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Marital Rape in India: A Critical Analysis

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Marriage has been a socially and legally binding union between a husband and a wife, based on shared and mutual consent marriage becomes a part of a spouse in a married relationship when regulated through laws, beliefs and customs. Along with this, just being in a marital relationship is not enough as it comes with the prescribed rights and obligatory duties of a partner. Marriage is the most significant idea of every human life in every part of the world, yet in recent periods it has been observed that the dimensions of egregious offences based on marriage are getting much broader. Based on distinct offences within marriage such as dowry deaths, physical abuse and mental abuse etc, these are the majorly highlighted offences within matrimonial relationships but in recent observations of the criminal world, it has been taken into account that the offence of 'Marital Rape' has been reaching the sky. Acknowledging the urgent need to understand and have the idea of 'Marital Rape'. This study seeks to thoroughly deal with the pervasive issue of matrimonial rape, examining the distinct grounds responsible for such offence. This study employs the secondary source of data parallel with distinctive case laws to comprehensively delve into the historical perspective of marital rape in India along with its current status of it and its comparative study over distinct countries. Along with this, the study provides a comparative analysis of IPC 1860 to BNS (Bharatiya Nyaya Sanhita) based on the definition of Rape. In other parts of this study here the material seeks to provide certain conditions for the mitigation of such heinous offence.

Keywords: *marital rape, sexual intercourse, consent, spouse.*

INTRODUCTION

India is positioned as the 2nd most populated country in the world after China and parallel to this it has the highest amount of crime rates when compared with other countries. In India, rape is considered among the 5 top most widespread crimes. The concept of rape when studied in-depth, comes out with distinctive categories, being one of the most heinous crimes against the human race, rape has its distinctive forms some of them are aggravated rape, gang rape, the crime of rape and murder etc. Apart from this marital rape is another form of rape that is undoubtedly present in current times.

The concept of Marital rape has recently got people's eye, often observed as the most debated subject of discussion this offence is not yet criminalized in India. Marital rape or spousal rape cites to the violation taking place within the Matrimonial relationship between the husband and wife where one spouse commits a sexual act without the other's consent i.e., if commits a non-consensual and coercive sexual act it is referred to as Marital rape. In simple words when there is a commitment of sexual intercourse without the spouse's consent such commitment of sexual offence over the spouse in a marriage is termed as marital rape. Due to the existence of multifarious definitions regarding the institution of marriage, certain ideologies provide their perception about marriage and state that marriage is not merely a socially or legally binding union between a woman and man that is regulated by law rather it is ascribed to other basic personal functions which incorporate sexual gratification as well. Therefore, in certain countries, it is presumed to have given implied consent regarding the establishment of a sexual relationship between spouses. But this existence of presumption when the victim and the perpetrator are married leads to the suffering of the victims of marital rape. It is to be kept in an account that marital rape is a gender-neutral offence but still when data analysis regarding marital rape among married women 83% of them report their current husband as a perpetrator for committing rape over them.¹ In the Indian context, the concept of Spousal rape invariably

¹ Saumya Uma, 'Why the 'Marital Rape Exemption' in Criminal Law Must Go' *The Wire* (30 November 2023) <<https://m.thewire.in/article/rights/why-the-marital-rape-exemption-in-criminal-law-must-go>> accessed 26 April 2024

loves around the definition of rape which is stated under section 375² and says man is said to commit 'rape' if he –

a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her do so with him or any other person; or

b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her do so with him or any other person; or

c) manipulates any part of the body of a woman to cause penetration into the vagina, urethra, anus or any part of the body of such woman or makes her do so with him or any other person; or

d) applies his mouth to the vagina, anus, or urethra of a woman or makes her do so with him or any other person, under the circumstances falling under any of the following seven descriptions.

1. Against her will.

2. Without her consent.

3. 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 hurt.

4. 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.

5. With her consent when, at the time of giving such consent, because 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.

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

² Indian Penal Code 1860, s 375

7. When she is unable to communicate consent.

Exceptions:

1. A medical procedure or intervention shall not constitute rape.
2. Sexual intercourse or sexual acts by a man with his wife, the wife not being under fifteen years of age, is not rape.

This definition of rape when read with its exception 2 raises questions regarding the dereliction of duty of law while dealing with cases of marital rape. Also, when compared with Section 63³ it has made sexual intercourse with a wife as 'marital rape' if her age is below 18 years. But the actual concern delves within the criminalization of marital rape as just increasing the age of consent is not fair enough for the women in marriages who are being raped and whose age is above 18 years.

OBJECTIVES

The core goal of this article is to thoroughly analyze the pervasive issue of marital rape, exploring the multiple grounds responsible for the commitment of marital rape. Marital rape which incorporates the concept of sexual intercourse between a husband and wife without the involvement of consent which means marital rape is a commitment of sexual intercourse by one spouse over the other without his or her consent is not only an offence rather, it is a gender-neutral offence. Based on this issue of marital rape, this paper aims to analyze the historical trajectory of marital rape parallel to multifarious factors responsible for marital rape along with the comparative study of countries who have criminalized marital rape. By examining the legal framework this paper aims to highlight the legal system's incautious and deceptive provisions regarding rape. The paper seeks to provide insights into mitigating the issue of marital rape and criminalizing it. By safeguarding the human rights of the victims of marital rape.

