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Penalising the Crime against Women Behind Closed Doors: An Effort towards Eradication of Archaic Law Impacting Performance of Women

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They say that there is always a woman behind a successful man, when we talk about a woman, for her to be at the forefront and become successful, it is not only the support of the man behind that is required, but also, we need to ensure her protection from the man behind. While we discuss the eminent need for more robust policies as well as laws in various fields, including entrepreneurship, finance, sports, politics, education, technology, entertainment, and journalism, to ensure women receive the opportunities and protections they deserve, what certainly cannot be overlooked is the appropriate protection of women in their very homes, as, it is an unsaid norm that for a person to flourish outside, their needs to be a healthy environment inside the home. This paper analyses the existing issue of marital rape in Indian society and the application of the II exceptions of section 375 of IPC[1] on even unnatural sex enshrined under section 377 of IPC[2], as has been interpreted in a few judgements of the High Court and how such an application of the exception to unnatural offence, as well as marital rape itself, cannot stand the test of constitutionality. In the end, the paper goes on to provide legal interpretations and understanding of the existing law and how modification in the same can aid the resolution of the issues highlighted in this paper. The author concludes with the imperativeness of the protection of women within their homes for encouraging them, by removing any hurdles in their way, to perform well in the fields outside their homes and be at the forefront, taking centre stage. Well, just like other fields, even the household is a performing platform for women

[1] Indian Penal Code 1860, s 375
[2] Indian Penal Code 1860, s 377

wherefore otherwise also, it is of utmost importance to protect the women in their own homes alongside the workplaces or outside their homes. This paper discusses that the archaic theories and approach of law, considering the conservative sects of society, is the leading force behind exception II to section 375 of the IPC in part II. Part III of the paper discusses the application of the same on unnatural offences under section 377 of the IPC, further part IV discusses how this exception cannot sustain the challenge of constitutionality and the similar the case is with the newly enacted Bhartiya Nyaya Sanhita 2023 and lastly, the V part of the paper provides for a mechanism to eradicate the exception of marital rape and way forward.

Keywords: *gender justice, marital rape, equality, privacy, right to life, personal liberty.*

INTRODUCTION

Quantitative research was conducted by the National Institute of Health to analyze the impact of Domestic Violence on workers and workplaces, wherein the result tremendously demonstrated that more than a third of respondents reported experiencing Domestic Violence; among them, more than a third reported that Domestic Violence affected their ability to get to work, and more than half reported that it continued at or near work. Most reported that Domestic Violence negatively affected their performance. Almost all respondents, regardless of Domestic Violence experience, believed that it impacts victims' work lives.[3] Rape can be considered to be one of the most aggravated and heinous forms of Domestic Violence. However, the same is not punishable under the Indian Penal Code 1860[4] [*hereinafter referred to as* '**IPC**']. Section 375 of the IPC[5] defines the offence of rape, whereunder, exception II enshrines the exemption or protection of a husband against the offence of rape, as may be committed, on his own wife. Wherefore, the offence of rape committed by a husband on his own wife is not penalised as per the Indian laws and based on the premise that a victim happens to be the wife of the perpetrator, even the non-consensual sexual intercourse shall not fall under the definition of rape. In some matters, e.g. in the case of minors, the presumption is that they are incapable of

[3] C Nadine Wathen et. al., 'The Impact of Domestic Violence in the Workplace' (2015) 57(7) Journal of Occupational and Environmental Medicine <https://doi.org/10.1097/JOM.0000000000000499> accessed 30 May 2024

[4] Indian Penal Code 1860

[5] Indian Penal Code 1860, s 375

giving consent, and hence, the consent becomes immaterial owing to such a presumption of law.[6]

There are two major limbs that have been provided to support the exception so carved out against such a heinous offence; one happens to be **theories of coverture and implied consent,** and the other major limb talks about the approach of law considering the conservative sects of society, both major limbs are discussed at length in II part of this paper. Recently, this exception II appears to have been interpreted to cover even the unnatural offences as penalised as per section 377 of the IPC,[7] wherefore, the husband has been interpreted to be immune to committing unnatural offence/carnal intercourse/anal sex with his wife in the absence or lack of her consent. The basis for carving out such an exception for one of the most heinous offences against women is multifold. However, the same cannot be sustained in the light of contemporary developments. Further, an extension of the application of this exception to the unnatural offences defined is a hurdle in the progressive path of law and society.

