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Criminalisation of Marital Rape: An Analysis of its Constitutionality with reference to Judicial Pronouncements in India

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ABSTRACT

Marital rape is a complicated topic nowadays because it is not a crime in India. Our legal system fails to recognise this severe problem of marital rape. It is a serious issue that our legislative system ignores. Currently, there is no appropriate legislation against marital rape. Despite the Justice Verma Committee's recommendation, various bills for the criminalization of marital rape are lagging behind due to gender inequality and society's mind-set, which doesn't see marital rape as an issue or problem. Further, in Indian culture, marriage is a holy sacrament that requires the wife to give her implied consent for physical intercourse with her husband while they are married. This attitude of Indian society has become the root cause of gender injustice among men and women, and it also never considers marital rape a problem or offence.

The main purpose of this Article is to present a socio-legal analysis of marital rape and the constitutionality of such violence within marriage in Indian jurisprudence. With the help of emerging jurisprudence, this Article highlights, how it is important to criminalise marital rape for the protection of women human rights and for their welfare.

Keywords: *Marital Rape, Implied Consent, Cruelty, Constitutionality.*

I. INTRODUCTION

Marriage is considered a holy sacrament bond between a man and a woman, in which they make a lifelong commitment to each other. However, this bond gets strained if either partner fails to comprehend each other and exerts dominance over their partner's will or consent. Marital Rape is one of the types where the husband dominates his wife's will or consents to having intercourse or a physical relationship. Marital rape refers to rape committed when the perpetrator is the victim's spouse². 'Marital rape' is defined in Black's Law Dictionary, 8th Edition, as "a husband's sexual intercourse with his wife by force or without her consent"³. The term "marital

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² Raveena Rao Kallakuru & Pradyumna Soni, *Criminalisation of Marital Rape in India: Understanding its Constitutionality, Cultural and Legal Impact*, NUJS Law Review, (2018), <http://docs.manupatra.in/newslines/articles/Upload/8787A55C-D93F-4589-8A68-A9A032AF0E.pdf>

³ Ayushi Raghuwanshi, *Marital Rape- A Legalised form of Oppression*. Volume no. IV Issue no. III Indian Journal

rape" describes forced sexual contact between a husband and wife. It is also known as "spousal rape". It is a term used to describe a sexual act that a husband commits against his wife's will or without her consent. In India, marital rape exists *de facto* but not *de jure*.⁴ Marital rape allows the husband to have sexual intercourse with his wife without her consent, and there is an obligation on the part of the wife to surrender herself as per his will or desire. The outcome of a marital rape goes beyond the physical harm, it also causes emotional and psychological harm⁵. Due to the establishment of a male-dominated culture, women are seen as objects after marriage and do not have their own rights. Therefore, any sexual relations between a husband and his wife become the husband's property or turn the wife into his chattel. It has long been believed that women are merely machines made to conceive, raise, and have sex with their husbands whenever they want, regardless of whether they want to do so or not. In Indian Society, wife becomes the personal property of her husband. As per the Doctrine of Curvature, a woman has no personal legal identity after marriage⁶. The National Commission on Women has suggested that "marital sexual intercourse by a man with his own wife without consent should also be considered as sexual assault".⁷

Recently, women who have been raped by their own husbands are coming forward, but our legal system ignores them since the idea of rape in a marriage is not recognised. Due to this, a husband is immune from having non-consensual sex with his own wife under the Indian Penal Code of 1860. The non-recognition of marital rape contributes to the invisibilization of the trauma and the mental, physical, sexual, and reproductive health implications experienced by the survivor⁸. In another words, it goes against the dignity of the woman and also violates her fundamental rights as well as human rights.

