gama had lodged a kidnapping complaint against Ashok. At the police station, Gama, Ashok and his sister were asked to leave the station, but Mathura was asked to stay. Her relatives became concerned that it took time and asked where Mathura was, they received the answer that she had already left the police station. A while later, when Mathura came out of the police station, she told her relatives that she had been raped by multiple police officers who had a connection to the police station. The Supreme Court chose to acquit the officials. The grounds for the acquittal were, among other things, medical statements from doctors stating that she since previously was sexually active, and that no injuries were found on her, and that the Supreme Court also followed the arguments from the police officers that it was not proven that she

[6] Sakhrani (n 17) 261–62; Patel (n 17) 1522.

had not given her consent[7]. The public gave attention to the Mathura case as women's rights groups in 1979 criticized both the Indian legal system's mismanagement of rape victims and the Indian society's attitude and ignoranceregarding rape[8].

2.1.2 State Through Reference vs Ram Signh & Ors.: The public reaction to State Through Reference vs Ram Signh & Ors. (Delhi gang rape case) contributed to the next wave of change in Indian rape law, which eventually led to the enactment of the Criminal Law (Amendment) Act 2013 (Amendment Act 2013)[9]. The Delhi gang rape case concerns a 23-year-old student who was repeatedly raped, beaten and brutalized in a bus by six males when she was on her way home. In her lower region, a heavy metal object was inserted and removed multiple times, when it was pulled out of her it was done with such force that it led to that only five per cent of the intestines remained, which was noticed when she was examined at the hospital. Within two weeks, the girl died in the hospital from her injuries. The crime committed against the girl lead to national protests and the establishment of the Verma Committee (Verma Committee) on behalf of the former Chief Justice of India, Late J.S. Verma. The Verma Committee's task was to make suggestions for both changing and improving the laws regarding both sexual violence and rape. One of the recommendations made by the Verma Committee was to remove the marital rape exception. The basis for the recommendation is that a marital relationship should not give a husband immunity for rape, thus the relationship between the victim and the perpetrator has no significance[10]. With Amendment Act 2013 established several changes in Indian rape law. The definition of rape under Section 375 IPC, was changed to encompassing various forms of penetration into any body parts of a woman/girl. Before this change, rape only encompassed the vaginal penetration of a man's penis. A seventh addition was added, which describes that if the woman cannot give her consent, it also constitutes a ground for rape[11]. Although the Amendment Act 2013 led to changes in the IPC, it can be stated that the Verma Committee's recommendation on the removal of the marital rape exception was not complied with. So, the fact remains that a man cannot be punished for rape within the marriage unless there is a legal separation or that the wife is under 15 years of age[12].

Chapter III: The marital rape exception

3.1 Rests on historical foundations: Entering into a marriage means that an implicit consent is given, is an argument often used to support the retaining non-criminalization of marital rape against wives over the age of 15[13]. The idea of implicit consent can be traced to the legal legacy of when the British occupied India. So, to understand the origin of the argument requires a historical

retrospective perspective. The English judge and lawyer Sir Matthew Hale stated, in 1736, in his leading treatise: '[T]he husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract[14]. With this, it can be understood that the wife is viewed to be the property of her husband[15]. Another historical trace to not acknowledging marital rape as a crime can be traced to the year 1753 when the English lawyer Sir William Blackstone justified the common law doctrine of coverture[16]. Sir William Blackstone did so by stating that: 'By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing and her condition during her

marriage is called her coverture[17]. So, it can be stated that these exemplified historical foundations have thus played a role in the choice not to criminalize rape within marriage in India. Not criminalizing marital rape thus means that the husband is granted immunity and can therefore not be prosecuted under the Indian legal system for rape against his wife. Immunity for marital rape thus constitutes a common law doctrine, which has been incorporated in the marital rape exception[18].