HISTORY AND THE BASIS OF SUPPORTING THE EXCEPTION OF MARITAL RAPE

'A female slave has an admitted right and is considered under a moral obligation to refuse her master the last familiarity. Not so the wife. However brutal a tyrant she may, unfortunately, be chained to… he can claim from her and enforce the lowest degradation of human being, that of being made the instrument of an animal function contrary to her inclinations'[8].

The preceding set of lines throws light on the pathetic condition of the wife in light of the marital rape exception provided under the various legal systems, including the Indian legal jurisprudence. To begin with the understanding of the theories and reasoning behind the inculcation of such an exception, we must first briefly look at the current legal position and text in the IPC, for the same, the exceptions under section 375 of the IPC[9] are reiterated hereunder:

"S. *375.*

[6] Protection of Children from Sexual Offences Act 2012, s 3
[7] Indian Penal Code 1860, s 377
[8] John Stuart Mill, *The Subjection of Women* (first published 1869, Oxford University Press 2007)
[9] Indian Penal Code 1860, s 375

Exception I. – A medical procedure or intervention shall not constitute rape.

Exception 2. – Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape".[10]

It is pertinent herein to mention that, earlier, the definition of rape only contained assault by way of pe-no-vaginal sexual intercourse, the paradigm shifts towards the expansive inclusion of other forms of sexual assaults apart from pe-no-vaginal sexual assault has been brought within the bound of this definition of rape only after the amendment bill of 2013 was passed. A bare reading of the provision clarifies that an act of the nature prescribed committed on a woman by a man will be rape provided that any of the seven conditions are satisfied, at the end of the provision, two exceptions have been provided, exception one culminates the way for medical procedures and make them fall out of the purview of rape, the second exception is the marital rape exception whereby, on the basis of the marital status of a woman, she cannot claim to have been raped despite facing non-consensual sexual assault by her own husband. What could be the possible legislative intent or the reasoning behind creating such a distinct exception? There are two major limbs supporting and forming the basis of the marital rape exception, which are discussed hereinafter-

THEORIES SUPPORTING MARITAL RAPE EXCEPTION FROM THE COMMON LAW

There is a twin theory as per the legal history texts, which formed the very basis of the marital rape exception, i.e. the theory of coverture and implied consent.[11] The premise of the doctrine of coverture comes from the point where marriage is a union of husband and wife, both of them merge into one, and the identity, especially legal identity, of the wife is, therefore, subsumed into that of the husband, and they become one individual in the eyes of the law.[12] The basis of the aforementioned doctrine comes from the premise that women were considered to be the

[10] *Ibid*
[11] Rebecca M Ryan, 'The Sex Right: A Legal History of the Marital Rape Exemption' (1995) 20(04) Law and Social Inquiry <www.jstor.org/stable/828736> accessed 06 May 2024
[12] *Ibid*

'property' or 'chattel' of men,[1314] whereafter, post as well as pre-marriage, the women were to be considered as the property belonging to the dominant male of her immediate family, i.e. her husband or her father. Women were considered to be in constant need of protection and were considered like children or infants who were neither allowed to execute contracts nor to hold any properties.[15] On the other hand, the theory of implied consent, supported by the theory of coverture, lies on the premise that the woman at the time of marriage gives absolute consent to her husband, i.e. 'by way of their mutual matrimonial consent, the wife has given up herself in this kind to the husband'.[16] This theory is based on the primary consideration where the woman marrying the man enters into the contract of marriage with him and gives her irrevocable consent against the protection and general well-being provided to her by the husband.[17]

Both the aforementioned theories were founded more than a centennial ago, during the times when women had no autonomy in society, no autonomy on their bodies, nor any rights attached to their persona. The rape laws initially seem to have been included in the form of protection of one man's property from another man and not for the protection of the dignity of the victim. After hundreds of years, the social dynamics have changed. Women have gained autonomy in various terms, from running empires/businesses to holding equal rights during succession in the ancestral property, as reiterated recently by the Hon'ble Apex Court,[18] women have come a long way and are outperforming even other genders in varied fields, creating and holding their distinct identity, individuality and status despite being a daughter to someone or a wife to someone. Therefore, the etymological and theoretical basis for carving out such exceptions has become outdated with the current socio-legal status of women. Another reason for the outdating of the social contract theory is that it relates to the provision of bodily autonomy to the husband against the general wellbeing and protection of the wife, again putting women into a chattel-