II. MARITAL RAPE AND HUMAN RIGHT PRESCRIPTIVE

The perception of marital rape internationally is similar to that in India. If a husband engages in non-consensual intercourse with his own wife, he is not guilty of marital rape and is not subject to punishment under any Penal Code. The Sir Hale theory and the Doctrine of Coverture have

of Law and Legal Research, (June 24, 2022), <https://www.ijlr.com/post/marital-rape-a-legalised-form-of-oppression>

⁴ Saurabh Mishra & Sarvesh Singh, *Marital Rape- Myth, Reality and Need for Criminalization*, ebc-india.com, (2003), <https://www.ebc-india.com/lawyer/articles/645.htm>

⁵ Ibid

⁶ Jis John Sebastian, *Marital Rape*, clearIAS, <https://www.clearias.com/marital-rape/>

⁷ Harshika Mehta, *Marital Rape and Indian Legal Scenario*. Volume no. 4 Issue 3, ISSN 2581-5369, International journal of law Management and Humanities, 756, (2021), file:///C:/Users/Dell/Downloads/Marital-Rape-and-the-Indian-Legal-Scenario.pdf

⁸ Equality Now, https://www.equalitynow.org/news_and_insights/a-ruling-on-marital-rape-in-india-is-coming-up-heres-why-you-should-be-watching-closely/ (last visited June 25, 2022)

an impact on this law of marital exception. Because of the patriarchal mind-set, once a woman marries, she perpetually consents to her husband's sex interactions. The reason behind marital exception in the Penal Code is Implied Consent Theory, or Hale's Theory (1736), which states that a husband cannot be guilty of raping his legitimate wife as long as the wife provides her implied consent during marriage, which she cannot retract.⁹ There is another theory Doctrine of Coverture, which supported the Implied Consent Theory, stated that the legal rights of a woman was submitted by her husband's upon marriage. The belief that the wife and the husband are the same person arises from these principles or doctrines.¹⁰ Up until the 19th century feminist movement, these two concepts were commonly accepted in England. The basis of the feminist movement provides them with the financial and legal rights essential for their empowerment¹¹. Therefore, the protection and welfare of women become one of the objectives of the Universal Bill of Declaration of Human Rights (UDHR). The International Bill for Human Rights (also known as UDHR), which includes the International Covenant on Civil and Political Rights (ICCPR), is a multilateral treaty, adopted by the United Nations General Assembly on December 16, 1966, and came into force on March 23, 1976. The treaty commits its parties to respect the civil and political rights of individuals, including freedom of religion, the right to life, freedom of assembly, electoral rights, due process, and a fair trial.

1. According to Article 26 of ICCPR¹², mandates that domestic law should ensure that all citizens, regardless of their status or race, are treated equally. India violates the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights by granting marital immunity. Due to the discriminatory nature of exception 2 to Article 376¹³, India also violates Article 1¹⁴ of the Universal Declaration of Human Rights. In my opinion, India signed these conventions, and India should take a step ahead to end marital immunity for the protection and dignity of women. The marital immunity in the IPC goes against the recommendation of the CEDAW.

⁹ Ayantika Bhattacharya, *Marital Rape Laws: An International Overview*, Legal-Service India, (Jun. 25, 2023, 11.30 AM), <https://www.legalserviceindia.com/legal/article-7872-marital-rape-laws-an-international-overview.html>

¹⁰ Ibid

¹¹ Prime Legal, *Marital Rape in India-Can it be Criminalised?* (Jun. 25, 2023. 1.30 PM), <https://primelegal.in/2022/05/31/marital-rape-in-india-can-it-be-criminalized/>

¹²International Covenant on Civil and Political Rights (1976), art. 26, All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

