

EXCEPTION TO MARITAL RAPE IN INDIA: AN UNCONSTITUTIONAL INTRUSION INTO THE VICTIM'S RIGHT TO EQUALITY AND PRIVACY

*Harleen Kaur**

*Aayush Tripathi***

ABSTRACT

The world, since the advent of mankind, has been run predominantly according to patriarchal setups barring a few notable exceptions. Indian society is a prime example, wherein, the biggest form of patriarchy has been witnessed in the institution of marriage, conferring the husband with an unequivocal right to his wife's body and demand for sexual intercourse whenever it pleases him. Such an act, popularly known as 'Marital Rape', has been made an offence in fifty-two jurisdictions around the world. However, in India it still serves as an exception to the offence of rape under section 375 of the Indian Penal Code (IPC). The present article is an endeavour to address the reasons as to why it should be made an offence under the IPC in context of article 14 and 21 of the Indian Constitution, while discussing latest judicial pronouncements calling for a shift from 'societal morality' towards 'constitutional morality'.

Keywords: Marital Rape, Exception, Privacy, Equality, Unconstitutional

- I. The Concept of Marital Rape: Genesis and Evolution**
- II. Marital Rape in Indian Context: Historical and Contemporary**
- III. Constitutionality of Marital Rape Exception Clause**
- IV. Marital Rape as a Ground for Divorce**
- V. Evidence in Cases of Marital Rape**
- VI. Suggestions**
- VII. Conclusion**

I. The Concept of Marital Rape: Genesis and Evolution

MARITAL RAPE is an offshoot of the concept or the offence of Rape. The offence of rape, as perceived by various legislations across different jurisdictions, does not go past the parameters of patriarchy. It reflects the antediluvian mindset of the society which places the modesty and virginity of a woman at a pedestal. The definition of rape in India and in many other jurisdictions around the world exempts a certain class of males from the act- the

* Assistant Professor, Campus Law Centre, Faculty of Law, University of Delhi.

** Advocate, Delhi High Court and District Courts.

husbands. This is also known as *Marital Rape Exception Clause*¹ which found its relevance under the common law. According to the common Law, a wife by the virtue of being involved in the union of marriage with her husband gives an implied consent to the husband to have intercourse with him whenever he so pleases.² As propounded by Sir Matthew Hale in 1736,³ “The husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband which she cannot retract”.

It is also known as the theory of *Implied Consent*. According to this theory, a woman becomes devoid of all her rights over her mind as well as her body. Following one of the basic maxims of law, where there is right, there is a corresponding duty, the issue of getting raped can never arise since the husband enjoys absolute privilege over her.⁴ This exemption stems from the patriarchal belief of women being subordinate to men. This is true not just for India, whereby it has been justified by scriptures such as Manusmriti where subservience to her husband was considered a wife’s greatest duty⁵ and various other outdated customs, but also in the West. The prime examples of it are the customs of Bride capture (whereby any man could claim a woman by raping her) and stealing an heiress (Kidnapping a woman and forcing her into marriage) which existed in medieval England.⁶ In Indian context, such a mindset can be traced since the time of Mahabharata where Draupadi was gambled off by her husbands in a game of dice.

Another theory which justifies this act of non-consensual sexual intercourse is the Unities Theory enunciated by Blackstone. The said theory is based on the Doctrine of Coverture or unity of husband and wife.⁷ According to this doctrine, the husband and the wife are one person and the legal status of a woman is suspended post her marriage or at least merges into that of her husband.⁸ Thus, this doctrine legitimized the belief that a married woman is her husband’s property devoid of any identity of herself. A change was seen in the late twentieth

¹ Raveena Rao Kallakuru and Pradyumna Soni, “Criminalisation of Marital Rape in India: Understanding its Constitutional, Cultural and Legal Impact” 11 *NUJS L. Rev.* 122 (2018).

² Justice J.S. Verma Committee Report, “Report Of The Committee on Amendments to Criminal Law” 113 (January 2013).

³ *Ibid.*; *Also see*, Sir Matthew Hale, “History of the Pleas of the Crown” (1736) 1 Hale PC 629; *Also see*, Anne Dailey, “To have and to hold: The Marital Rape Exception” 99 *Harv. L. Rev.* 1256 (1986).

⁴ *Id.*, at 1261.

⁵ Sakshi Kanodia and Ranjabati Ray, “Why Penalize Marital Rape” 21 *IOHR-JHSS* 49 (2016).

⁶ Anne Dailey, “To have and to hold: The Marital Rape Exception” 99 *Harv. L. Rev.* 1257 (1986).

⁷ *Id.*, at 1256.

⁸ *Ibid.*

century whereby the rise of Feminism led a change in the attitude of the society in general and women were seen as equal to men.⁹ Therefore, we can clearly observe that the problem of Marital Rape has more to do with society rather than just law. It is an example of the law reflecting the character of our society.