[13] Lalenya Weintraub Siegel, 'The Marital Rape Exemption: Evolution to Extinction' (1995) 43(2) Cleveland State Law <https://engagedscholarship.csuohio.edu/clevstlrev/vol43/iss2/7/> accessed 07 May 2024
[14] Jessica Klarfeld, 'A Striking Disconnect: Marital Rape Law's Failure to Keep Up With Domestic Violence' (2011) 48 American Criminal Law Review <https://heinonline.org/HOL/LandingPage?handle=hein.journals/amcrimlr48&div=52&id=&page=> accessed 06 May 2024
[15] Jill Elaine Hasday, 'Contest and Consent: A Legal History of Marital Rape' (2000) 88(5) California Law Review <https://doi.org/10.2307/3481263> accessed 07 May 2024
[16] Sir Matthew Hale, *The History of The Pleas of The Crown* (Oxford University Press 2007)
[17] Carole Pateman, *The sexual contract* (Stanford University Press 1988)
[18] *Vineeta Sharma v Rakesh Sharma* (2020) 9 SCC 1

like state, condemning the very idea of marriage to be union of two equals wherefore, such consideration totally disturbs the gender justice graph in the current state of society.

APPROACH OF LAW IN ACCORDANCE WITH CONSERVATIVE SECTS OF THE SOCIETY

The second limb of the opposing arguments favouring the exception of marital rape is the perception of the institution of marriage to be a sacrament or sacred union which cannot be put through the vice of laws. When the questions were posed to the central government regarding the validity of the marital rape exception by the Delhi High Court, the primary response was that the criminalisation of marital rape would destabilise the institution of marriage, and the same shall face the outrage of society.[19] The entire basis of continuation of the exception II appears to be the orthodox understanding of the society. The argument which is often advanced is that religious laws/family laws govern marriages in India, and their age-old understanding might be affected by criminalising marital rape in India.[20]

However, the aforementioned presumptions are flawed, and the reasoning is twofold. One, the religion-based argument appears to be prima facie weak. It can be understood by considering the example of Nepal, which is a Hindu Majority Country. Nepal has already recognised the offence of marital rape, despite the beliefs pertaining to marriage being sacrosanct and sacred. The Supreme Court of Nepal held that 'the marital rape immunity was unconstitutional, and violated Nepal's obligations under international human rights instruments and in light of the changing norms and values in criminal law, religious practices and customs have grown over the course of time as per laws, despite religious and traditional beliefs, the law, especially that regulating familial affairs, had consistently developed to align with changes in social, economic and cultural contexts. The traditional religious and cultural narrative of marriage adopted by the Indian government is not an adequate justification for non-recognition of marital rape as a

[19] Aarefa Johari, 'As Government Refuses to Criminalise Marital Rape, Laws on Such Assaults Remain a Muddle' *The Scroll* (30 April 2015) <https://scroll.in/article/724239/as-government-refuses-to-criminalise-marital-rape-laws-on-such-assaults-remain-a-muddle> accessed 24 May 2024

[20] Saptarshi Mandal, 'The Impossibility of Marital Rape' (2014) 29(81) Australian Feminist Studies <http://dx.doi.org/10.1080/08164649.2014.958124> accessed 15 May 2024

crime.' Wherefore, the assumption regarding religious outrage does not hold any statistical support to be considered as a solid predicament in the eradication of the marital rape exception.