³ Bharatiya Nyaya Sanhita 2023, s 63

METHODOLOGY

This study utilizes secondary method of data collection to comprehensively investigate the extensive issue of marital rape and its impact on victims of marital rape. Marital rape, which involves sexual intercourse between married couples without the consent of one of the partners in a marriage, has emerged as one of the major challenges in violation of human rights, incorporating the right to privacy, dignity and mental health. To advocate this issue of marital rape by the use of secondary data collection methodology this paper has gathered information on multiple case laws and has focused on judicial verdicts which served as legal precedents and has played a crucial role in shaping and framing new laws. To address this pressing issue, it is essential to gather data from multiple sources to gain a thorough understanding of its implications and explore potential solutions. Through the collection of data from distinct secondary sources, this paper has highlighted multifaceted challenges faced by victims of marital rape and how deeply ingrained norms of society have suppressed this arising issue. These secondary sources allow for a holistic examination of the issue, taking into account various perspectives, experiences, and expert opinions. Through data collection, this study seeks to contribute to the ongoing discourse on marital rape and inform strategies to mitigate their negative impact on society.

HISTORICAL TIMELINE

Akin to any other community vices, marital rape is not an extraordinary circumstance when the history of this offence is in discussion. It has its origin in ancient India when women were viewed from the lens of possession with limited rights. There are innumerable cases of marital rape in the history. During the past women were not well acquainted with the knowledge of their rights and were often observed being reliant on their husbands wholly when married. Thus, these women had no choice left rather to submit to the wills of their husbands. As previously cited, since women were viewed from the lens of possession with limited rights to their personal belief and perspective, they were believed to be dependent on their father before marriage and over their husbands wholly when married and later on their sons if any. This historical trajectory of women being dependent on men generally forced them to become dependent on their male counterparts instead of being independent economically and socially. Based on traditional

gender roles, societal norms and prevailing historical attitudes, people have this idea of implied irrevocable consent to sexual relations in marriage which makes it difficult for the judicial authorities to provide judgment as implied consent is a presumption in an institution of marriage, create certain difficulties in dealing with the matters of spousal rape. This shows the lacking ness of legal frameworks in addressing sexual autonomy within marriage.

Later, a magnificent shift in societal awareness, legal perspectives and social norms began to occur making it possible for women to express their interest, to own their rights and to have their voice. The feminist movement along with human rights movements played a vital role in challenging traditional norms and advocating for identification of marital rape as a form of domestic violence. This advocacy acted as a ladder and contributed to reaching the mountain of change in legislation in various parts of the globe. Distinct feminist movements have played crucial roles in raising awareness and advocating for the recognition of marital rape as a form of violence. Some of the movements include:

First-wave feminism (late 19th to early 20th century):⁴ Based on sparkling discussions, this initial wave of feminism predominantly aimed at women's rights, creating ground for challenging traditional gender roles and rights of women within the Matrimonial relationship. This first wave of feminism was highly focused in favour of white women's rights and passion for multiple resolutions for the specific rights of these women incorporating the right to vote. Despite focusing on women's rights this wave came up with loopholes as Black women and other women of colour, their rights were not taken into account.

Second wave (1960s to 1980s): This second wave had intensified focus on matters such as reproductive rights, domestic violence, and sexual autonomy. Taking inspiration from the civil rights movement and multifarious strikes and protests against the Vietnam War, this wave highly reevaluated the irrelevant traditional norms and traditional gender roles parallelly to bring to an end gender discrimination. Since every coin has its two sides this second wave of

⁴ Sarah Pruitt, 'What Are the Four Waves of Feminism?' (*History*, 2 March 2022) <<https://www.history.com/news/feminism-four-waves>> accessed 26 April 2024

feminism was criticised for giving more privileges to white women, and some Black women made their feminist organisations.

Third-wave (1990s to early 2000s): The third wave was highly focused on combating the issues that were still prominent, incorporating sexual harassment at the place of work and less involvement of women who are in positions of power. This wave focuses its attention on intersectionality, acknowledging that subject matters like marital rape and how disproportionately such offences affect women of different backgrounds. Feminists continued to move forward to bring legal changes and societal awareness.

Fourth Wave - Present Day: This fourth Wave of feminism is quite challenging to define as it covers multifarious movements, protests and legal perspectives when dealing with matters based on feminism. This wave highly focuses on sexual abuse, sexual harassment, sexual violence, the objectification of women etc. along with advocacy for homosexuals, transgender and people of colour, to heighten their contributions in society. One of the most famous movements within this wave is the #MeToo movement. Apart from this marital rape in the current state of modern times is a highly concerned and heated subject matter of discussion as multiple attempts have been till now to criminalise this brutal offence.

Working in connection with feminist movements the Human rights movements have been acting as a tool in advocacy for recognizing the offence of marital rape as a crime. Some of the notable human rights movements include:

Universal Declaration of Human Rights (1948): This human rights declaration addresses the right to freedom and the right to security of a person, creating the ground for later efforts to address violence within intimate relationships. Parallel to this, this declaration focuses on the elimination of discrimination which incorporates women as well. Also, this declaration is concerned that violence against women serves as a restriction for the achievement of equality and development for women. Further to cover up an aspect of this declaration is a bit challenging yet the scope of this declaration provides a wide perspective in tackling the uprising societal issue.