¹³ Supra Note at 4

¹⁴ Universal Declaration of Human Rights (10 Dec, 1948), Article 1, All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Further, the UN General Assembly adopted the Convention on the Elimination of Discrimination Against Women in 1979 for the protection and welfare of women. It is also known as the International Bill for the Rights of Women. As per Article 1 of the United Nations Committee on the Elimination of Discrimination against Women, "Discrimination against women¹⁵" in which discrimination includes gender-based violence. Any violence against a woman, includes acts that inflict physical, mental, or sexual harm or suffering, threats of such acts, coercion, and other deprivations of liberty. India signed the Committee on Elimination of Discrimination against women (CEDAW) in 1980, and ratified it on July 9, 1993 with certain reservation¹⁶. The CEDAW Committee considered the combined fourth and fifth periodic reports of India on July 2, 2014, during its 58th session¹⁷. India is a signatory of the United Nations Convention on the Elimination of All Forms of Discrimination against Women" (CEDAW), which considers that any discrimination against women violates the principle of equal rights and the human dignity of women. Furthermore, the Human Rights Commission, at its fifty-first session, in its resolution no. 1995/85 of 8-3-1995 entitled "The elimination of violence against women", recommended the criminalization of marital rape.¹⁸ Although the protection of women's dignity is a fundamental duty under the Constitution, the duty of every citizen is "to abandon derogatory practises for the dignity of women".¹⁹

III. MARITAL RAPE IN INDIA

The Indian Penal Code of 1860 defines "Rape²⁰" as including all sorts of non-consensual sexual relationships with a woman, exempts such conduct when a husband engages in it with his own wife.²¹ The word "Rape" is derived from the Latin word "Rapio" which means "to seizure²²". Rape is defined under Section 375 of the Indian Penal Code of 1860. The definition of rape is widened after the famous Nirbhaya case²³ (Delhi Rape Case) which happened on December 16, 2012, which introduced the Criminal Law Amendment Act 2013. This Amendment²⁴ raises the

¹⁵ UN Women, General Recommendation 19 of United Nation Committee on Elimination of Discrimination against women, <https://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm> (June 27, 2023)

¹⁶ Ibid

¹⁷ Vaibhavi Patel, *Marital Rape in India: An International Human Rights Law Violation*, Berkeley Journal of International laws, (Jan. 10, 2021), <https://www.berkeleyjournalofinternationallaw.com/post/marital-rape-in-india-an-international-human-rights-law-violation>

¹⁸ Ibid

¹⁹ The Constitution of India, art. 51A, clause e.

²⁰ Indian Penal Code 1860, Act no. 45 of 1860, sec. 375.

²¹ Indian Penal Code 1860, Act no. 45 of 1860, sec. 375 explanation 2

²² Harshika Mehta, supra note at 7

²³ Mukesh and others v. State of NCT of Delhi (2017) 6 SCC 1

²⁴ Yamini, *Criminal Law (Amendment) Act, 2013: Sexual Offence*, Academika, (Apr.8, 2015), <https://www.lawctopus.com/academike/criminal-law-amendment/>

penalty for rape in India from seven years to ten, or even the death penalty or twenty years in prison, in cases when the victim dies as a result of the rape or enters a vegetative state. After Nirbhaya case, Justice J.S. Verma Committee was established on December 23, 2012. It was headed by Justice J.S. Verma as the committee's chairman, and Justice Leila Seth, a former judge of the Delhi High Court, and Gopal Subramaniam, a former solicitor general of India, was also members²⁵. It suggested criminal law amendments in order to expedite trials and strengthen penalties for offenders convicted of perpetrating sexual assault against women. It is also recommended that the exception of rape (marital rape) be removed by stating that marriage should not be considered irrevocable consent for sexual relationships. This is a progressive step to safeguard the rights of women in India. But this recommendation was rejected on the grounds that criminalising marital rape would destabilise the institution of marriage as it gives implied consent for sexual intercourse by the husband and may be misused. The patriarchal society makes the assumption that the act of solemnising a marriage entails granting approval for the husband to violate the woman's privacy of body. In India, there is no specific statute against marital rape. Therefore, such sexual violence against married women is dealt with under the Protection of Women from Domestic Violence Act, 2005. This Act does not consider marital rape a crime, but rather a form of "domestic violence." According to the definition of "domestic violence" also includes "sexual abuse" which states "any conduct of a sexual nature that abuses, humiliates, degrades, or otherwise violates the dignity of woman²⁶". It is pertinent to mention that this Act is not effectively protecting women from this kind of offence as it only provides relief of a civil nature, like protection orders, custody orders, compensation orders, monetary orders, and residence orders. The another remedies for spousal rape victims are filing divorce on "ground of cruelty"²⁷. As stated in the Kerala High Court²⁸ Marital rape is a ground for divorce in cases of cruelty under Section 498A of the IPC. In this case, the husband (appellant) and wife (respondent) had an arranged marriage and had two children from this wedlock. The husband was a qualified medical doctor at the time of the marriage, but he never practised as a doctor, and engaged in real estate business and construction. But he suffered losses in that business. Due to this financial loss, the appellant made it a habit to borrow money from his father-in-law and start harassing the respondent physically and mentally. The respondent had deposed that even during her pregnancy, the appellant abused her and committed forceful sex