The second limb for consideration against the averment related to outrage in the conservative secs of society cannot stand tall. It is a well-established principle that law and society need to progress together. For a progressive society, there needs to be a progressive legal system. It is further pertinent herein to note that, at the time of the decriminalisation of consensual sexual acts between same-sex persons or the LGBTQ+ community[21] or decriminalisation of adultery,[22] the considerations before the Hon'ble Apex Court were put forth relating to the impact of such decriminalisation on the conservative sects of the society. Despite that, the court provided well-elaborated reasoning and decriminalised the aforesaid acts, providing a progressive pathway for society to broaden its horizon. The marital rape exception ought to have become extinct ever since the gender-based roles started to vanish from the institution of marriage. In today's world, both spouses work, jointly look after the household and have shared responsibilities. Nowhere do the gender-based roles justify the giving up of the bodily autonomy of the women, the dissolution of gender-based roles and induction of gender equality in the institution of marriage further warrant criminalisation of any sexual act in the absence of consent of both the husband and the wife. Another limb endorsing the view of the society is that Marriage is a private affair, and there pre-exists the notion regarding 'reinforcement of the classical public-private divide'.[23] It would not be out of place to state that the third limb is condemnable on the very premise that other lesser severe offences committed within the family or in the garb of the institution of marriage are put to scrutiny of the criminal justice system for of domestic violence, wherefore, there remains no justification to wilfully overlook this heinous and aggravated offence committed against the persona of the woman by her husband. Speaking of not overlooking or exempting the marital rape committed by the husband on his wife from the vices of law, what is far more shocking is the application or extension of this exemption to cover the unnatural

[21] *Navtej Singh Johar v Union of India* (2018) 10 SCC 1
[22] *Joseph Shine v Union of India* (2018) SCC On Line SC 1676
[23] Frances Olsen, 'Constitutional Law: Feminist Critiques of the Public/Private Distinction' (1990) 10 Constitutional Commentary <https://scholarship.law.umn.edu/cgi/viewcontent.cgi?params=/context/concomm/article/1347/&path_info=10_02_Symposium_Olsen.pdf> accessed 15 May 2024

offences, as opposed to the conventional pe-no-vaginal sex, committed by the husband in the absence of the consent of the wife. The next part of the paper discusses the aforesaid extension.

EXEMPTION OF UNNATURAL OFFENCES COMMITTED WITH WIFE

The exception of marital rape has been challenged before the High Courts as well as the Hon'ble Apex Court of India on the grounds of violation of the fundamental rights of women and for being a challenge to equality and gender justice. The aforementioned challenges resulted in the reading down of the exception by the Hon'ble Apex Court and increasing the age of the wife to the majority[24] to fall under the exception of marital rape. The challenge to this exemption from marital rape is still in the process of being contemplated, as the Supreme Court has sought a response from the central government on the inculcation of this exception in the newly enacted *Bhartiya Nyaya Sanhita'* 2023[25] as well.

This exception is now being interpreted to be applied to even unnatural offences/carnal/anal intercourse by the husband with his wife without her consent, in light of amendments brought in the IPC by the Amendment Act of 2013. Prior to the amendment, Section 375 of the IPC[26] only included the peno-vaginal form of sexual assault, and all other forms were covered under Section 377 of the IPC under the category of unnatural offences. Section 375 IPC applied the exception of marital rape, whereas there was no such exception for offences falling under the purview of section 377.

Recently, the Madhya Pradesh High Court has quashed the FIRs against the husband in a few of the cases,[27] exercising its inherent power enshrined under section 482 of the Criminal Procedure Code' 1973[28]. In one of the judgements, the court considered that post-amendment of 2013, the husband is immune under the marital rape exception even for unnatural offences.[29] The court went on to discuss the extension of the marital rape exception to the unnatural offences, owing to the Apex Court's Verdict on the decriminalisation of the non-peno-vaginal

[24] *Independent Thought v Union of India & Anr* 2017 (10) SCC 800
[25] Bhartiya Nyaya Sanhita 2023
[26] Indian Penal Code 1860, s 375
[27] *Umang Singhar v State of M.P.* (2023) SCC OnLine MP 3221
[28] Criminal Procedure Code 1973, s 482
[29] *Manish Sahu v State of MP* (2024) SCC OnLine MP 2603

consensual sexual activity between any two consenting adults.[30] This precedent is now being followed and is resulting in the quashing of the cases in all benches of the Hon'ble High Court of MP, raising concern regarding the progressive role that the law is expected to play for the progressive movement in society. Hon'ble Apex Court solely emphasized the part of Consent to be of utmost importance while holding that consensual sexual acts other than peno-vaginal intercourse cannot be criminalized as it will take away the individual's autonomy over their body.[31] Nowhere did the Hon'ble Apex Court warrant any application of the exception of marital rape, even where the wife has been subjected to unnatural sex without her consent. Had the legislature intended to protect the institution of marriage even against the vice of unnatural offences, there could have been an exception to that effect provided with section 377 IPC as well or even otherwise, had the legislative intent been of protection of husband against unnatural offence committed on the persona of wife; there could have been repeal to that effect in the light of amendment Act of 2013.