3.2 Cultural relativism:

An argument of retaining non-criminalization of marital rape is that the view of marriage in the rest of the world is not compatible with the view of marriage in India, which means that the concept of marital rape is not applicable in India, due to strong cultural differences between India and the rest of the world. The basis for this is the argument that marriage is considered a sacrament, values and social customs and religious beliefs which together with the lack of education, illiteracy and the increasing proportion of poverty form an environment in India that is not suitable for criminalizing marital rape. Those supporting this argument claim that the criminalization of marital rape entails a trespass to the private nature of the marriage sacrament. The prevailing idea is that the problems that occur within the family can be solved by the family itself, and the opinion is that the whole family system is affected if marital rape is criminalized[19]. It can be pointed out that these arguments have their origin in,

for example, public statements by Ministers[20]. The fact that "high-ranking" persons who have a possibility to influence Indian society and its legal system speak out in public means that the population of India may share and accept these persons views, without question them and/or forming their own opinion. All in all, it can be understood that the proponents of retaining non-criminalization of marital rape mean that it should be seen from a cultural relativism perspective. With this perspective, it follows that culture should not be assessed on the basis of other countries' norms regarding what is "considered" to be normal or strange and right or wrong. The purpose is instead that the country under investigation should be seen from 'its own cultural context[21].

The argument that the cultural value of marriage should be seen as a sacrament and thus that the institution of marriage is destroyed by criminalizing marital rape has been declined as a valid reason by the Supreme Court. In Independent Thought vs Union of India, the Supreme Court declared that marriage is in itself personal, so by criminalize marital rape it cannot destroy the institution of marriage. In addition, the Supreme Court pointed out that since there is a view of that neither divorce nor legal separation is considered to destroy the institution of marriage, there exists neither no potential possibility that the concept of marital rape does so either[22]. In addition, the High Court of Gujarat in Nimeshbhai Bharatbhai Desai vs State of Gujarat reasoned that the confidence and the trust are damaged of the non-consensual act of sexual intercourse in a marriage and emphasized that it is precisely the occurrence of marital rape that destroys the institution of marriage[23]. So, it can be stated that in these two exemplified cases the Courts do not share the view that criminalization of marital rape destroy the institution of marriage.

3.3 Not common in India:

As marital rape is not common in India, there is no need to legislate about it, is an argument used by proponents of retaining non-criminalization of marital rape[24].The argument that marital rape is uncommon in India can be elucidated against the background of four other perspectives. Firstly, in a study published in 2011, led by the International Center for Research on Women, one in five Indian men surveyed admitted of forcing their wife to sexual intercourse. Of interest to point out, the same study also presented, that 57% of the surveyed Indian men meant that men are in greater need of sex. In addition, 58% of the Indian men surveyed stated that men do not speak about sex[25]. So, with this it can be stated that it indicates, that it is a matter of course that men's view

of sex prevails. Secondly, in 2014, the International Center for Research on Women presented in its survey, that about a third of the Indian men surveyed stated that they had exposed their wife to some form of violence, of which 16% stated that it encompassed sexual violence[26]. Thirdly, the Committee on the Elimination of Discrimination of Women (CEDAW Committee) presented its Concluding observations of India in 2014 also, in which the CEDAW Committee highlighted their concern regarding violent crimes against women, specifically rape cases, which according to the National Crime Records Bureau had increased with 902.1% since 1971 and that impunity for these acts still exist.[27] Fourthly, in a National Family Health Survey (NFHS-4) conducted by the Ministry of Health and Family Welfare in 2015-16, 83% of the surveyed Indian women stated that they were subjected sexual violence by their current

husband. The most common form of sexual violence that 6% of the surveyed Indian women was exposed to was that their husband physically forced them without consent to sexual intercourse. Furthermore, 4% of the surveyed Indian women stated that their husband used threat or other methods to force them into performing sexual acts without consent. In addition, 3% of the surveyed Indian women stated that they were forced by their husband to perform other sexual acts without consent.[28] Thus, in the light of these perspectives, it can be questioned how it is possible that the proponents of retaining non- criminalization of marital rape can argue that it is not common for marital rape to occur in India.

3.4 Misuse of the law:

The proponents of retaining non-criminalization of marital rape, argues that a repeal means that it gives the wife space to misuse the law and solve unrelated quarrels thru accusing her husband of rape.[29]The argument that women misuse the law, has been used in relation various laws aimed at protecting Indian women exposed of domestic violence such as, for example, the PWDVA and Section 498A IPC, which criminalizes mental and physical cruelty perpetrated by a husband or his family.[30] Regarding, for example, Section 498A IPC, the Supreme Court stipulated in Arnesh Kumar vs State of Bihar that instead of the provision being used as a shield, it is used as a weapon by dissatisfied wives.[31]However, there is a visible pattern, consisting of that the proponents of this argument consistently have not succeeded in substantiate their defense of claims with empirical evidence[32].