II. Marital Rape in Indian Context: Historical and Contemporary

Historical Context

The exception to Marital Rape emanates from the societal approval provided to the husbands to treat their wives and their bodies as they please. The fact that a man can overpower his wife and nothing can happen to him due to it being backed by no legal or moral sanction whatsoever, with wife having no choice or say whatsoever, is a testament to the patriarchal nature of the society being responsible for the existing exception to still be in place. Such an attitude has been propagated by various ancient texts and traditions like Manusmriti. These texts were the promoters of a patriarchal setup and provided that a good woman is one who never commits an act that exasperates her husband whether dead or alive.¹⁰

Further, it is stated that it is a woman's duty to make love to a man irrespective of his age or looks. The custom of child marriage is also propagated in the same when the text lays down the rule that a man of thirty years should marry a girl who is between eight to twelve years of age.¹¹ Thus, a woman's primary role was child rearing, household chores and subservience to her husband's wishes in every way possible. However, sexual offences against women were regarded to be one of the most heinous crimes that could be committed by a man. Such crimes were divided into *Sahasa* (rape) and *Stri Sangraha* (Adultery).¹²

The position of women in the society degraded further during the medieval age. They were socially subjugated as it was propagated by the important religious scriptures of the time that

⁹ *Supra* note 1.

¹⁰ Sreyashi Ghosh, "Manusmriti: The Ultimate Guide to Becoming a Good Woman", *Feminism In India*, January 11th 2018, available at: <https://feminisminindia.com/2018/01/11/manusmriti-ultimate-guide-good-woman/> (last visited on November 21, 2020).

¹¹ *Ibid.*

¹² Badapbiang T. Dakhar, "Protecting India's Women: The Need for Criminalization of Marital Rape and the Criminal Amendment Act, 2013" 1(1) *ALEXIS J. PUB. POL'Y. & L.* 38 (2014).

they were unfit for being provided with any freedom whatsoever.¹³ It was said that they should be under male authority for the entirety of their lives. Foreign invasions also played a major role in deterioration of women's position in the Indian society as it led to the prevalence of the *purdah* system.¹⁴ With it also grew the practice of *sati* and incidents of female infanticide, child marriage along with a restriction on the remarriage of widows.¹⁵ Thus, women lived a life of servitude and seclusion where their life was determined by the men in her family; father and brother before the marriage and husband post her marriage.

The position of women in the Indian society in the post medieval age remained more or less the same if not worse. Similar to the ancient and medieval times, the family setup was typically patriarchal even though some reforms were brought about by the British rule with legislations such as Child Marriage Restraint Act, 1829 and The Widow Remarriage Act being passed.¹⁶

Contemporary Context

The IPC deals with the offence of Rape in sections 375 and 376. The crux of the offence rests upon 'Consent' given by an adult woman at the time of sexual intercourse which is free from coercion and false promises. However, it is pertinent to note exception 2 to section 375 which 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*"¹⁷ This clearly indicates that on one hand, while our law considers non-consensual intercourse as an offence, on the other hand, it is archaic in its acceptance of the theory of Implied consent in marital relationships which takes birth from the belief that women are chattels in the hands of their husbands, devoid of any individual personality and rights of their own, giving the husbands the rights to their wives' bodies.

Before we move further, it is important that we look at some statistics with respect to Marital Rape in India. The National Family Health Survey-4 (NFHS-4) prepared by International Institute of Population Sciences (IIPS) under the aegis of Ministry of Health and Family Welfare (MoHFW) and published in the year 2016 reports that 5.4% of women in India have

¹³ Women In History, National Resource Centre for Women, *available at*, <https://web.archive.org/web/20090619085059/http://nrcw.nic.in/index2.asp?sublinkid=450> (Last visited on March 19, 2022)

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ The Indian Penal Code, 1860 (Act No 45 of 1860), s. 375.

been physically forced to perform sexual intercourse with her husband when she did not want to. The data shows that the same been experienced by 4.4% of the women in the past twelve months.¹⁸ Also, a similar question was asked in the previous survey in the year 2005-06 where 9.5% of the women answered in the affirmative.¹⁹ Further, 6.9% of women said that it has happened to them Often or sometimes.²⁰ The survey was conducted amongst women aged between fifteen to forty-nine- years of age and men of fifteen to fifty four years of age in twenty nine states, seven Union Territories and 640 districts of the country.²¹

The issue of Marital Rape has been dealt again and again under various reports of the Law Commissions and committees constituted by the Indian Government. A perusal of these reports not only reflects the mindset of the legislators over this issue but also gives an insight into the factors hindering a penal provision being drafted against such an act. . In this context, it become pertinent to look into some of these Reports, which are discussed hereunder-

i. The 42nd Law Commission Report, 1971

This report was the first government report discussing, *inter alia*, the exception of marital rape under IPC.. It put forward the suggestion that the marital rape exception shouldn't apply in cases where the husbands and the wives were judicially separated from each other since the marriage exists only technically and also since they are not living together.²² Although it was a welcome suggestion, it again gave legs to the theory of *Implied Consent* whereby it was fine if a husband forced himself upon the wife without her consent when married but not so much when they were judicially separated. The aforementioned suggestion was later added in the IPC by the Criminal Law Amendment Act of 2012, which said that:²³

Whoever has sexual intercourse with his own wife, who is living separately, whether under a decree of separation or otherwise, without her consent, shall be punished with imprisonment of either description for a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine

¹⁸ Ministry of Health and Family “*Welfare, National Family Health Survey (NFHS-4)*” 568 (Indian Institute of Population Sciences, 2017).