The interpretation of this effect is regressive in nature and ought not to be sustained in light of the gross violation of fundamental rights and is antithetical to equality and gender justice. By the virtue of the very fact that the couple is married, it would be a natural presumption that both are heterosexual in nature, the reasons given for justifying marital rape cannot suffice to justify the extension of the exception to the commission of unnatural sexual offences because even in the light of school of thought where the purpose of marriage is reproduction, the implied consent for being subjected to unnatural offences cannot be assumed on part of the wife. The best exit from the archaic theories of common law was to eradicate the exception of marital rape from the newly enacted *Bhartiya Nyaya Sanhita'* 2023, which defines rape under section 63[32]. However, the opportunity of bringing this historic reform has been missed and the entire battle to bring the much-needed reform will have to be fought in the court of law. The next part of this paper demonstrates how exception II, let alone its application to unnatural offences, cannot stand the test of constitutionality.

[30] *Shashank Harsh v State of M.P.* (2023) SCC OnLine MP 5042
[31] *Navtej Singh Johar v Union of India* (2018) 10 SCC 1
[32] Bhartiya Nyaya Sanhita 2023, s 63

TESTING THE MARITAL RAPE EXCEPTION AGAINST FUNDAMENTAL RIGHTS PROVIDED IN THE CONSTITUTION

The marital rape exception cannot sustain the test of constitutionality, as it is violative of the golden triangle of the fundamental rights enshrined in part III of the constitution of India. The violations of fundamental rights provided under articles 14, 19 and 21 of the constitution[33] by the marital rape exception are discussed hereunder:

Exemption from penalizing marital rape and unnatural offence violates the right to equality of married women:

To pass the test of reasonable classification under Art. 14, 'the classification should be based on an intelligible differentia'[34] and 'the differentia should have a reasonable nexus with the object sought to be achieved by the law in question.'[35] For the twin test to justify equality laid down under Article 14 to be satisfied, the intelligible differentia must be rational[36] and should be found on the characteristics that resonate with the class of people falling within and must not have any common characteristics with those who are left out.[37]

Carving out the difference between rape victims solely on the basis of their marital status with the perpetrator has no intelligible differentia or rationale behind the creation of such class within the class as all the rape victim stands on a similar footing,[38] all the rapist remains on the similar footing,[39] the hurt and trauma caused to a woman and its adverse impact on her dignity cannot be considered any less when she is a wife,[40] loss caused to her mental state and sense of self-esteem stands on exactly the same footing[41] or even higher as in case of marital rape the perpetrator is known to her. Furthermore, the object of enactment of this law ought to be the

[33] Constitution of India 1950
[34] *Naresh Kumar v Union of India* (2004) 4 SCC 540
[35] *Budhan v State of Bihar* (1955) 1 SCR 1045
[36] *Union of India v Indian Charge Chrome* (1999) 7 SCC 314
[37] Udai Raj Rai, *Fundamental Rights and Their Enforcement* (PHI Learning Pvt. Ltd. 2011)
[38] *Independent Thought v Union of India* (2017) 10 SCC 800
[39] PNS Rumney, 'When rape isn't rape: court of appeal sentencing practice in cases of marital and relationship rape' (1999) 19(2) Oxford Journal of Legal Studies <http://dx.doi.org/10.1093/ojls/19.2.243> accessed 15 May 2024
[40] *Kaushal Kishore v State of Uttar Pradesh* (2016) 9 SCC 395
[41] *State of Madhya Pradesh v Munna Choubey* (2005) 2 SCC 710

protection of rape victims,[42] and not the protection of the respective property of men, i.e. their wives or daughters from other men,[43] wherefore, even in the light of the object sought to be achieved such a distinction forms no reasonable nexus and hence, is arbitrary and antithetical to equality.[44] The Hon'ble Apex Court has held that 'classification based on the marital status of women is arbitrary and cannot be sustained in the eyes of law'.[45] Wherefore, in the present context where the marital rape exception is being given effect, based on archaic and outdated assumptions and theories like the doctrine of coverture whereby no woman held a legal identity of her own, it becomes unsustainable in the eyes of the fundamental right to equality and even otherwise, cannot stand in the modern era of equality and gender justice.