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW):

This convention of CEDAW was adopted for precisely addressing violence against women, involving violence inside the family. It has been a significant instrument to bring a legal change about marital rape on an international scale. It highly focuses on attaining gender equality and addresses the issues concerning the rights of women and their protection.

Beijing Declaration and Platform for Action (1995):⁵ Based on a visionary agenda for women's empowerment, this fourth World Conference on Women introduced this landmark document, highlighting the significance of addressing violence against women, including within marriage, and urging governments to take action. This platform serves as the commitment of the international community to achieve gender equality and to provide better opportunities for women and girls. Since this declaration is highly concerned with the human rights of women, this spotlight why it is essential to highlight the issue of marital rape which violates woman's human rights in the institution of marriage. Human rights movements, with a primary goal of dignity, equality, and individual freedoms, have continuously contributed to the global effort to recognize marital rape as a crime. These efforts silhouette the interconnection of human rights and gender justice in challenging societal norms and legal frameworks that perpetuate violence within intimate relationships.

ROLE OF COLONIZERS OVER INDIAN PENAL CODE 1860

It is observed that Lord Thomas Babington Macaulay drafted the IPC around 1837. But later, after the sepoy mutiny the Indian Penal Code was appropriately implemented in India. It has been more than one century since the IPC served India with its clear and thorough regulations. Despite its past significance, certain doubts regarding its colonial nature are still in existence. Ahead of the curve in its historical context, the IPC has magnificently served India, but the evolving societal customs and perspectives along with certain ideologies on crime require presentation and acknowledgement within its provisions. Certain contentions arise reflecting the reconversion of the IPC highlighting the demand of having a gender-neutral definition for

⁵ Beijing Declaration 1995

section 375⁶ which defines the offence of rape. The IPC uses the term man, thereby reflecting the fact that the offender in the offence of rape is a male and the victim of the offence is female.

Also, to ascertain the issue that males and transgender individuals have also suffered this heinous crime. There has been an alarming call for gender-neutralizing the definition of rape within the Indian law. The current definitions in IPC and BNS restrain them from pursuing justice, making the preceding argument valid and advocating for a just cause. Equalization of rape laws across genders would guarantee every victim – be they female, male, or transgender – receives equal protection and safeguard against this heinous offence, upholding everyone's right to justice. Furthermore, it is important for amendments in the definition of rape, making it gender neutral as rape is committed on every gender in the 21st century.

COUNTRIES THAT HAVE CRIMINALIZED MARITAL RAPE AND INTERNATIONAL CONVENTIONS

Poland became the first country to criminalise spousal rape in the year of 1932. Over the past decades, there are more than 10 countries around the globe which has criminalized marital rape. Even all the states of the United States have criminalized spousal rape. In addition to this International Conventions on Marital rape had played a pivotal role in dealing with the issue of marital rape.

Citing discrimination against women in Article 1, in the year 2013 CEDAW (UN Committee on Elimination of Discrimination Against Women) made recommendations for India to end marital impunity.

Contemplating sexual and mental harm is discriminatory and violative of the rights of women as mentioned in general recommendation 19 of (CEDAW), the marital immunity granted by the Indian Penal Code contradicts this. Even General Recommendation 35 highlights that marital rape involves a lack of free consent and coercive measures. Even though India has not signed CEDAW's optional protocol, India is still obligated to protect women under Article 2(f), facing sanctions for noncompliance. Despite having multiple laws on marriage Indian laws do find

⁶ Indian Penal Code 1860, s 375

strong ground for marital rape and thus seem to violate the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights, and also seem to discriminate between married and unmarried women. India's legislation on marriage contradicts the Beijing Action Platform, demanding CEDAW enforcement and elimination of discriminatory laws. The United Nations, including UN Women, has been continuously increasing concerns about legislation permitting marital rape, advocating for criminalization.

COMPARATIVE AND CONTRAST APPROACH OF DISTINCT COUNTRIES IN ADDRESSING MARITAL RAPE

Previous to 1983, Canada witnessed the USA and UK in the absence of laws for spousal rape. It was examined that there exist no strict legal provisions for marital rape in these countries. It was through the legislative amendments by which the offence of marital rape was challenged to criminalise it and to grant marital rape immunity to the victims of this offence. Even religious institutions perpetuated the view asserting that husbands couldn't rape their wives. The transcendent movement took place when Canada criminalized marital rape through amendments to the Criminal Code, addressing the individual rights of women. This was not just the sole result of legislative change as behind this was the feminist movement's aspirations which challenged multiple issues along with police hostility in the direction of victims of rape and lenient provisions of the Penal. Through judicial interpretations, the resistance for the victims of spousal rape was not codified yet it was gradually repealed. The Criminal Code, through Bill C-127, put back the offence of rape and indecent assault with a gender-neutral framework in the Criminal Code. The spouses in a Matrimonial relationship can face legal charges and can be prosecuted under section 246 for sexual offences including their spouse. Notwithstanding, the judicial decisions by the court acted as a spark in igniting concerns among citizens about the credibility and effective enforcement of the law. Multiple groups of activists served as advocates for the creation of a strict legal framework addressing sexual offences within the institution of marriage, with the expectation that legislative inconsistencies would be gradually addressed and resolved.