¹⁹ International Institute for Population Sciences (IIPS) and Macro International, “National Family Health Survey (NFHS-3): 507 (September 2007).

²⁰ *Ibid.*

²¹ *Supra* note 23.

²² Law Commission of India, “42nd Report on Indian Penal Code, 1860” 277 (June, 1971).

²³ *Supra* note 22, s. 376B.

ii. The 172nd Law Commission Report, 2000

It was under this report that for the first time the question of marital rape was directly put to the Law Commission. It was argued by the opponents of marital rape exception that when other facets of marital relationship have been dealt under the Criminal Law, then why non-consensual sexual intercourse forced by a husband upon his wife can't be dealt under it. The proponents of the abovementioned exception though rejected the argument on the basis that it would lead to excessive interference with the institution of marriage.²⁴ This report shed light on the reluctance of the legislature and the intelligesia to criminalize the act of rape considering Hindu marriage as a sacrament not just according to the law but also according to religion and they feared that such a provision may put the institution altogether in danger.

iii. Justice J.S. Verma Committee Report on Amendments to Criminal Law, 2013

This report presented a significant change from the previous two reports by the Law Commission as it addressed the need to criminalize Marital Rape in a comprehensive manner. To start with, it acknowledged the fact that the act emanates from an archaic notion of women being a property of their husbands.²⁵ Further, addressing the Doctrine of coverture and Lord Hale's declaration, it stated that the immunity with respect to non-consensual intercourse by a husband on her wife has been abolished in many jurisdictions. The report also shed light on the observations of the House of Lords in England where it said in a 1991 judgment that the status of women has changed beyond recognition since the eighteenth century when Lord Hale made his declaration.²⁶

It dwelled further on Lord Keith's comments in the same case where he, speaking for the Court, said that marriage is in modern times regarded as a partnership of equals and the notion of subservience of wife to her husband is an outdated concept.²⁷ The report further substantiated its argument by looking at the European Commission of Human Rights judgment in the case of *C.R. v. UK* wherein it was held that a rapist remains a rapist regardless of the relationship with the victim.²⁸ The Court in its judgment acknowledged that

²⁴ Law Commission of India, "172nd Report on Review of the Rape Laws" 23 (March, 2000).

²⁵ *Supra* note 2 at 114.

²⁶ *Id.* at 113; Also see *R. v. R* [1991] 4 All ER 481

²⁷ *Ibid.*

²⁸ *Id.* at 114; Also see *C.R. v. UK* Publ. ECHR, Ser.A, No. 335-C.

it's opinion was in consonance with the European Convention of Human Rights, "the essence of which was respect for human rights, dignity and freedom".²⁹

iv. 167th Report of the Parliamentary Standing Committee on The Criminal Law Amendment Bill, 2012

This report also witnessed a divergent opinion amongst its members on the issue of marital rape. Some members were of the opinion that there should be a room for the wife to take up the issue of Marital Rape, and³⁰ They were further of the opinion that consent in marriage cannot be a consent forever.³¹ However, the other members opined that penalizing marital rape had the potential of ruining the entire institution of marriage and putting the family system under great stress.³² They believed such non-consensual sexual intercourse can be dealt under the heading of Cruelty under section 498A of the IPC and other statutes such as the Domestic Violence Act, 2005.

v. Parliamentary Discussions

Discussions in the Parliament regarding marital rape have been negligible to say the least. It was not until 2015 that the topic was first breached in the Rajya Sabha by Mrs. K Kanimozhi, a Member of Parliament (MP) from Tamil Nadu. The MP raised a question to the Minister of State for Home Affairs Haribhai Parathibhai Chaudhary as to whether the government would amend the marital rape exception under section 375 of the IPC in light of the recommendations made by the United Nations.³³ In his reply, the Minister said that the concept of marital rape cannot be applied to India due to myriad of factors such as low levels of education, poverty, customs, values, societal mindsets like treating marriage as a sacrament etc.

Further, he also said that even though criminalization was recommended by the United Nations Committee on Elimination of Discrimination against Women, but since it was not recommended by the Law Commission of India, the government did not intend to bring about

²⁹ *Ibid.*

³⁰ Department Related Parliamentary Standing Committee on Home Affairs, "167th Parliamentary Committee Report on The Criminal Law (Amendment) Bill, 2012" 26 (March, 2013).

³¹ *Id.* at 26-27.

³² *Id.* at 27.

³³ Special Correspondent, "India Not to Criminalize Marital Rape", *The Hindu*, April 29, 2015, available at <https://www.thehindu.com/news/national/concept-of-marital-rape-cannot-be-applied-in-india/article7154671.ece> (last visited on June 14, 2021).

an amendment to the IPC.³⁴ Further, in the year 2018, the Lok Sabha MP from Thiruvananthapuram, Mr. Shashi Tharoor introduced a Private Member's bill in the Lok Sabha titled Women's Sexual, Reproductive and Menstrual Rights Bill 2018 which proposed the abolition of exception 2 to section 375 of IPC³⁵ and to insert a proviso to explanation 2 of section 375 in the following words:³⁶

Provided that the women's ethnicity, religion, caste, education, profession, clothing preference, entertainment preference, social circle, personal opinion, past sexual conduct or any other related grounds shall not be a reason to presume her consent to the sexual activity.