THE CREATION OF A PRIVATE SPHERE WHERE FUNDAMENTAL RIGHTS CANNOT BE ENFORCED:

It is necessary to analyse the reluctance of the judiciary to engage with fundamental rights in the private sphere by tracing the trajectory of the decisions with regard to 'restitution of conjugal rights' ('RCR'). This is because the constitutional law issues that arise with regard to RCR are analogous to the debate on marital rape. The RCR is a remedy that originated in English law, although it no longer exists there[33]. It is a mechanism through which a court may pass an order compelling a married couple to live together, a restitution of a spouse's conjugal right against the other. In India, this is found in S.9 of the Hindu Marriage Act, 1956 ('Hindu Marriage Act')[34].The gist of the section is that if a husband or wife does not live with the other spouse 'without reasonable excuse', the court can grant a decree of RCR.[35] RCR has been known to work to the disadvantage of women. Women are often forced to resume conjugal relations with their husbands. Here, similar to the debate on marital rape, the central question is whether the State can compel a woman to have sexual relationships with her husband[36].

CRITIQUING THE CREATION OF A PRIVATE SPHERE :

These cases indicate two views that are relevant to distancing marital rape as an infringement of fundamental rights. First, there is a creation of an impenetrable sphere known as the 'marital sphere' where constitutional law has no application. The impact of this is that while rape is seen as a violation of the fundamental right of a woman, this argument ceases to hold in the 'marital

[33] The remedy for restitution of conjugal rights was primarily granted by Ecclesiastical Courts. However, in 1969, Justice Scarman recommended the abolition of this remedy. Accepting this recommendation, an amendment was made to the relevant law which prevented the courts fromgranting this remedy

[34] See The Hindu Marriage Act, 1956,S.9

[35] Id.

[36] In the case of marital rape, by not criminalizing it, the State is essentially presuming that a woman has provided an irrevocable consent to her husband for sexual activity. By not providing her the option to refuse such activity (say no), the State is offering her no choice but to participate in that sexual activity. Therefore, the State is compelling her to have conjugal relations with her husband.

sphere'. This is because fundamental rights are inapplicable in the marital sphere. Feminist theory has critiqued the notion of public and private spaces in law. Traditionally, it was believed that law could not regulate certain private affairs of the family. Thus, the law was thought to regulate mainly public affairs and the private world was immune to law. However, this is now understood to be a misplaced notion of the role of law.[37] Frances Olsen in the 'Feminist Critique' argues that the notion of certain private spaces creates an area wherein those who are harmed do not have recourse under law, and as a consequence, no legal action can be taken against those who harm.[38]There is no basis for the argument that constitutional law does not have place in the realm of the family.

Marriage is an anthropological, cultural, and legal institution, that establishes socially sanctioned rights and obligations between individuals. In many cultures, marriage forms the basis for acknowledgement of sexual relationships. However, sexual violence and physical aggression within marriages have traditionally formed a grey legal area. Marital rape refers to "forcible sexual assault or violence by one spouse towards the other."1 In other words, it's the act of sexual intercourse with a spouse without his/her spouse's consent. Though historically establishing sexual relationship between the married couple was considered as a "right" in many societies, the context of consent becomes equally important as among nonmarried individuals. Twentieth century onward, there has been growing international conventions and voices against sexual and intimate partner violence in marriages (more specifically for sexual violence against women).2 However, in spite of the known devastating consequences of any form of forcible sexual encounter, marital rape has

[37] 7 Margaret Thornton, The Public/Private Dichotomy: Gendered and Discriminatory, 18 Journal of Law and Society 448 (1991)

[38] Frances Olsen, Constitutional Law: Feminist Critiques of the Public/Private Distinction, 10 Constitutional Commentary 319. (1990); Catherine McKinnon, Feminism, Marxism, Method & the State: Toward Feminist Jurisprudence, 8 Journal of Women in Culture and Society 635 (1983); See Nancy Fraser, Rethinking the Public Sphere, A Contribution to the Critique of Actually Existing Democracy, 25/26 Social Text 56. (1990).

remained under the shadow of legal ambiguity in many nations, outside the criminal law and widely tolerated.