APPROACH OF UNITED STATES ON SPOUSAL RAPE LAWS

The grounds for spousal rape in the United States have gone through a significant transformation since the 19th century. An early case of marital rape in the USA which is *Frazier v State* (1905), whose judgment was granted by the Texas Court, involved Mr. Frazier facing charges of raping his wife. Nevertheless, swayed by previously existing patriarchal norms, the Court of Texas reversed the decision of the Trial Court, by giving judgment that Mr. Frazier was not responsible for rape. The disinclination to criminalize Spousal Rape at the beginning of the 19th century can be imputed to the influence of Sir Matthew Hale, an erstwhile Chief Justice of England, and his treatise. However, there was a significant shift in the year 1977 when Laura X founded the National Clearinghouse on Marital and Date Rape to prevent and educate people regarding rape. It was due to Laura X's consistent efforts through which in the state of California marital rape was first outlawed, triggering a nationwide movement. Later in 1978, in the USA, Oregon became the first and foremost state to criminalize marital rape, with other states following suit, including New York in 1984. Due to vast media coverage in the year 1978, one more pivotal incident took place and multiple movements fueled the demand for the criminalization of marital rape. In Oregon, Greta Rideout filed a complaint report against her husband for rape, this was the first trial where a victim accused their spouse of such a crime. As per the view of Joan M Ross, Rideout's case shifted Americans' perspectives due to wide media coverage. Further in 1986, the Federal Sexual Abuse Act federally criminalized spousal rape. Despite marital rape being an offence today, several countries still lack criminalization for this act.

INDIAN LAWS FOR MARITAL RAPE

The framework for marital rape in India has been a heated subject matter of discussion. The Indian legal system does not provide any legal provisions for criminalization of marital rape. Though from the past times sexual intercourse between a husband and his wife had been considered a right of partners in marriage with or without consent even then the former section 375 provides an exception by granting immunity to marital rape.

Section 375 of IPC defines the offence of rape widely, underscoring multiple forms of sexual acts i.e., it lists down 7 perceptions of consent. However, exception 2 of Section 375⁷ exempts non-consensual sexual intercourse between a husband and a wife in case the wife is more than fifteen years of age and lays down that if a husband commits sexual intercourse over his wife who is below 15 it will be considered as rape. But later on, in the year 2017 in *Independent Thought v Union of India* the honourable Supreme Court of India held that if there is sexual intercourse with a minor wife whose age is below 18 years, it will amount to the offence of rape. Thus courts these days view this case as well well-established precedent. However, apart from this the role of section 375 of the IPC, legislature has been debating for the creation of new laws by saying that marital rape comes within the purview of the Indian Penal Code (IPC),1860 granting married women legal remedy under Section 498A⁸ for cruelty or through the Domestic Violence Act,2005 it covers sexual, physical, emotional, verbal cruelty as well. Her husband could be charged with a punishment of 3 years. Therefore, this Act recognizes sexual abuse as a form of domestic violence.⁹ Also, The Constitution of India itself provides the ground and says that the offence of marital rape is violative of Articles 14,¹⁰ 15¹¹ and 21¹² respectively.

Article 14 grants equality before the law and equal protection of the law to all the citizens of India. Article 15 strengthens the roots by creating an environment not subjected to discrimination based on caste, sex, race, place of birth, or religion and in the confines of Article 21 the immunity to protect sexual autonomy, bodily integrity, and acknowledgement of reproductive rights provides safe ground against the severe offence of rape. This silhouettes the wider perspective of individual rights despite being biased on specific provisions of law. Even, the Domestic Violence Protection Act serves as a civil remedy where partners can get separated on multiple grounds based on the provisions that meet demands of the Act. These previously cited laws set the idea which highlights why marital rape is not yet criminalized in India.

⁷ Indian Penal Code 1860, s 375 ex 2

⁸ Indian Penal Code 1860, s 498A

⁹ Soumali Roy, 'Marital rape: review of rights of women' (*iPleaders*, 22 April 2021)

<<https://blog.iplayers.in/marital-rape-review-rights-women/>> accessed 27 April 2024

¹⁰ Constitution of India 1950, art 14

¹¹ Constitution of India 1950, art 15

¹² Constitution of India 1950, art 21

However, there are multiple case laws in existence where judicial verdicts were seen not in favour of recognizing marital rape as an offence but there were other case laws as well where the validity of the 'marital rape immunity' based on the Constitution was challenged.

COMPARATIVE ANALYSIS BETWEEN (IPC) INDIAN PENAL CODE,1860 AND (BNS) THE BHARATIYA NYAYA SAHINTA,2023 BASED ON RAPE LAWS

The Constitution is considered as the beginning source for all the laws yet exception 2 of section 375 of IPC acts as a blanket shield of protection for the husbands who commit rape over their wives. This provision of the Indian Penal Code violates the constitutional protection granted to all citizens under Articles 14, 15 and 21. This exception 2 of Section 375 of IPC exempts the fact that the commencement of rape by a husband over his wife who is above 15 is not punishable. It is just simply violating constitutional laws by being biased based on specific provisions of IPC.