²⁵ Justice Verma Committee Report, <https://prsindia.org/policy/report-summaries/justice-verma-committee-report-summary> (Jun. 27, 2023)

²⁶ The Protection of Women from Sexual Offence, sec. 3, cl. d, sub cl. (ii), No. 43, Acts of Parliament, 2005 (India)

²⁷ Indian Penal Code 1860, Act no. 45 of 1860, sec. 498A

²⁸ Kamini Sharma, [Marital Rape] Ker HC | Is marital rape a form of cruelty? Can it be a ground for divorce? HC examines, *SCC Blog* (August 10, 2021), <https://www.sconline.com/blog/post/2021/08/10/marital-rape/>

when she was sick and bedridden. She also deposed that she was subjected to the worst form of sexual perversion and unnatural sex against her will²⁹. Therefore, the respondent filed a case of divorce on grounds of cruelty and the demand for dowry. In consequence, the husband filed a petition for restitution of conjugal rights, which was dismissed. Then the respondent filed an appeal in the High Court against the dismissal of the petition. The High Court held that "merely for the reason that the law does not recognise marital rape under penal law, it does not inhibit the court from recognising the same as a form of cruelty to grant divorce"³⁰ The court also stated that a marriage has a choice, a choice not to suffer, which is fundamental to the autonomy guaranteed under natural law and the constitution³¹. After this dynamic judgement of the HC, marital abuse is considered a ground for divorce when there is cruelty, but it is not considered a specific law. Therefore, married women can also file a divorce petition when there is spousal rape instead of getting any specific criminal remedy. It seems that domestic violence and marital rape do not fall within the definition of 'dignity'³².

In this regard, Senior Advocate Rebecca John of the SC, appearing as amicus curiae in the matter for criminalization of marital rape, submitted that "availability of other provisions in various legislations, including Sections 498A and 304B of the IPC, the Domestic Violence Act, and other civil remedies, is insufficient to deal with the offence of rape under Section 375, as regards a wife alleging rape by her husband³³". In other words, she also added that "section 498A of the IPC can't be used as a substitute for Section 375 of the IPC. It can be used in addition, but it's not a substitute³⁴." Therefore, it is evident that other criminal remedies to deal with marital rape are not sufficient, so there is an urgent need to criminalise marital rape for the protection and welfare of women in India.

IV. MARITAL RAPE AND ITS CONSTITUTIONALITY IN INDIA

The term "Rape" is defined under Section 375 of the Indian Penal Code of 1860. This section includes all forms of non-consensual sexual intercourse with a woman. But Section 375 has an exception that excludes non-consensual sexual intercourse between a man and his wife who is of age between 15 to 18 years. After the case of *Independent Thought v. Union of India*, Justice

²⁹ Ibid

³⁰ Amrutha K, *Marital rape a valid ground to claim divorce: High Court of Kerala*, Prime Legal Blog, (June 26, 2023, 9.03 PM), <https://primelegal.in/2022/06/04/marital-rape-a-valid-ground-to-claim-divorce-high-court-of-kerala/>

³¹ Supra note 58

³² Deeptilata Nayak & Aman Srivastava, *Criminalization of Marital Rape Law in India is still a Taboo*, 8 *Acclaims*, 1, (Jan. 2020), <http://www.penacclaims.com/wp-content/uploads/2020/02/Deeptilata-Nayak-1.pdf>