Marital rape is mostly, but not exclusively, experienced by women. It tends to form a vicious cycle of abusive relationships between the couple, perpetuating chronic violence. This also varies based on sociocultural and political ideologies. For example, the interpretations of the institution of marriage, traditional ways of viewing male and female sexuality, and cultural expectations of relationship dynamics among the husband-wife dyad have led to concerning reluctance of classifying nonconsensual marital sex as a punishable crime. These doctrines started getting challenged in the West between 1960s and 1970s during the "second wave feminism" that focused on gender respect, autonomy, and right to self-determination (concerning all matters of a women's own physical self and identity).2 However, marital rape has been overlooked in literature and policies throughout centuries and "marriage" being used as a common exemption/defense in sexual assault cases. This has also led to invalidation of the experiences of marital rape survivors, reduced help-seeking, and persistent trauma.

Chapter 4- The Constitution:

The marital rape exception hinders married women from enjoying their human rights under the Constitution.[39] More specifically, it concerns an infringement of, for example: Article 14 which is an equal protection provision which guarantees equality before and of the law; Article 15, which prohibits discrimination on the basis on only, inter alia, sex and Article 21 which guarantees the right to life and personal liberty.

4.1 [40]Equality before the law:

Firstly, as exemplified in the foregoing paragraph, two elements are contained in Article 14 of the Constitution, namely equality before the law and equal protection of the law.[41] In an interpretation of Article 14 by the Supreme Court in Special Courts Bill vs Unknown, the Supreme Court held that the underlying principle of the Article is that equal laws should apply to all persons in the same situation, and there should exist no discrimination between one person and another person in the case of the same legal issue provided that the persons' position is approximately the same. The Supreme Court thus emphasizes that the underlying principle of the Article does not mean that the same rules of law should apply to all persons located in Indian

Territory or that the same measures should be made available to them regardless of differences in circumstances[42].

4.2 Prohibition of discrimination on the ground of sex:

Article 15 constitutes the second guarantee of the equality provisions provided for in the Constitution, which purpose is that the State is to ensure that there occurs no discrimination, on the basis of only, for example, sex. This guarantee is expressed in Article 15(1) and has been considerably developed in recent time. The view of 'sex plus' i.e. differentiation due to sex along with other criteria has changed. The Critics means that when using the anti-stereotyping principle together with the anti-discrimination clause, as well as the language of dignity it is clear that the marital rape exception violates Article 15[43].

4.3. The anti-stereotyping principle:

The anti-stereotyping principle has been incorporated into the spectrum of India's Constitution and is derived from American jurisprudence. In Anuj Garg vs Hotel Association of India, the Supreme Court argued that Section 30 of the Punjab Excise Act, 1914 was constitutionally invalid as the provision prohibited female employees in facilities where intoxicants drugs or alcohol were consumed. The assumption that female employees would 'provoke sexual assaults' meant that the provision discriminated between the women and men on the ground of stereotypical gender roles, even though the utter goal was to safeguard women's safety.[44]The Critics points out that differential treatment cannot have its ground in assumptions based on tradition or culture of roles to be taken or sectors to be filled by different sexes, this is the center of the anti-

stereotyping principle.[45]Further on, they highlight that the same principle also was subsequently approved in National Legal Services Authority vs Union of India, as the Supreme Court acknowledged the right of self-identification for transgender individuals. In this case, the Supreme Court interprets that the meaning of the Constitution is that people should not be discriminated against on the grounds of sex. Furthermore, people shall not be indirectly or directly treated differently due to non-nuanced and stereotypical attitudes towards binary genders (i.e male/female).In Navtej Johar vs Union of India[46], it was recognized that the two decisions exemplified in the two paragraphs above, that the anti-stereotype constitutes an element in determining a compatibleness with Article 15.In Air India vs Nargesh Meerza[47], it was stated that female air hostesses were not allowed to get married in the first four years of their employment as

it would be beneficial to family planning and marriage. However, this view was criticized in Navtej Johar vs Union of India on the basis of the anti-stereotyping principle.The Supreme Court[48] argued that the fact that, this stereotypical idea that the burden of marital happiness and family planning only applies to women, is discriminatory[49].