Exemption from penalizing marital rape and unnatural offence violates the right to freedom of speech and expression of the married women:

Article 19(1)(a)[46] recognizes and guarantees the fundamental right to freedom of speech and expression to every citizen of India. This fundamental right also includes the negative right.[47] 'The right to the freedom of an individual to engage in sexual activity is an expression of one's sexual preference.'[48] 'The freedom of an individual to decide on one's own consensual adult relationships, without the interference of the State, is a fundamental human right.'[49] Every woman, being a citizen of our country, holds this fundamental right irrespective of her marital status, nowhere does the constitution restrain any person from enjoying the freedom of speech and expression on the basis of their marital status. As per Article 19(2)[50], only a reasonable restriction can be put to restrict the freedom of speech and expression. Marital status cannot be classified as a reasonable restriction to curtail the freedom of speech and expression of a woman. 'Any restriction imposed on the exercise of the right under Art. 19(1)(a) would be unconstitutional if it does not fall under the four corners of reasonable restriction under Art.

[42] *R.K. Garg v Union of India* (1981) 4 SCC 675
[43] Ratanlal and Dhirajlal, *Indian Penal Code (Act XLV of 1860)* (32nd edn, LexisNexis 2010)
[44] HM Seervai, *Constitutional Law of India* (4th edn, Universal Law Publishing Co Ltd 2010)
[45] *Samvita Samvedi v Union of India* (1996) 2 SCC 380
[46] Constitution of India 1950, art 19(1)(a)
[47] *Naresh Kumar v Union of India* (2004) 4 SCC 540
[48] *Suresh Kumar Koushal v Naz Foundation* (2014) 1 SCC 1
[49] *Dudgeon v U.K.* [1982] 4 EHRR 149
[50] Constitution of India 1950, art 19(2)

19(2).'[51] Any restriction to be placed on the ground of morality has to pass the test of constitutional morality,[52] for a moment, if we consider that the marital rape exception is provided by restricting the freedom of married women on the basis of public morality or sexual morality for protecting the institution of marriage, the same shall not stand the test of reasonability to classify as a reasonable restriction on the fundamental right to freedom of speech and expression, as it does not satisfy the standards of constitutional morality.[53]

Exception II, protecting men against the offence of rape committed on their wives by themselves, was brought to enforcement in order to protect sexual morality as per Victorian notions,[5455] which considered a wife as a chattel of her husband, and subsequently, the wife could not revoke her consent to sexual intercourse.[56] Hence, the restriction on the freedom of women to express their sexual interests and preferences is inconsistent with the principles of free consent and, thus, cannot be assumed to be protected in the garb of Article 19(2) of the Constitution.

Exemption from penalizing marital rape and unnatural offence violates the right to life and personal liberty:

The life and liberty of an individual are protected with absolute strength, as Article 21 of the Indian Constitution guarantees the fundamental right to life and liberty[57]. The Hon'ble Apex Court has held the right to privacy to be an intrinsic part of Article 21.[58] Furthermore, it is a well-settled proposition that the right to reproductive choice of a married woman and the right to health also form the intrinsic part of the right to life and personal liberty. 'The fundamental right to privacy guarantees an individual the right to retain the integrity of the body,'[59] which is inclusive of the right of an individual/person to preserve her/his/its private space[60] and 'be

[51] *VG. Row v State of Madras* (1952) 1 SCR 597
[52] *Indian Young Lawyers Association v State of Kerala* (2018) SCC OnLine SC 1690
[53] *Ibid*
[54] Elizabeth Pleck, 'Criminal approaches to family violence, 1640-1980' (1989) 11 Crime and Justice <https://www.jstor.org/stable/1147525> accessed 03 June 2024
[55] Margot Finn, 'Women, consumption and coverture in England, c. 1760–1860.' (1996) 39(3) The Historical Journal <https://doi.org/10.1017/S0018246X0002450X> accessed 03 June 2024
[56] *R v Clarence* [1888] 22 Q.B.D. 23
[57] *Maneka Gandhi v Union of India* (1978) 2 SCR 621
[58] *K.S. Puttaswamy v Union of India* (2017) 10 SCC 1
[59] *Pramati Education & Cultural Trust v Union of India* (2014) 8 SCC 1.
[60] *Common Cause v Union of India* (2018) 5 SCC 1