The Bill however, did not exceed the phase of initial discussion and has been left pending in the Parliament ever since, which does not appear to be surprising, considering the recommendation of the 167th Parliamentary Standing Committee Report and later the reply by the Minister of State for Home Affairs. However, it indicates that given the extremely sensitive nature of the topic, the parliamentarians are not comfortable discussing the same.

III. Constitutionality of Marital Rape Exception Clause

The constitutionality of the Marital Rape exception clause can be examined with respect to it being in violation of-

Right to Equality

The Right to equality enshrined under article 14 clearly states that every citizen of the country is guaranteed the fundamental right of equality before law and equal protection of laws. It is pertinent to mention that the provision has been interpreted by the court as 'equals should be treated equally' which means that there is a scope of reasonable classification if the persons in question are a different class of people.³⁷ In *Chiranjit Lal v. Union of India*³⁸, the Supreme Court of India stated that article 14 implies that equal protection should be provided to all persons situated in like circumstances. The constitutionality test for any provision under

³⁴ *Ibid.*

³⁵ The Women's Sexual, Reproductive and Menstrual Rights Bill 2018 (Bill No 255 of 2018), s. 2 (b).

³⁶ *Id.*, s. 2 (c).

³⁷ *Indra Sawhney v. Union of India* AIR 1993 SC 477.

³⁸ AIR 1951 SC 41.

article 14 requires that firstly there must be an intelligible differentia *i.e.* there must be a reason for the distinction to be made which should also be capable of being understood, and, secondly, there must be a nexus with the object sought to be achieved. The argument given by majority of the people in favor of retaining the second exception to section 375 of the IPC is that married women are different class of people as compared to unmarried women and hence falls under the category of of reasonable classification under article 14 of the Constitution. Such an argument is not just wrong, but out rightly regressive in its approach. It is not in consonance with changed nature of the society in the twenty-first century. The above reasonable classification argument stems from the notion of putting property rights in the chastity of women.³⁹ In the case of Marital Rape, the argument put forward by the proponents of the exception clause in the IPC is that Marital Relationship between the husband and the wife provides the required reasonable classification for the provision under the IPC to stand the test of constitutionality.

At this juncture it is pertinent to mention the observation of the Apex Court in the case of *Independent Thought v. Union of India*⁴⁰ where the constitutionality of exception 2 of section 375 was called into question. The exception in its original form stated that sexual intercourse by a man with his wife not being less than fifteen years of age doesn't amount to rape. The court opined that the reason for the Parliament to increase the age of marriage of girls to eighteen years was to keep pace with the changes in the society as law is supposed to be dynamic in nature.

Furthermore, it observed that even the minimum age for consent had been raised to eighteen years. In light of these developments, the court stated that inaction in not raising the age under the said provision amounted to arbitrary non exercise of power.⁴¹ The court questioned the reason for not amending the provision insofar as the exception was fixed at fifteen years and eighteen years. The court remarked that when the marriageable age and the age of consent according to the law is eighteen years, then the exception relating to sexual intercourse with a minor wife is untenable and it is difficult to comprehend the objective that is sought to be achieved by the Parliament. It was stated unequivocally when the age for marriage and consent is eighteen years, then the reason for classification in fixing the age of consent for fifteen years with respect to the said provision cannot be defended.

³⁹ Lisa R Eskow, "The Ultimate Weapon?: Demythologizing Spousal Rape and Reconceptualizing Its Prosecution", 48 *Stanford Law Review* 677-709 (1996).

⁴⁰ (2017) 10 SCC 800.

⁴¹ *Id.* at para 74.

Thus, the court held that the exception insofar it related to minor girls below the age of eighteen years was arbitrary, whimsical and capricious and violative of the rights of the girl child and is not fair, just and reasonable and therefore violative of article 14, 15 and 21 of the Constitution of India.⁴² Insofar as the rest of the provision is concerned, the Court left it to the wisdom of the Parliament. However, it is an important landmark in the struggle for criminalization of marital rape since it is the first instance of the Apex Court actually looking into the anatomy of the Marital Rape exception.

However, the most interesting development took place in 2018 when the Gujarat High Court in the case of *Nimeshbhai Bharatbhai Desai v. State of Gujarat*⁴³ (*Nimeshbhai*), looked into the constitutionality of the provision *i.e.*, Marital Rape of adult women. The single judge bench of Pardiwala J. held that the exception 2 to section 375 was unconstitutional as it was in violation of articles 14 and 21 of the Constitution. The court termed marital rape as a disgraceful offence that scarred the trust and confidence of the institution of marriage and recognized the fact that several married women suffered from the non-criminalization of the act of rape by the husband of his wife.⁴⁴

It was opined by the court that when a provision treats marital rape and non-marital rape differently, it infringes upon the equal protection clause under the Constitution. It further expressed that when it comes to women exercising their right to bodily autonomy, there can be no difference between married and unmarried women. It also said that they have full rights over their body on matters such as sexual and reproductive health, married or unmarried.⁴⁵ Therefore, the argument that a married woman is a different class of person as compared to an unmarried one stands negated on the above grounds. These rights provided to every woman, the court opined, are inalienable in nature and aren't subject to her marital status.⁴⁶ Further, it illustrated that an environment of acceptance of the practice of Marital Rape flourishes when the law doesn't protect married and unmarried women equally and it gives the liberty to men to think that it is acceptable to have forceful sexual intercourse with their wives.