4.4 The right to protection of life and personal liberty:

The Critics claim that all acts of rape are violations of the most basic pillars of human life i.e. dignity, integrity and autonomy, which thus constitutes a

violation of Article 21 which secures the right to life and personal liberty.[50]They refer to the fact that in Puttaswamy vs Union of India and Navtej Johar vs Union of India, has the Supreme Court in its decisions strongly emphasized that the values of bodily integrity and autonomy and dignity are incorporated within Article 21.[51]They thus mean that the marital rape exception affects married women regarding the fact that they are denied the right to live a dignified life, and that they are denied the right to autonomy and bodily integrity, which are aspects under the umbrella of personal liberty.

4.5 The right to live a life with dignity

[52]Not only life and limb are secured by Article 21, but the provision also provides for a guarantee of an existence that is dignified.[53]The Critics mean that the language of dignity, within Article 21 has been widened to strengthen and also more assertions of liberty that are communicated in fewer material terms, unlike cases where the concept of dignity has been invoked as identifying conditions for a decent standard of living. They exemplify this by referring to two cases. In Puttaswamy vs Union of India human dignity was acknowledged as a nuance of privacy which in turn was interpreted as an element of liberty.[54]The right to liberty was interpreted as to be widened with dignity in Navtej Johar vs Union of India[55].

A different approach

Two central questions frame the debate on the crimnalisation of marital rape in India.

First: can the state compel a woman to have sexual intercourse with her husband. Second: what is the role of the judiciary to protect the constitutional rights of a woman under Articles 14 and 21 of the Constitution.

The judiciary encourages a vertical approach in the case of women's right against marital rape by

maintaining a strict public-private divide. This approach to constitutional rights has become a default mode thinking over time. It assumes constitutional rights as safeguard against the state, which is the by- product of the contract between the state and its citizens.

Although the judiciary has been hesitant to bring constitutional rights within the private sphere in the case of marital rape, there is a selective penetration of the state. Take, for instance, court-mandated restitution of conjugal rights. Found in Section 9 of the Hindu Marriage Act, 1956, the crux is that if a husband and a wife do not live together 'without reasonable excuse', the court can grant a decree of restitution. The section works to the disadvantage of women, who are often forced to resume conjugal relationship with their husbands.

A horizontal approach to constitutional safeguards offers insights.

Scholars like Van der Walt, Jean Thomas, Gautam Bhatia have proposed that the institutions and structures embedded in our society are constitutive of a set of norms, conventions, patterns of conduct. These norms assign roles, functions, and power to individual actors, often in a hierarchical manner.

The law should examine the allegedly right violating practices between two parties in the context of the background institutions and the individuals' relative position.

Hierarchies of domination and subordination created by and through institutions, are permanent, enduring, and pose difficulties to overcome. Thus, the law should examine the allegedly right violating practices between two parties in the context of the background institutions and the individuals' relative position within these institutions (for example, patriarchy, caste, class).

When there exists a difference in power between parties enabling one to violate certain constitutional rights of the other and difference is flowing from the parties' relative position within the institution in place, the constitutional rights should be enforceable horizontally.

A notable judicial precedent was set in Indian Young Lawyers Association v. State of Kerala (2018), when the Supreme Court, by a 4:1 majority, held that the exclusion of women between the ages of 10 to 50 from the Sabarimala temple was unconstitutional. The concurring opinion of Justice Chandrachud is specifically insightful that aspires to bridge the gap between the constitutional ideas and our social reality.

The scope of Article 17 could be extended to other situations where "social exclusion

of the worst kind has been practiced".

Chandrachud referred to Constituent Assembly Debates around the 'untouchability' clause (Article 17). He argued that the framers of the Constitution had refrained from further concretising the concept of 'untouchability' for two reasons. First, the purpose of Article 17 was to combat "social norms which subjugated individuals into stigmatised hierarchies." Second, and following from the first, the scope of Article 17 could be extended to other situations where "social exclusion of the worst kind has been practiced and legitimized on notions of purity and pollution." Thus, Chandrachud used the analogous logic of patriarchy which discriminates menstruating women based on their sex to uphold their constitutional right to participate in "key social activities."