free from physical interference'.[61] Furthermore, self-determination right also forms a part of the right to life and personal liberty,[62] 'which includes the right to sexual self-determination and sexual autonomy that is the freedom to choose sexual activities'.[63] The intimacy between any two persons is a matter of their choice and freedom; a person is free to surrender their bodily autonomy out of their own sweet will.[64] It is an individual's inalienable right to choose their sexual partner and the autonomy to decide freely when and under what circumstances he/she wishes to engage in sexual activity.[65] However, the moment such surrender or engagement into sexual intimacy becomes a mandate of law or is obtained forcefully by an individual, the same becomes violative of the fundamental right to life and personal liberty as it violates an individual's right to privacy as much as it violates his or her right of reproductive choice. Any legislation warranting sexual cohabitation in a marriage, when one of the partners is not willing, amounts to coerced or forced sexual intercourse[66] and, thus, violates the sexual autonomy of that individual, including their right to abstain from reproduction at a certain stage.[67] [68] Lastly, the right to health is a fundamental right under Art. 21.[69] It includes one's inalienable right to have freedom to protect one's sexual and reproductive health and this freedom remains vested in all persons including women, irrespective of their marital status.[70] Wherefore, the exception of marital rape guarding the husband against any forceful sexual act with the wife vis-à-vis not recognising the right of the wife to be protected against such heinous offence is violative of her right to health and fundamental right enshrined under Article 21 of the Constitution. Having demonstrated that the exemption of commission of marital rape and unnatural offences without consent of the wife is violative of fundamental rights provided by the Indian constitution, the

[61] Jonathan Herring and Jesse Wall, 'The Nature and Significance of the Right to Bodily Integrity' (2017) 76(3) Cambridge Law Journal <https://doi.org/10.1017/S0008197317000605> accessed 30 May 2024
[62] *Aruna Ramachandra Shanbaug v Union of India* (2011) 4 SCC 454; *Shampa Singha v State of West Bengal* (2019) SCC OnLine Cal 153
[63] *Santhini v Vijaya Venketesh* (2018) 1 SCC 1
[64] Alexa Koenig et. al., 'The Jurisprudence Of Sexual Violence' (2011) University of California <https://humanrights.berkeley.edu/wp-content/uploads/2018/12/the-jurisprudence-of-sexual-violence-sv-working-paper_0.pdf> accessed 03 June 2024
[65] *Joseph Shine v Union of India* (2018) SCC On Line SC 1676
[66] *Eera v State (Govt. of NCT of Delhi)* (2017) 15 SCC 1335
[67] *Pawan Kumar v State of Himachal Pradesh* (2017) 7 SCC 780
[68] *Hodgson v Minnesota* [1990] 497 US 417
[69] *Ashwani Kumar v Union of India* (2019) 2 SCC 626
[70] *Nimeshbhai Bharatbhai Desai v State of Gujarat* (2018) SCC OnLine Guj 732

next part entails suggestions pertaining to the mechanism for the criminalisation of such heinous offences.

SUGGESTIONS FOR PENALISING THE MARITAL RAPE & COMMISSION OF UNNATURAL OFFENCE AND WAY AHEAD

Justice J.S. Verma Committee report i.e. Report of Committee on Amendments to Criminal Law released in 2013, is the most progressive report to date, warranting crucial changes in the criminal justice system, which included the suggestions regarding scrapping the exception of marital rape from the sexual assault law in the country vis-à-vis penalizing the same. Justice J.S. Verma Committee report suggested not only should the exemption clause of exception II be removed from the text of the offence of rape under section 375 of the IPC, but also it should be explicitly provided that marriage cannot be taken as a defense against the commission of the offence of rape.[71] The true challenge pertaining to penalizing the act of forceful sexual assault of a husband against his wife lies in the degree of evidence that should be accepted in order to prove such an allegation. When we talk about the burden of proof, should there be a presumption of consent and the burden be on the victim to rebut the same or should it be the other way round to assume, like in other cases, that there was a lack of consent and the burden is on the accused husband to discharge and prove that there was consent. Such black and white approach could be difficult to be implemented in its practical sense owing to the nature of spousal relationships, implied consent for cohabitation or consummation of marriage and surrounding factors making this area quite grey for implementing the normal rape laws in this situation. In the author's opinion, a specific mechanism can be devised to ensure that the rape laws cover the act of rape committed by a husband on his own wife, which could be practical enough to equally penalize such acts and at the same time not weak enough to jeopardize the institution of marriage resulting in unnecessary harassment of the husband.