³³ Nupur Thapliyal, *Live Law*, <https://www.livelaw.in/top-stories/section-498a-not-a-remedy-against-marital-rape-amicus-curiae-rebecca-john-to-delhi-high-court-190243>, (Jan. 24, 2023, 7.03 PM)

³⁴ Ibid

Madan B. Lokur held that "the sexual intercourse between a man and his wife who is between 15 and 18 years of age is rape³⁵". The SC also stated that exception 2 of Section 375 of the Indian Penal Code of 1860 creates discrimination between unmarried and married women and has no rational nexus. Therefore, decriminalising marital rape is a violation of fundamental rights stated under the Constitution of India (COI). Article 14 of the Indian Constitution ensures that "the state shall not deny to any person equality before law and equal protection of the law³⁶". Article 14 of the COI violates exception 2 of Section 375 of the IPC, which treats married women in distinct ways, by denying them equal protection against rape and harassment. In addition, it makes a distinction between married and unmarried women.

Now it is evident that Article 14 of the COI provides protection and equality to all citizens of India, but criminal law (the Indian Penal Code of 1860) discriminates on the basis of gender and also violates the constitutional rights. The draft of the Indian Penal Code was prepared by the First Law Commission, chaired by Thomas Babington Macaulay.³⁷ Further, the draft was based on the law of England, while at the same time borrowing elements from the Napoleonic Code and Louisiana Civil Code of 1825³⁸. Therefore, it can be stated that the Indian Penal Code was drafted on the basis of English laws, keeping in mind that women didn't have their own identities but were rather recognised by their husband's names. Further, man and woman are not equal, and a woman is considered the chattel of her husband. But now that time has evolved, there is a need to amend this colonial law, i.e., the Indian Penal Code of 1860, to provide equal status to women as specified in our Constitution.

Further, Marital Rape also violates Article 21 of the Indian Constitution, which states that "No person shall be deprived of his life or personal liberty except according to a procedure established by law³⁹." Therefore, this article secure two rights which are right to life and right to personal liberty. The scope of Article 21 of the Indian Constitution has been greatly expanded by judicial interpretation, and "the right to live with human dignity⁴⁰" now falls under the same section. In *Maneka Gandhi v. Union of India*, the SC quoted "the right to live is not merely a physical right, but includes within its ambit the right to live with human dignity⁴¹." Moreover, in *Kharak Singh v. State of Uttar Pradesh*, the SC opined that "the term "life" under Article 21

³⁵ *Independent Thoughts v. Union of India* (2017) 10 SCC 800

³⁶ The Constitution of India, art. 14.

³⁷ BJJU's Exam Prep, <https://byjus.com/free-ias-prep/indian-penal-code/>, (Jun 25, 2023)