The court in Sabarimala indicated a paradigm shift, from a binary understanding of the public and private spheres to individual autonomy pertaining to the application of constitutional rights. This simultaneously weaves a narrative where the essence of liberty and aspirations of equality goin hand in hand.

SHOULD WE PRESUME CONSENT IN CASES OF MARITAL RAPE?

We agree with the J.S. Verma Report that the existence of a marriage does not lead to a presumption of consent. However, in practicality, the judiciary will undeniably look at some threshold of force to answer questions of consent. There are three ways to treat consent while criminalize marital rape. The first would be to presume consent, and put the burden on the victim to rebut that consent. The second is to presume absence of consent, and the accused will have to establish consent. The third would be to draw out a system especially for cases of marital rape, and this will require a review of existing principles of evidence law. The most ideal of these would be to treat consent in the similar manner as we would in other cases. It is extremely difficult to presume the existence of consent in a marriage since rebutting it would close to impossible considering the nature of spousal rape and abuse which happens within the private confines. The other extreme of presuming consent is that once the wife testifies in court that she was raped there will be a presumption of lack of consent that will act against the accused.[56]Both of these will not operate well practically while determining the existence of 'consent' in cases of marital rape. According to law at present, there need not be force used to indicate lack of

[56] The Indian Evidence Act 1872, S.114A.

consent.[57]Consent is understood on the basis of circumstantial evidence.[58]Considering the nature of the act of marital rape, producing evidence is extremely difficult. This is even more so due to societal imagery of women's filing for charges of rape as using it to harass or hurt or seek revenge. In light of this, we submit that a few factors that the court must take into consideration while understanding cases of marital rape. The first problem we would face is that proof of the existence of sexual intercourse will not amount for much in cases of marital rape. This is because of the implicit underlying assumption that it is expected that married couples will engage in sexual intercourse with each other. Thus, the proof of lack of consent is not as simple as in stranger rape cases. In the United States of America, thirty-three states have some qualifications regarding the amount of force required to prove marital rape.[59]Thus, the general rule that force is not a qualification might not practically work in these cases. However, this situation is not grim since statistically, most cases of marital rape also exist in tandem with signs of physical injury or other forms of cruelty, including mental cruelty. Thus, the general rule of lack of force not being a consideration will face a shift in cases of marital rape.

Due to the private nature of the crime, very often, the only proof will be that of the wife's testimony. In such instances, it is extremely important to look for other forms of evidence to corroborate charges of rape. This means that if the husband has had patterns of cruelty, domestic violence, it will be relevant while determining whether the husband has committed rape. It need not be a mandatory factor but must work as a contributing factor. This will be in conflict with S.53 and 54 of the Indian Evidence Act, 1872 as past bad character is not relevant. However, in cases of marital rape, this might sometimes be the only significant source of corroborative evidence to prove a

history of assault. For example, if a wife applies for protection under the PWDVA, 2005 on the basis of being a victim of 'sexual assault', this must be treated as admissible evidence. In addition to this, there is established case law recognising that past sexual activities of the woman are not required for establishing the existence of consent.[60]However, this is couched in terms of the woman's sexual history with another man. However, this ratio can still be applied in these cases, i.e. to not take into consideration whether the woman has had past sexual history with that man. This is extremely crucial in case of marital rape, since the woman could have had consensual sexual relationship with her husband before the instance or instances of non-consensual intercourse,

i.e. rape. Expert testimony, specifically testimonies of doctors, will also be relevant since the

mental trauma and the psychological trauma that the victim faces can be established through such evidence. This will increase the importance of such evidence from the side of the prosecution. Testimony from family members attesting to such instances will also be hugely beneficial.

SENTENCING POLICY

We agree that there must be no difference in the sentencing policy. S. 376 of the IPC lays down the sentencing policy. The punishment for rape is between seven years to life imprisonment. However, S.376B deals specifically with husband and wife living separately has a different sentencing policy with the punishment between two years and seven years. This clearly shows that the intention was to bring about a lesser standard for punishing rape when the husband was the convict. However, on grounds of equality as given in Article 14, we argue that this is unconstitutional. There is no justification for having a lesser punishment policy because of the relationship of existence of marriage. In light of this, we propose that S.376B be repealed and the sentencing policy work as it does.