Currently with the enactment of a new law grounded on BNS 2023, Section 63 of this renders certain modifications with the judicial effect through *Independent Thought v Union of India* (2017) and brought significant change in expectation 2 of section 63 of (BNS) stating the change in the age of married women and provides that the consent based on age should be 18 years that is, this provision increased the age based on consent from 15 to 18 years therefore, exception was read down to the extent that it allowed sexual intercourse between married partners where if a man is major and his wife is minor. Still, it retains the exception of Marital rape and simply provides protective grounds to husbands who commit rape over their wives who are above 18 years. This minor change proposed under new law based on exception might bring slight change while dealing with the cases of marital rape yet it is a big challenge as Marital rape is not yet criminalized in India.

LEGISLATIVE DEBATES ON MARITAL RAPE

The Indian legislature has the huge potential to act in favour of the eradication of marital rape within India. However, there seems reluctance within the legislative structure when it the criminalization of marital rape. Despite making multiple attempts at the introduction of bills in

the Parliament, the legislature has constantly rejected proposals to criminalize marital rape, revealing loopholes in the legislature in addressing this issue of marital rape.

The reluctance appears rooted in concerns about the fact that such criminalization of marital rape could negatively impact the traditional institution of marriage in India, which can lead to an increase in divorce cases. In the years of 1860 when section 375 was introduced in IPC at that point of time people had limited understanding regarding the institution of marriage and from then till now, we have developed a better understanding of marriage, privacy, and consent which has changed the scenario of marriage in a broad sense. Still, the legislature by debating on these issues come up with 3 highly concerned reasons for not criminalising spousal rape and rejected the proposal of Justice Verma Committee. The key reasons involve:

1. The Criminalization of marital rape will undermine the institution of marriage.
2. Another reason was that they presumed that marriage involves implied consent for sexual intercourse between married couples.
3. This key reason incorporates the burden of proof i.e., how a man will prove that he is innocent.

The legislative discourse on marital rape is still in continuance. With multifarious discussions, considerations, and exchanges of views within the legislative body this debate for the criminalization of marital rape has not yet reached its conclusion, making it difficult for the victims of such offences to deal with such brutal offences within a marital bond.

JUSTICE VERMA COMMITTEE ON RAPE AND ITS PERCEPTION ON MARITAL RAPE TO BRING CHANGE

The Committee recommended the gradation of the classification of sexual offences within the Indian Penal Code by emphasizing its focus on highlighting that both rape and sexual assault are expressions of dominant power rather than just an act. The committee proposed wide scope for the definition of rape by asserting that it should incorporate any non-consensual penetration of a sexual nature, extending beyond specific body parts rather than limiting it to specific body parts. The Committee proposed the recommendations for the exclusion of the exception of

marital rape. The Committee argued by advocating that marriage should not serve as an implied consent to sexual relations between married couples, emphasizing that the relationship in the middle between the victim and the accused in a marriage should not be a relevant factor in ensuring consent during inquiries into sexual activity.¹³

The Committee with the submission of its report made recommendations with the aims of shaping distinct criminal laws to bring changes in various laws of sexual offence, increased penalties and to bring change in legal principles.

FACTORS RESPONSIBLE FOR THE PREVALENCE OF MARITAL RAPE

The Factors are as follows:¹⁴

1. Traditional Gender Roles and Power Dynamics: The rigidly perpetuated traditional gender roles can share for the continuation of marital rape in society by establishing an imbalance of power within marital bonds. Patriarchal dominance in Indian society and its expectations of placing men in dominant roles and women with submissive roles makes situations more difficult for women which forces situations to be in a certain way which leads to situations where consent of women is presumed in a marital relationship when it comes to sexual relations between married couples rather than having active communication. These dominant gender roles often create a sense of prerogatives, making it rigid for victims of marital rape to assert their boundaries. Thus, mutual consent and respect are the most essential elements in challenging these traditional norms for creating healthy relationships among spouses.

2. Controlling Societal Norms: Unquestioned obedience within marriage is attributable to the cultural expectations along with dominant gender roles and power dynamics due to patriarchal structure are major analysed factors, contributing to the growth of controlling societal norms. These elements often lead to surroundings where autonomy and its limitations, along with open communication about personal boundaries are discouraged among the partners. There are times

¹³ Swarati Sabha Pandit, 'Criminalising marital rape in India' *The India Forum* (31 July 2023) <<https://www.theindiaforum.in/law/criminalising-marital-rape-india>> accessed 27 April 2024

¹⁴ Satish Kumar Mishra et. al., 'Exploring Concerns Associated With Marital Rape In India: An In-Depth Legal Analysis' (2023) 12(10) *European Chemical Bulletin* <<http://dx.doi.org/10.48047/ecb/2023.12.si10.00539>> accessed 27 April 2024

when it is observed that controlling others is often found in marital relationships by neglecting the partners' choice in marriage by intruding into their intimacy matters in the name of cultural values or family unity. Therefore, it becomes crucial to highlight and pluck out these challenges by reshaping these ingrained norms.