It is worthwhile to mention here that the institution of marriage has changed considerably in the 20th century across the world. Women today are not seen as subservient or subordinate to

⁴² *Id.* at 64.

⁴³ 2018 SCC OnLine Guj 732.

⁴⁴ *Id.* at para 75.

⁴⁵ *Id.* at 79.

⁴⁶ *Ibid.*

their husbands but as equals in a marital relationship. Moreover, legislations such as the Hindu Marriage Act, 1955, Dissolution of Muslim Marriage Act, 1939, Indian Divorce Act, 1869 and The Special Marriage Act, 1954 do not conform to the idea that the dynamic between the spouses is an unequal one.⁴⁷ It is also significant to note the 2005 amendment made to the Hindu Succession Act which bestowed equal property rights to women thereby reaffirming her position as an equal in the society.⁴⁸

Right to Privacy

Furthermore, another argument by the opponents is that marital relationship is entailed in the murky waters of private sphere wherein law cannot pervade. The argument has also been endorsed by the judiciary, though not directly with respect to Marital Rape, but certainly in cases related Restitution of Conjugal Rights (RCR). It is important to understand as to why RCR gets a mention here. The Hindu Marriage Act, 1955, under section 9, allows Courts to compel spouses to live together and resume conjugal relationship if they are staying separately without any reasonable excuse.⁴⁹ Resumption of conjugal relations also takes away the freedom of indulging in sexual relationship from the individual and grants it to the Court or the State. Much akin to this, in the case for Marital Rape, the question is that whether the State can compel a woman to have sexual intercourse with her husband even against her consent. In a nutshell, the questions regarding constitutionality that arises with respect to RCR are the same as in marital rape and therefore, a parallel can be drawn as to how courts have treated the question of privacy and autonomy in case of the former.

The Andhra Pradesh High Court in the *T.Sareetha v. T.Venkatasubbaih*⁵⁰ held that section 9 of the Hindu Marriage Act, 1956 is unconstitutional in nature since it strikes down the sexual autonomy of a woman. Substantiating its argument, the court held that forcing an act of sexual intercourse upon an unwilling person, no matter what the relationship is between the persons involved, is a humiliation not just to the dignity of an individual but also demeaning to the human spirit.⁵¹ It was further opined by the court that a decree for RCR offends the inviolability of the body and the mind along with offending the marital privacy of an individual. Focusing on marital privacy, the court referring Tom Gaiety said that the definition of right to privacy “is bound to include body’s inviolability and integrity and

⁴⁷ *Supra* note 1 at 14.

⁴⁸ The Hindu Succession Act 1956 (Act No 30 of 1956), s 6.

⁴⁹ The Hindu Marriage Act, 1955 (Act No 25 of 1955), s 9; Also see, *Supra* note 5 at 10.

⁵⁰ AIR 1983 AP 356.

⁵¹ *Id.* at para 18..

intimacy of personal identity including marital privacy.”⁵² Thus, the court focused on both autonomy as well as marital privacy of an individual while interpreting and upholding the right to privacy in cases of RCR.

However, the Delhi High Court, in *Harvinder Kaur v. Harmander Singh Choudhary*⁵³, took a view to the contrary and upheld the constitutionality of the provision, in order to protect the institution of marriage and thereby ignoring the fact that when a woman is forced to resume conjugal relations with her husband, there is a very high possibility that she can be forced into an act of sexual intercourse without her consent and with no legal recourse available to her. Further, the court said that since marital relationships lie in the private sphere, it was reluctant to go deeper into it since it would strike at the very nature of spousal relationship and open up the gates for ‘unlimited litigation.’⁵⁴ Further, the court also held that it will be inappropriate to introduce Constitutional law in homes as it is akin to introducing a bull in a China shop.⁵⁵ The matter also came up for consideration in the Supreme Court in the case of *Saroja Rani v. Sudarshan Kumar Chada*⁵⁶ whereby the court agreed with the Delhi High Court judgment and upheld the constitutionality of section 9 of the Hindu Marriage Act, 1956.

It is contended that the Delhi High Court and the Supreme Court have been erred in their judgments. Even if we agree to their line of arguments that the courts or the legislature cannot pervade into the private sphere of marriage, then why is it that a provision like section 498A under the IPC has been added to protect a married woman from cruelty in marriage? Why has the act called Protection of Women from Domestic Violence Act, 2005 been brought in by the legislature? And, was marital privacy not pervaded when the Dowry Prohibition Act, 1961 was enacted? These are the questions which the judiciary and the opponents of criminalizing Marital Rape also need to ponder upon. The court which is supposed to be the ‘guardian and protector of Fundamental Rights’ swayed away from its duty when it upheld the constitutionality of section 9 of the Hindu Marriage Act, 1955 as it violates articles 14 and 21 of the Constitution.

The aforesaid opinions of the Supreme Court and the High Court of Delhi are also not in consonance with the recent opinion of the Supreme Court in the case of *K.S. Puttaswamy v.*

⁵² *Id.* at para 24.

⁵³ AIR 1984 Delhi 66.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ AIR 1984 SC 1562.