THE ROLE OF CULTURE IN DETERMINING WHETHER MARITAL RAPE MUST BE CRIMINALISED

Throughout history, the relationship between culture and law has been scrutinized. Law and culture share a symbiotic relationship with each influencing and being influenced by the other. This relationship has been studied extensively on a jurisprudential level. However, within the scope of this paper, we argue that this debate is irrelevant. First, because we have established that the matter of criminalisation of marital rape is a matter relating to fundamental rights enshrined in the Constitution. Second, because having a law that moves against established cultural ideas is not unknown in our legislative history. This is because most gender specific laws or laws for marginalised communities are not in consonance with our understood ideas of society and its structure. With regard to the demand for criminalisation of marital rape being one based on the Constitution and not on culture, we draw an analogy with the debate between the freedom of speech and the laws on obscenity in India. Article 19(2) mentions ‘morality’ as one of the grounds for restricting freedom of speech. The Supreme Court has interpreted ‘morality’ to mean ‘public morality’.112 This would imply that cases wherein the public at large viewed certain speech as immoral, the Court would deem this speech to be immoral.

This perception of what the public might consider moral might be in conflict with that the Constitution envisages being moral[61].

In our case of marital rape, it is true that this term is an oxymoron when adjudged in light of the societal background. However, this does not undermine the unconstitutionality of the marital rape exception. This is more so in countries such as India in which the societal structure is starkly different from the constitutional moralities envisaged. For example, the Dowry Prohibition Act, 1961 was brought in because of the cultural practice of dowry that was prevalent in India.[62]Historically, sati was an accepted cultural practice and even that was criminalised. The argument that a crime is culturally acceptable is not a reason to not criminalise it. If anything, it should act as a catalyst to the criminalisation since it indicates a culture which is accepting toward a crime. This argument is especially relevant while discussing matters of rape simply because of the 'rape culture' that exists in society, more so, in cases of spousal rape.[63]For these reasons, we argue that because our 'culture might not permit rape', does not undermine the unconstitutionality of not doing so. If anything, this should only motivate both the judiciary and the legislature to take prompt action.

THE LAW MUST SPECIFY THAT THE RELATIONSHIP OF MARRIAGE IS NOT A DEFENCE

First, we agree with the J.S. Verma Report's suggestion that mere removal of the exception clause in S. 375 is not sufficient to ensure that the peculiar circumstances in cases of marital rape is covered. This is because it will lead to excess of judicial discretion. For example, in Ghana, marital rape is legally criminalised, i.e. they do not have an exception clause, but because it was not explicitly mentioned that the relationship of marriage is not a defence, it opened up for the

judiciary to frame its own framework for dealing with such cases. It is possible for the judiciary to treat cases of marital rape differently, by imposing a higher evidentiary requirement or presuming consent. This will lead to arbitrary consequences. Secondly, it is important that the exception be clearly laid down in law. This is more so when there is significant cultural opposition to this legislation since the reader might not be aware that the act isa crime.

CONCLUSION

The debate of marital rape is crucial in establishing substantive equality for married women who are otherwise relegated in public and legal discourse to the confines of their home. It is crucial to recognize that this is a major lacuna in criminal law at present defeating the constitutional provisions that grant women equality and autonomy. As we have continually illustrated, there have been stiff political, legal and cultural arguments against crimnalisation. We have carefully analyzed the validity of these arguments which are coated with notions of the family, marriage and the role of women in society. We have established how all the arguments against crimnalisation do not have any legal standing. We have argued that the exemption clause in S. 375 of the IPC as it stands today, is unconstitutional. This is because it fails the equality test as given in Article 14. In addition to this, we have depicted how there are not any effective alternatives in law, and further that our focus should not be on alternatives but rather on criminalize it. We also brought out how our culture not being accepting towards marital rape is not a reason to not criminalize it. In light of all of this, we propose a model to criminalize marital rape. First, we propose that the exception clause be deleted. Second, we propose that it be specifically highlighted that the relationship of husband and wife between the

accused and the woman will not be a defence. Third, we propose that the sentencing policy be the same. Fourth, we propose for certain amendments in the Evidence Act to ensure that it takes into account the complexities of prosecution in cases of marital rape.