3. Societal Stigma About Discussion of Sexual Offences within the Marriage: The culture of putting a veil of silence when it comes to the discussion of sexual offences within marriage creates hindrances for the victims in seeking justice. This stigma of silence often arises from distinctively rooted taboos such as privacy norms as it is believed in certain cultures that what happens within the outer limits of marriage should be kept private, making it challenging for victims to openly have discussions or to report sexual offences. The fear of getting judged, blamed, or social ostracization can be a powerful brake, leading victims to endure abuse silently. Further sticking stigma over those victims who come forward to speak up for themselves, by highlighting the belief that sexual offences don't occur within committed relationships it becomes easy for people to hamper the efforts of victims who try to fight for their rights; this is therefore, another factor responsible for inadequate support systems for victims.

4. Inadequate Sex Education: Due to the absence of extensive sex education, there is a lack of knowledge or skills to plot a route through sexual interactions in a dignified and consensual manner. The absence of understanding regarding consent and boundaries within the intimate relationship between married couples often leads to misunderstanding and coercive sexual interactions among married couples which often hamper marital relationships and creates fear in the victims of marital rape.

5. Economic Dependency: Financial dependency on a partner creates an imbalance of power within marital bonds. Financial dependency of one spouse over another often creates a situation where it becomes challenging for victims of marital rape to discover and set boundaries that force them to be in an abusive marital relationship. The agitation of financial unreliability frequently leads to the suffering of victims of violence in a marriage by any of the spouses. Giving talks on economic disparities and economic empowerment becomes crucial in dealing with the issues of intimate partner violence.

Apart from the previously highlighted factors, the fright of retaliation may also hinder the victims from seeking out help.

CASE LAWS SUMMARY ON MARITAL RAPE

1. Independent Thought v Union of India (2017):¹⁵ As previously mentioned within this research paper, this case remitted the subject matter of whether sexual intercourse with a girl between 15 and 18 years of age, even if she is married, constitutes rape or not? Despite the certainty that there is Exception 2 to Section 375¹⁶ which serves as the blanket of protection for the husband whose sexual intercourse with his wife without her consent when she is below 18 was acceptable. In other words, exception 2 of section 375 simply states that – ‘Sexual intercourse or sexual acts by a man with his wife, the wife not being under fifteen years of age, is not rape’. It was challenged by the viewpoint of the distinction between marital and non-marital rape. Within this case, the court ruled that sexual intercourse with a girl who is less than 18 years of age, nevertheless of marital status, constitutes rape.

The court condemned the unnatural difference constructed by exception 2 of section 375 of IPC highlighting its violation of Article 15(3) and Article 21 of the Constitution of India. Additionally, amendments were made for the decriminalization of marital rape of a girl child rather only Child marriage was criminalized under the Prohibition of Child Marriage Act (PCMA), 2006. This demand for decriminalization of marital rape was again put to an end by The Protection of Children from Sexual Offences (POCSO) Act, 2012 with the fact that a girl who is between 15 and 18 years of age who is married could fall within the category of a victim under ‘aggravated penetrative sexual assault’, under this Act and Indian Penal Code did not recognize such an offence as rape. Therefore, again this offence of spousal rape was not criminalised.

The court had a critical perspective on exception 2 to Section 375 of the Indian Penal Code (IPC), for the girls who were below 18 years of age and the court highlighted the inconsistency, arbitrariness and tyrannical nature of exception 2. It stressed its attention on how this provision violates Article 14 (Right to Equality), Article 15 (Prohibition of discrimination on

¹⁵ *Independent Thought v Union of India* (2017) 4 KLT SN 42 (SC)

¹⁶ Indian Penal Code 1860, s 375

grounds of religion, race, caste, sex, or place of birth), and Article 21 (Right to Life and Personal Liberty) of the Constitution of India. Additionally, the court spotted the light contradiction of exception 2 to the Protection of Children from Sexual Offences (POCSO) Act and showed concern by highlighting the acknowledgement that treating a married woman distinctively from an unmarried woman based on the factor of sexual offences was unjust, unfair, and lacked reasonability. Later in 2017 the Honorable Supreme Court of India gave its verdict and held that sexual intercourse between a man and his wife whose age is between 15 to 18 years is rape. Therefore, the age of consent was increased.

2. Nimeshbhai Bharatbhai Desai v State of Gujarat (2018):¹⁷ Within this case, the court directs one's attention to the fact that if a husband compelled his wife by force into oral sex could it be qualified as rape under Section 376 of the Indian Penal Code (IPC)? Later, the court conceded that in India spousal rape is not criminalized, in the essence of concerns that highlights the reasons of destabilization of the institution of marriage. Despite this, the court emphasised that the fear of fabricated complaints should not be a reason to ignore the issue of marital rape even when there exist multiple laws in the criminal legal system which Safeguard and inspect fabricated marital complaints, and provides provisions to charge for any erroneous and spiteful complaints. The court through judgement highlighted that even though assault by a husband upon his wife is an offence under the IPC, forcing a wife into sexual intercourse doesn't consider rape solely based on the reason of a valid marriage.