Union of India,⁵⁷, also popularly known as the ‘Right to Privacy’ judgment. The judgment held that the privacy and autonomy of an individual is a fundamental right enshrined under article 21 of the Constitution. Therefore, it is time for us as a society to move away from the argument of marital privacy and focus on the arguments related to right to equality, autonomy and choice of a woman. This argument ensures that a woman is seen as person with an individual personality of her own rather than being symbolized as a wife. This is where the *T. Sareetha* judgment erred in its approach whereby it held that section 9 wasn’t in sync with ‘marital privacy’ rather than focusing on the autonomy of the woman.⁵⁸ This left enough room for its judgment to be overturned later in the *Harvinder Kaur* and *Saroja Rani* judgments.⁵⁹

On the point of marital privacy consistently raised by the proponents of the exception clause, Chandrachud J., writing the majority opinion, he pointed that there is a need to move to individual autonomy from Marital Privacy. The bench stated “privacy allows each human being to be left in a core which is inviolable.”⁶⁰,and reiterated the observation of the Apex Court in *Gobind v. State of Madhya Pradesh*⁶¹, where the bench held that the central concern of any limited government under a constitution should be individual autonomy with explicit guarantees. It was held that individual privacy of a human being is not only one of the most important facets of human life but also provides dignity to a human being, and that the liberty to exercise personal choice is imbibed in the idea of privacy.

The majority opinion also addressed the fact that privacy includes Bodily Privacy an inalienable right that prevents others from violating someone’s body⁶², and also Decisional Privacy which signifies the ability to make life decisions including sexual and reproductive decisions.⁶³ Nariman J. in a separate opinion, concurring with the majority, held that the Right to Privacy includes the Privacy of Choice which includes the right to make choices that are integral to a person’s life.⁶⁴ It is pertinent to mention the ruling of the Supreme Court in the case of *State of Maharashtra v. Madhukar Narayan Mardikar*⁶⁵ wherein it was held by

⁵⁷ 2017 10 SCC 1.

⁵⁸ *Supra* note 1 at 12.

⁵⁹ *Ibid.*

⁶⁰ *Supra* note 63 at para 2.

⁶¹ (1975) 2 SCC 148.

⁶² *Supra* note 63 at 202.

⁶³ *Id.* at 203.

⁶⁴ *Id.* at 449.

⁶⁵ (1991) 1 SCC 57.

Ahmadi C.J. that even if a woman accepts ‘*dark sides of her life*’, she is entitled to her privacy which no one can pervade according to his whims and fancies.

In *Suchitra Srivastava v. Chandigarh Administration*⁶⁶ where Balakrishnan C.J. held that the right of a woman to procreate or not and to make reproductive choices is part of her fundamental right to personal liberty enshrined under the Constitution. Most importantly, it was held that a woman shouldn’t be restricted to make her right to reproductive choice such as the right to refuse participation in sexual intercourse or her insistence on contraception. The court further stated that the aforementioned right included the right to choose the kind of birth control she wants and her prerogative of motherhood.⁶⁷

It is evident that the Apex Court has given primacy to individual privacy and autonomy of a person in unequivocal terms and not marital privacy. In light of the above rulings of the Supreme Court, it is clear that the right to bodily integrity is a natural corollary to the right to privacy which every woman possesses. Therefore, the marital rape, which violates the bodily integrity, autonomy, privacy and dignity of every married woman, and the exception clause to article 375 permitting it, are ultra vires article 21 of the Constitution.

In recent years, the Delhi High Court and the Supreme Court have heard a slew of petitions against Marital Rape but the attitude of the judiciary has not been benign towards the cause of married women. It is pertinent to note that since 2017, the Delhi High Court has been hearing a series of petitions filed by the RIT Foundation along with All India Democratic Women’s Association (AIDWA), challenging the constitutionality of section 375 of the IPC. It has been argued that the law discriminates against married women who are sexually assaulted by their husbands.⁶⁸ However, the Government has responded by saying that criminalizing marital rape would destabilize the institution of marriage and that it will become an easy tool in the hands of wives to harass their husbands.⁶⁹

Further, the Government also has also argued that if sexual acts between a husband and his wife is termed as marital rape, then the sole authority as to what constitutes marital rape will rest with the wife. The Government has also raised questions regarding the nature of evidence which will be relied upon before the Court in such procedures as “there can be no lasting

⁶⁶ (2009) 9 SCC 1.

⁶⁷ *Id.* at para 11.

⁶⁸ Meera Emmanuel, “Marital Rape Case: Marriage does not mean all time Consent for Sexual Relations, Delhi HC”, *BarandBench*, July 18, 2018, available at: <https://www.barandbench.com/news/delhi-hc-marital-rape-marriage-consent> (last visited June 12, 2021).