³⁸ *Ibid*

³⁹ The Indian Constitution of India. art. 21

⁴⁰ The Indian Constitution of India. art. 21

⁴¹ *Maneka Gandhi v. Union of India* AIR 1978 SC 597

is restricted to merely animal existence, but it is much more than that".⁴²

Therefore, exception 2 of Section 375 infringes on the right to live with dignity of the married woman by allowing non-consensual sexual intercourse with her. In *Bodhisattwa Gautam v. Subhra Chakraborty*⁴³ the Supreme Court said that "rape is a crime against basic human rights and a violation of the victim's right to life under Article 21 of the Constitution of India In my opinion, as Article 21 of the COI provides "protection of life and personal liberty" to everyone without any discrimination, making distinction between the act of rape committed by one's spouse and a stranger is unfair and unjust, as well as a violation of the abovementioned Article. Further, in *State of Maharashtra v. Madhkar Narayan*⁴⁴, SC opined that "every woman has the right to sexual privacy, and no one can violate this right. Even women of easy virtue or prostitutes have the right to say no to having sexual intercourse⁴⁵". Further, the SC also expanded the scope of Article 21 of the COI by including "right to privacy" by pronouncing the landmark judgements of *Puttaswamy v. Union of India* and *The State of Maharashtra v. Madhukar Narayan*.⁴⁶ "Right to privacy" includes sexual privacy, which is a fundamental right of all citizens, and forced sexual acts would be a clear violation of this right. Further, in *Chairman, Railway Board v. Chandrima Das*⁴⁷, it was held that rape is a crime against the basic postulates of human rights and is an unlawful intrusion onto the right to privacy and sanctity of a female as guaranteed under Article 21.⁴⁸ In the cases of the *State of Karnataka v. Krishnappa*, the SC held that "sexual violence intrusion of the right to privacy and sanctity of a female⁴⁹". It also held that "non-consensual sexual intercourse amounts to physical and sexual violence". Now, it is very evident to say that these judgements of the higher judiciary did not make any difference between married and unmarried women. But exception 2 of Section 375 of the IPC violates fundamental rights like the right to privacy, the right to equality, the right to live with dignity, the right to choose sexual relations, etc. Therefore, the fundamental rights of women enshrined under Articles 14 and 21 of the COI must be protected, as women also have a right to consensual sexual relations with their husbands.

⁴² *Kharak Singh v. State of Uttar Pradesh* 1964 SCR (1) 332

⁴³ *Bodhisattwa Gautam v. Subhra Chakraborty* (1996) 1 SCC 490

⁴⁴ *State of Maharashtra v. Madhkar Narayan* AIR 1991 SC 207

⁴⁵ Arvind Jain, *State of Maharashtra v. Madhkar Narayan Madikar*, Lawyerclubindia, (Feb. 21,2009), <https://www.lawyersclubindia.com/judiciary/state-of-maharashtra-v-s-madhukar-narayan-mardikar-523.asp>

⁴⁶ *Puttaswamy v. Union of India* (2017) 10 SCC 1 and *The State of Maharashtra v. Madhukar Narayan* AIR 1991 SC 207

⁴⁷ *The Chairman, Railway Board v. Chandrima Das* (1973) 2 SCC 696

⁴⁸ Astha Bhattacharya, *Supreme Court recognises sexual right of all women. So how is marital rape still legal?* The Print (Sep. 01, 2023), <https://theprint.in/campus-voice/supreme-court-recognises-sexual-right-of-women-how-is-marital-rape-still-legal/725574/>

⁴⁹ *The State of Karnataka v. Krishnappa* (2000) 4 SCC 75

V. EMERGING JURISPRUDENCE ON MARITAL RAPE IN INDIA

The judiciary makes a welcome move for the protection of women and provides them with their equal rights of equality and the right to live with dignity, as mentioned in Articles 14 and 21 of the Constitution of India. In the case of *Jaideep Bhanushankar v. Union of India*, the Gujarat High Court stated that "Marital rape ought to be a crime and not a concept." In the same case, Justice Pardiwala quoted that "It has long been time to jettison the notion of 'implied consent' in marriage. The law must uphold the bodily autonomy of all women, irrespective of their marital status."⁵⁰

In the landmark judgement of the Supreme Court of *Independent Thought vs. Union of India*, it stated, Constitutionally, females have equal rights as males, and no statute or act can take away those rights from females, and if such a statute or act is passed regarding the same, it should be declared null and void⁵¹." In this case, there was an opinion to put an end to the prolonged discussion on the constitutionality of Section 375's Exception 2 and repeal the right to rape a minor girl. The central government argued that the exception was introduced in conformity with socio-cultural and religious norms that were undermined by extramarital relationships. The argument was rejected by the court because it believed it was arbitrarily protecting the spouse and approving of the quiet sexual assault.⁵² As Section 375 of the IPC is secular-oriented, it prevailed as a special act over all personal laws, like the Muslim Marriage Act of 1939, and the Hindu Marriage Act of 1955. The court also stated that the variety of legislation regarding child marriage has led to confusion, and exemption 2 of Section 375 of the IPC has harmed the minor by making sexual exploitation legal. Further, in the same ruling, the court stated that the husband may not have committed rape as per the IPC, but he qualified to commit aggravated penetrative sexual assault under the Protection of child from Sexual Offences Act of 2005 (POCSO). As POCSO protects sexual offences against minors. Therefore, under these two provisions of POCSO and Section 375 of the IPC, rape of a minor under the age of 18 is not rape. In lieu of that, the SC, in this case, highlights that:

- Non-consensual sexual intercourse within child marriage is rape;
- Child Marriage and Marital Rape are violations of constitutional and human rights;

⁵⁰ *Jaideep Bhanushankar v. Union of India R/WRT PETITION (PIL) NO. 146 of 202*, <https://www.verdictum.in/court-updates/high-courts/gujarat-hc-admits-pil-challenging-marital-rape-exception-in-section-375-ipc-senior-judge-in-the-bench-had-held-in-2018-that-marital-rape-should-be-a-crime-1343985>

⁵¹ *Independent Thought vs. Union of India* (2017) 10 SCC 800

⁵² **DEBANJAN BANERJEE AND T.S. SATHYANARAYANA RAO, *THE DARK SHADOW OF MARITAL RAPE: NEED TO CHANGE THE NARRATIVE*, 4 JOURNAL OF PSYCHOSEXUAL HEALTH, 11-13, (JAN. 2022), [HTTPS://JOURNALS.SAGEPUB.COM/DOI/EPUB/10.1177/26318318221083709](https://journals.sagepub.com/doi/epub/10.1177/26318318221083709)**

- There is an urgent need for the government to implement and strengthen child marriage laws.
- The judgement settled the harmonisation of the legal framework and addressed areas of ambiguity; and
- The government cannot use tradition as an excuse to justify child marriage or rape.

In *Bishnu Dayal V. State of Bihar*⁵³, the court stated that non-consensual sexual intercourse, under the condition mentioned under Section 375 (a) to (d) of IPC⁵⁴, by a person with his own wife who is under a decree of separation or otherwise, is living separately is made an offence of rape under the IPC. Further, in *Bhupinder Sharma V. State of Himachal Pradesh*⁵⁵, sexual intercourse with a wife, whose marriage with him is void as he was already married and had a living spouse and who was aware of the fact of the first marriage amounts to rape.

Recently, in the landmark judgement of Karnataka High Court, *Hrishikesh Sahoo v. State of Karnataka*, Justice M. Nagaprasanna, stated in own words, that, if the husband sexually assaults his wife, then he can't always take the defence of exception 2 of section 375 as the exemption is not absolute⁵⁶. In this case, the petitioner (accused) and complainant (wife) got married on June 20, 2006, at Bhubaneshwar and also have a girl child out of wedlock. But after a few years of living together, the couple gets horribly strained. The wife filed a complaint of physical and mental torture against her husband. Then an FIR was also filed under sections 506, 498A, 377, and 323 of the IPC against her husband. The wife also stated that her husband accused her in front of a relative of not providing sex and made her as sex slave. He also compelled and forced her to have unnatural anal sex, oral sex by imitating the sex films. Moreover, his wife stated he forced her to do forcible sex after pregnancy and continued sex after their baby got terminated. He also forced her to perform all unnatural sex in front of her daughter and also beat her for forcible sex. In all these circumstance husband took a plea of exception 2 of Section 375 of the IPC, in which marital rape is not a crime. Then the High Court stated, "A marital or other relationship between the perpetrator or victim is not a valid defence against the crimes of rape or sexual violation"⁵⁷.

In another landmark judgement of the Delhi High Court, *RIT Foundation V. UOI*,⁵⁸ the Justice

⁵³ *Bishnu Dayal V. State of Bihar* AIR 1981 SC 39

⁵⁴ Indian Penal Code, sec. 375, No. 45, Acts of Parliament, 1860, (India)

⁵⁵ *Bhupinder Singh V. Union Territory of Chandigarh* (2008) 8 SCC 631, (2008) Cr LJ 3546 (SC)

⁵⁶ Live Law, https://www.livelaw.in/pdf_upload/89-hrishikesh-sahoo-v-state-of-karnataka-23-mar-2022-412964.pdf (last visited Jun. 23, 2023)

⁵⁷ Live Law, https://www.livelaw.in/pdf_upload/89-hrishikesh-sahoo-v-state-of-karnataka-23-mar-2022-412964.pdf (last visited Jun. 23, 2023)

⁵⁸ *RIT Foundation V. UOI* 2022 SCC OnLine Del 1404.