The judgment of this case by the court of law discussed three prevalent forms of marital rape:

- **Battering Rape:** This marital rape incorporates physical as well as sexual violence within a marital bond in distinct ways. For instance, the wife in a marriage is battered during sexual acts or rape by her husband following a physically brutal episode where the husband pressures the wife into sex against her will.
- **Force-Only Rape:** Within such type, husbands often involve unnecessary force to coerce their wives with them into sexual acts. Battering may not be involved, but women who restrict sexual intercourse often have to face assaults.

¹⁷ *Nimeshbhai Bharatbhai Desai v State of Gujarat* (2018) 11 SCC 20

- **Obsessive Rape:** This type of rape is quite brutal and characterized by vicious torture and/or perverse sexual acts, it may incorporate sadistic elements and therefore, is considered the most severe kind of marital rape. The Court is of the view by highlighting that, the laws of India provide women with their right to life and liberty within marriage but spotted light on the absence of protection laws for the bodies of these women. It addresses the need to focus on marital rape despite potential misuse, highlighting and ensuring that provisions to safeguard exist within the criminal justice system to identify and deal with false complaints.

3. RIT Foundation v Union of India:¹⁸ In this ongoing case, a bench of the Delhi High Court is presently reviewing a cluster of petitions filed for the criminalisation of spousal rape. The petitioners incorporating the RIT Foundation, All India Democratic Women's Association (AIDWA) along with two individuals argued and filed a petition based on the fact that the exception for marital rape in Section 375 of the Indian Penal Code (IPC) is unconstitutional. They showed contention with the view that this exception prioritises the marriage over the rights of spouses individually within the matrimonial relationship.

Facts of the Case: The general question which was brought forth through RIT Foundation, All India Democratic Women's Association (AIDWA), and two individuals, was whether a husband should face criminal charges for committing rape over his wife if she is above 18 years of age. The central concern, under Justice Rajiv Shakhder, whirls in the direction of retention of the Marital Rape Exception (MRE), specifically underscored in Exception 2 to Section 375 IPC. Advocates also sought the annulment of MRE parallel to the aim of striking down Section 376B which deals with non-consensual sexual intercourse by a separated husband. In addition to this, they focused on invalidating Section 198B of the Code of Criminal Procedure, 1973, which puts restrictions on a court from taking cognizance of an offence under Section 376B IPC barring certain specific conditions that satisfy when a wife files a complaint against her husband.

¹⁸ *RIT Foundation v The Union of India* (2022) Legal Eagle (Del) 310

Issues

- 1. Government Concerns:** The government's concerns were raised regarding 'Social disharmony' and potential loss to family systems rooted in the criminalization of marital rape.
- 2. Consideration of Article 14:** Acquiring whether the differentiation between actions within a Matrimonial relationship and those outside of it constitutes a valid 'intelligible differentia' under Article 14 of the Constitution.
- 3. Necessity of 'Rape' Label:** Examining carefully the need to classify acts within a matrimonial relationship as the severe offence of 'Rape' and questioning if hard punishment should apply in such cases.
- 4. Charging with 'Attempted Rape':** Exploring the probability of charging someone with 'attempted rape' against their spouse under Section 511 of the Indian Penal Code (IPC).
- 5. Evidence of 'Attempt' in Consensual Relationship:** Inspecting how evidence of an 'attempt' would be contemplated in a consensual sexual relationship.
- 6. Impact of Striking Down 'Marriage Exception':** Considering whether setting aside the 'marriage exception' would entail defining the new offence and reevaluating what could be sexual acts or behaviours which could fall within the scope of 'marital rape'.

Disagreements of this Case

- 1. Preserving Marital Rape Exception Argument:** One of the contentions was the belief that criminalizing marital rape could damage the concept of marriage. Previously, Chief Justice Dipak Mishra argued against the criminalization of marital rape, fearing it would lead to family disputes and will disrupt traditional values.
- 2. Husband's Sexual Control Argument:** Assertion that a woman surrenders continuous sexual consent upon marriage. Complications in concluding the validity of marital rape allegations because of the inherent sexual nature of marriage.

3. Potential Misuse of the Law: Another contention was that women may misuse marital rape laws. Discrepant with other sexual offences where no exemption exists for marital relationships.

4. Exception similar to Patriarchal belief: The exception of marital rape had an indistinguishable patriarchal belief: that in a marriage a woman's right to personal and sexual independence, in violation of her body and human dignity capitulate. It was believed that her husband is her sexual master and he has a right to rape her and the laws legally protect him like a blanket.

5. Violation of Constitutional Rights: The contention is that the marital rape exception violates Article 21, the right to live with human dignity under the Constitution of India. Supreme Court cases highlight the right to sexual privacy and autonomy. Parallel to Article - 21 of the Constitution of India, the marital rape exception violates Article 14 of the Constitution as well as crafting unequal protection under criminal legislation for married and unmarried women.

6. International Perspective: Reference to the UN Convention on Eliminating All Forms of Discrimination Against Women (CEDAW) whose signatory was India targets the problem of discrimination against women. Both Kerala High Court and Delhi High Court emphasised that individuals have the right to bodily integrity and mental integrity and have the right for saying no that is to say if there is no consent for sexual intercourse in a marriage it will amount to rape.