⁶⁹ *RIT Foundation v. Union of India*, W.P. (C) No. 284/2015

evidence in case of sexual acts between a man and his own wife.”⁷⁰ However, the Division Bench comprising of Justices Gita Mittal and C. Hari Shankar, made an oral observation that both husband and wife had the right to refuse sexual relations. The Bench quoted that, “Marriage does not mean that the woman is all time ready, willing and consenting for establishing physical relations. The man will have to prove that she was a consenting party.”⁷¹ Further, even the Delhi Government argued and submitted that marital rape cannot be made a penal offence via a separate provision as it was already a crime under section 498A of the IPC, which pertains to cruelty by the husband against his wife.⁷²

Also in the year 2019, a Public Interest Litigation (PIL) was filed in the Supreme Court requesting the bench to direct the Central Government to frame a law for making Marital Rape, a ground for divorce.⁷³ The division bench comprising of Bobde J. and Gavai J. directed the petitioner to approach the High Court of Delhi. Consequently, the petitioner approached the Delhi High Court seeking that it gives directions to the Legislature to introduce a law on marital rape. However, the petition was dismissed by a division bench of Patel J. and Shankar J. stating that the court did not have the power under article 226 of the Constitution to frame laws on its own.⁷⁴

Thus, while the Apex Court and various High Courts across the country have ruled in favour of bodily integrity, privacy and autonomy of women, they have fallen short of action when there has been a question of criminalization of marital rape. The legislators have also consistently held the view that criminalization would destabilize the institute of marriage, ignoring that nothing is left to stabilize in marriage post an incident of forced sexual intercourse or forced sexual assault by a man on his wife. These views are also influenced by societal responses to such acts which are coloured with ignorance, stigma, taboo etc.

IV. Marital Rape as a Ground For Divorce

Apart from the suggestion that marital rape should be criminalized, proponents of criminalization of marital rape have also suggested that it can be a valid ground for divorce.

⁷⁰ *Ibid.*

⁷¹ *Supra* note 72.

⁷² IANS, “Delhi Government Opposes Criminalization of Marital Rape in HC, Says It is ‘already an offence’”, *Firstpost*, January 18, 2018, available at: <https://www.firstpost.com/india/delhi-government-opposes-criminalisation-of-marital-rape-in-hc-says-it-is-already-an-offence-4309411.html> (last visited on June 13, 2021).

⁷³ IANS, “SC Refuses to Entertain PIL Seeking Law Against Marital Rape”, *Outlook*, July 1, 2019, available at: <https://www.outlookindia.com/newscroll/sc-refuses-to-entertain-pil-seeking-law-against-marital-rape/1565608> (last visited on June 10, 2021).

⁷⁴ *Anuja Kapur v. Union of India* W.P. (C) 7256/2019

This view was validated by the Kerala High Court when it held in a 2021 ruling that, merely because marital rape is not recognized as an offence under the law, it doesn't inhibit the court to recognize it as a form of cruelty, thus recognizing it as a good ground for divorce.⁷⁵ Further, it was also held that an insatiable urge for wealth and sex also amounted to cruelty. The case pertained to an appeal filed by the husband, firstly, against a judgement allowing divorce petition by the wife and secondly against a judgement dismissing a petition for RCR by the husband. In the divorce petition, the wife had alleged sexual perversion and physical harassment by her husband which she also testified for via oral testimony in the family court. The family court found her oral testimony to be unshaken and trustworthy during the cross-examination. Holding that autonomy of a human being is paramount even in case of marriage, the bench stated that:⁷⁶

In matrimony, spouse possesses such privacy as invaluable right inherent in him or her as individual. Therefore, marital privacy is intimately and intrinsically connected to individual autonomy and any intrusion, physically or otherwise into such space would diminish privacy.

Enunciating further, the court delved into modern social jurisprudence and opined that spouse are considered as equal partners in a marriage and thus, the husband cannot claim to possess a right over his wife's body. Therefore, it was held that the husband, by committing a sexual act against the wife's consent is marital rape.⁷⁷ The court also looked into the jurisprudence of divorce law and lamented the fact as to whether the present framework would be able to stand the test of constitutionality in present times since it does not take into account individual choice.⁷⁸ It was opined by the court that the objective behind divorce law should be allow individuals to exert their choice freely and help in taking decisions regarding their personal affairs. In conclusion, the court said that the need of the hour is to "have a law dealing with human problems with a humane mind to respond."⁷⁹

Thus, the Kerala High Court was unequivocal in its opinion of marital rape. The court, considering marital rape as a ground for divorce by holding that it amounts to cruelty, laid fertile ground for the argument that if it amounts to cruelty under Family Law, it can also amount to an offence under Criminal Law. By holding marital rape unacceptable, the Kerala

⁷⁵ *XXX (Party in Person) v. XXX (Party in Person)* MAT. APPEAL NO. 151 OF 2015

⁷⁶ *Id.* at para 13.

⁷⁷ *Ibid.*

⁷⁸ *Id.* at para 17.

⁷⁹ *Id.* at para 19.

High Court, after the Gujarat High Court has contributed to the growing jurisprudence against marital rape in the country.