Rajiv Shakdher and Justice C Hari Shankar, passed spilt judgement on the issue of the validity of marital rape. There are four petitions filed under this same case i.e., RIT Foundation v. Union of India (2015), All India Democratic Women's Association (AIDWA) in 2017 and two individuals. In this case, husband was accused of raping his wife, who is not under 18 years old. Justice Rajiv Shakdher contended that "the exemption to the husband from the offence of marital rape is unconstitutional and violates articles 14, 19, and 21 of the Constitution of India and Justice C. Hari Shankar contended that the COI provides protection to the weaker sections of society. Article 15 of the COI stated that "Nothing in this Article shall prevent the State from making any special provision for women and children After all these cases in the Higher Judiciary, the Public Interest Litigation (PIL) filed before the Apex Court. The batch of petition include four kind of matters i.e., Delhi High Court Spilt verdict⁵⁹, second plea is challenging the Karnataka High Court Judgement⁶⁰, third are PILs filed against the marital rape exception, and fourth are intervening applications. The SC heard the plea on May 9, 2023, concerning the constitutional validity of the Marital Rape exception. The batch of petitions, was listed before a bench comprising Chief Justice DY Chandrachud, Justice PS Narasimha, and Justice JB Pardiwala⁶¹.

VI. CONCLUSION

As the world moves further into modernization and liberalisation, there is bound to be a drastic change in the traditional social norms and the lifestyle of the people in a society. The concept of criminalising marital rape is gradually gaining acceptance in India, especially through judicial pronouncements. Law is not something that can be left stagnant; it also requires updates like any other thing in the world. It is a serious form of domestic violence in which the government must intervene. The Indian laws are not adequate enough for the Protection of women; as of now, women are treated as chattels of their husbands. There are no criminal remedies available to a wife when non- consensual sex is done by her husband, as stated under Exception 2 of Section 375 of the IPC. There are numerous flaws in laws protecting women from domestic violence, as they do not expressly prohibit marital rape but consider marital rape to amount to cruelty.

The marital rape prima facie violates Article 14 and Article 21 of the Constitution of India. The COI provides protection to the weaker sections of society. Article 15 of the COI stated that

⁵⁹ Supra note at 49

⁶⁰ Supra note at 48

⁶¹ Live Law, https://www.livelaw.in/top-stories/marital-rape-supreme-court-to-hear-pleas-seeking-to-criminalize-marital-rape-on-may-9-2023-224425?infinite_scroll=1 (last visited June 22, 2023)

"Nothing in this Article shall prevent the State from making any special provision for women and children⁶²". Therefore, it provides protection for women and children and compels the state to enact special provisions for women and children. Due to this, states enacted various acts like the Maternity Benefit Act of 1961 and the Juvenile Justice (Care and Protection of Children) Act of 2000. Therefore, the government of India needs to take serious concerns related to marital rape seriously. Further, there is a need to introduce new legislation, for the protection of women from such forceful sexual intercourse by husbands with their wives under the provisions of Article 15(3). The judiciary must take steps to protect women from domestic violence, like Marital Rape. The Indian Penal Code has to be amended to make marital rape a crime. Such a law will be constitutional and in favour of a better society for women. However, merely declaring an act unlawful is insufficient. The judiciary and police need to be kept more aware, so more needs to be done. The general public must also be educated about this crime if the real objective of criminalising marital rape is to be achieved. To achieve this, society must confront the widespread misconception that rape by a spouse is not a serious crime.

⁶² The Constitution of India, art. 15, cl. 3.