The mechanism may devise the procedure and degree of admissibility of evidence, and the testimony of the wife may be assessed in line with the corroborating evidence like medical evidence, reporting of past instances, and scientific evidence pertaining to the mental and

[71] Justice J.S. Verma Committee, *Report of Committee on Amendments to Criminal Law* (2013)

physical injury inflicted on the wife. It is, however, pertinent herein to state that, merely on the premise that assessment of marital rape cases would be difficult, the same ought not to be kept away from the purview of legal scrutiny and the criminal justice system.

CONCLUSION

The healthy environment for flourishing in the various fields outside begins with the home. Therefore, the protection of married women is a mandate to enforce gender justice and secure the seizure of equal opportunity without any gender bias or hurdles in various fields. This paper discussed regarding marital rape as an exception to the offence of rape as defined under section 375 of the IPC vis-à-vis the cascading effect of its application to the unnatural offence committed by a husband against his wife in the absence of her consent on the equality, personal liberty and freedom of speech and expression of a married woman. This paper further adjudicated the constitutional strength of exception of marital rape by demonstrating the violation of the golden triangle i.e. fundamental rights enshrined under articles 14, 19 and 21 of the Constitution of India. In the end, the paper proposes to build a parallel mechanism with respect to the admissible degree of evidence to determine the cases of marital rape in the criminal justice system in light of the unique nature of the spousal relationship. In the end, the sacrosanct or sacred nature of the institution of marriage cannot suffice to provide immunity to a perpetrator in the garb of the nature of the relationship he has with the victim.

Furthermore, a fair analogy to understand the situation could be drawn from the reservation system: people falling under a particular caste facing caste-based violence have been given empowerment by way of additional reservation, women who have been considered to be the chattel or property of their husbands as per the archaic laws and theories ought to be uplifted, instead of being deprived of their rights in the name of the customary legal system. Furthermore, the archaic theories cannot stand the test of the development of gender justice that is strived to be achieved in the present era. When the survey was conducted on the heterosexual couples in the 22 US cities, only 30% of the women were indulged in anal/unnatural forms of sexual

intercourse.[72] If we were to assume, but not accept, the theory of implied consent in a marital relationship, it is even more difficult to assume that the wife ever consented to non-peno-vaginal intercourse and hence, considering the remaining 70% of the women, extension of marital rape exception to the unnatural offences inflicts even graver violation of the fundamental rights of the married women.

Furthermore, the theory of implied consent in the light of marital contract is concerned, where the wife is projected to be given her bodily autonomy in exchange for protection provided by the husband, the author would like to reiterate the reality of the women in the modern era who are aware of their rights and who can afford to protect themselves as:

"Not a knight, she seeks a sword!"

In the end, where tolerance can be tested against unpopular opinions of society and the court has given liberal interpretation not to penalise the consensual carnal relations between the consenting adults, it is difficult to understand how the unpopular opinion where the wife may not always agree to be subjected to the sexual pleasure of the husband, cannot be tolerated by the society. For real progression and gender justice, it is the attitude along with the laws that need to be changed and altered. However, just because society might not be willing and not completely ready to face the rigours of progressive law, the same cannot warrant the continuation of the curtailment of the fundamental rights of married women. The journey towards equality in various fields would be incomplete until the same begins from the very home the woman resides in, and to ensure such a journey towards equality, the legal mechanism needs to raise its rigours to counter the sexual violence against married women.

Just because something may increase the burden of vicious litigation, just because something would face turmoil in society, is it justified to not unfold the very protection to married women against such heinous crimes instead of building safeguards against the same? Just because?

[72] Kristen L Hess et.al., 'Prevalence and Correlates of Heterosexual Anal Intercourse among Men and Women, 20 U.S. Cities' (2016) 20(12) AIDS and Behavior <www.ncbi.nlm.nih.gov/pmc/articles/PMC4949144/> accessed 05 June 2024