Judicial Opinions: Judicial opinions from distinct cases focus attention on the fact that both men and women in marriages have the right to say no.¹⁹ Even in the case of Justice K.S. Puttaswamy v Union of India, it was held that the right to make independent sexual decisions is envisaged in the right to privacy. Along with this in the case of Bodhisattwa Gautam v Subhra Chakraborty, it was highlighted that the exception of rape in marriage violates the spouse's entitlement to live with human dignity.

Findings: Through the observation of Justice Arjit Pasayat, he noted that just like a murderer wipes out the bodily presence of the victim, a rapist damages and destroys the soul of a vulnerable female. Also, the Justice Verma Committee highlights the Nirbhaya gang rape case

¹⁹ *Justice K.S. Puttaswamy (Retd.) & Anr v Union of India* (2019) 1 SCC 1

for criminalizing marital rape. Parallel to all these findings with allusion to the case of the European Commission of Human Rights in *C.R. V U.K*, it was stated that A rapist remains a rapist regardless of his relationship with his victim.

SUPPORT SYSTEMS AND SUGGESTIONS AIMING TO DEAL WITH THE ISSUE OF MARITAL RAPE

With a comprehensive understanding of the issue of marital rape, there comes various ways to deal with this alarming subject matter. By fostering aid to the victims of marital rape, these support systems underscore to highlight that how judicial involvement, legislative amendments, awareness campaigns, counselling services, shelters and, advocacy groups along with India's involvement with international Conventions helps to assist the survivors of marital rape to attain the justice they deserve. Let us dive into these support systems in depth:

1. Judicial Involvement: Courts have been playing an indispensable role in confronting marital rape through multiple landmark judgments by acknowledging the violation of fundamental rights and human dignity. Judicial pronouncements have made the state to take obligatory actions to safeguard and abet survivors, marking a legal modification in the legal discourse on marital rape.

2. Legislative Decree: The Indian Parliament has been presented with the bills proposed for legislative changes addressing the issue of marital rape. These bills have advocated the criminalization of marital rape along with the elimination of exceptions present in Section 375 of the Indian Penal Code. The major aim of these amendments is to bring forth protection laws for the survivors and victims of marital rape.

3. Awareness Campaigns: Awareness Campaigns are another supporting factor led by social rights activists, civil society organizations, and advocacy groups which have been working to ignite a spark of marital rape discussions in public. These campaigns culminate to identify major challenges based on biased societal norms and to make people aware of the rampancy and the results of marital rape.

4. Role of Advocates in Addressing the Issue of Marital Rape: The advocates have been working for addressing the issue of marital rape through legal representations. These advocates assist the victims of marital rape with multiple attempts like filing complaints on their behalf and participating in public discussions and policy-making strategies which contribute to developing supportive surrounding for the victims of marital rape.

5. Participation in International Agreements and Treaties: India has been involved in multiple global agreements and treaties focusing on the annihilation of violence over women, and fence within marital rape. Multifarious strategies have been adopted to harmonize local laws and policies within the boundaries of these global instruments, professing the imperative to treat marital rape as a breach of human rights. Using these legal ventures, India is progressively addressing and confronting the issue of marital rape.

6. Educational Programs: Integrated educational programs in schools, colleges and communities to promote the idea of consent, healthy relationships, and gender equality from a very early age.

7. Training for Law Enforcement: Ensuring specialized training for law implementing personnel to perceptively handle cases of marital rape, ensuring proper investigation and legal proceedings.

8. Engagement of Media: Media has been playing a crucial role in addressing multiple societal issues through reporting. Into and out of the reporting of media on issues related to marital rape to reduce stigma, raise awareness, and promote constructive public discussion.

9. Engagement of Community: Foster community dialogues aim to challenge enormously ingrained cultural norms that promote the existence of marital rape, uplifting open discussions and promoting societal change.

CONCLUSION

In conclusion, marital rape has emerged as one of the major issues within the institution of marriage. Due to the distinct ideologies of societal members, their perception is quite

challenging for the criminalizing spousal rape as they believe that there is a presumption of consent within a marriage and they deal with the fact that marriage is not just a legally binding relationship rather they think that marriage involves more of personal sexual activities as well. Thus, they focused on the part that marriage involves presumed implied consent for the establishment of a sexual relationship between the husband and wife. Yet, since consent in marital rape is often not involved it becomes difficult for victims of marital rape to deal with such offences against them. The cases discussed in this study illustrate the alarming prevalence of marital rape crime and ensure how this offence has been violating multiple human rights, infringing upon individuals' rights to privacy, dignity, and mental health. This calls for immediate action to safeguard these rights and protect individuals from falling victim to marital rape abuses. To combat this problem effectively, it is imperative to explore and implement solutions that address the root causes of marital rape crimes. This includes strengthening legal frameworks to prosecute perpetrators, enhancing legal ideas for protecting and mitigating the offence of marital rape promoting advocacy groups and awareness programs to educate the public about the issue of marital rape or spousal rape and fostering international agreements and treaties. Furthermore, just considering the matter of marital rape is not enough as it becomes essential to explore distinct approaches and collaborations across various sectors of society for awareness of such offences and to develop holistic and effective solutions. By prioritising the protection of fundamental human rights and adopting a proactive and collaborative approach, we can work towards mitigating such serious offences, creating a safer environment for all victims of marital rape.