V. Evidence in Cases of Marital Rape

One of the most common arguments given by persons opposing criminalization of marital rape is that it will be extremely difficult to prove the offence in the court of law. Another argument is that it has the potential to be misused by unscrupulous wives. Both the arguments are not profound since just because a crime is difficult to prove in a court of law or it has the potential to be misused cannot be a reason to not criminalize it. If we use that logic, then crimes like Sexual Harassment at Workplace or even taking Dowry are difficult to prove but there are legislations criminalizing the same. According to statistics, the perpetrators in most cases of sexual assault are known to the victims. According to the latest Delhi Police Statistics, there was a 21.6% increase in cases of rape last year. The number of rape cases went up from 1,969 in 2021 from 1,618 in 2020. However, the most striking feature was that out of the total registered cases, in a staggering 98.6% cases, the perpetrator was known to the victim.⁸⁰ A significant proportion within them will be husbands and partners. Due to the proximity of the accused with the victim and her family, evidence is mostly inadequate, witnesses are hard to procure to speak up and it is mostly one person's word against the other.⁸¹ According to Gautam Bhatia, the need of the hour is to strengthen the evidentiary procedures rather than making marriage immune from rape laws.⁸²

Perhaps, a leaf can be taken out of the book of the Kerala High Court in *XXX (Party In person) v. XXX (Party In person)* judgment where the division bench interpreted the term *cruelty* in matrimonial relationships. The court held that “*cruelty reflects in the character of a person.*”⁸³ It was suggested by the bench that while analysing the conduct of a spouse in matrimonial relationships, the court should adopt the approach of a prudent man's evaluation of human behaviour. It was further suggested by the bench that a social semiotic approach should be taken by the court in such cases.⁸⁴ Construing sexual perversion by the husband as

⁸⁰ Express News Service, Delhi: At least 5 Rape Cases Recorded Per Day in 2021, Police Data Shows, February 25, 2022, The Indian Express, available at: <https://indianexpress.com/article/cities/delhi/delhi-at-least-5-rape-cases-recorded-per-day-in-2021-7789979/> (last visited on March 18, 2022).

⁸¹ Gautam Bhatia, “The Argument Against Making Marital Rape A Criminal Offence Are Not Valid”, *Hindustan Times*, April 02, 2018, available at: <https://www.hindustantimes.com/analysis/the-arguments-made-against-making-marital-rape-a-criminal-offence-are-not-valid/story-Hsa5Esr4n8hKaCEhiYthHK.html> (last visited on March 18, 2022)

⁸² *Ibid.*

⁸³ *Supra*, note 83 at para 9.

⁸⁴ *Ibid.*

cruelty, the court relied upon the oral testimony of the wife which was unflappable during the cross-examination. It was corroborated by the statement by the husband's father where he accused him of ill-treating his wife and also stated that his son's marriage was in disarray. Even though, it was civil proceeding, what is important here that the court considered non-consensual sexual perversion by the husband as cruelty. Cruelty, whether physical, mental or emotional is an aspect which is common to between marital rape and others offences prescribed under the IPC.

The question which arises now is that how is cruelty committed by a stranger different to cruelty committed by a husband? Also, it has to be noted that, in the *XXX case*, the husband had a track record and a history of sexual perversity. Similarly, victims of marital rape will always have a history of sexual assault being levelled on them. It will never be an isolated event. According to Dr. Prasanna Gettu, CEO, International Foundation for Crime Prevention and Victim Care, "Marital rape will not happen in isolation, there will be a history of violence and physical abuse, and will fit into the larger picture of domestic violence. We have to look at it from that perspective".⁸⁵

Another argument against criminalizing Marital Rape is the lack of medical evidence in cases of marital rape as sex is considered to be a normal activity between a husband and wife. However, a combination of physical violence in the past and medical examination of the wife and witness testimony is enough corroborating evidence along with the testimony of the victim to prove the guilt of the husband in cases of marital rape. To this end, it is imperative to mention the case of *Sheikh Zakir v. State of Bihar*⁸⁶. The case pertained to the rape of a tribal woman where the accused was convicted by the lower court under section 376 of the IPC on the basis of the testimony of the complainant, her husband and two other witnesses.

The appeal by the accused was dismissed by the High Court, consequent to which, an appeal was preferred to the Supreme Court. It was argued by the accused in the Supreme Court that neither the complainant had not been medically examined by a doctor, nor were the Mukhiya or the police officer examined, to whom her husband had complained. On this ground, the accused submitted that it couldn't be proved beyond reasonable doubt that the complainant

⁸⁵ Sonal Singh, "Dear Supreme Court, Here's Why Marital Rape Should Be Criminalized", *The Better India*, December 01, 2017, available at: <https://www.thebetterindia.com/123017/supreme-court-criminalise-marital-rape-laws-india/> (last visited on March 18, 2022).

⁸⁶ AIR 1983 SC 911.

had been raped. To this, the court held that absence of injuries on the body of the complainant was not enough to discredit her statement. It was further held that:⁸⁷

Merely because the complainant was a helpless victim who was by force prevented from offering serious physical resistance she cannot be disbelieved. In this situation the non-production of a medical report would not be of much consequence if the other evidence on record is believable.

On the basis of this, the appeal was dismissed and the accused was asked to surrender and serve the remainder of his sentence. Thus, it is clear that there are enough judicial precedents and procedural safeguards under the law which can provide enough evidence to prove beyond reasonable doubt in cases of marital rape. While, it is admitted that once it is criminalized, new challenges may arise but the current arguments opposing criminalizing marital rape smack of laziness and patriarchal chauvinism.

VI. Suggestions

It cannot be denied that existence of exemption of marital rape instils a belief of women being subordinate to men and as akin to a chattel. Their chastity and purity are put at a pedestal and sold from the father to the husband at the time of marriage. The assumption that consent given once is consent for eternity is a flawed one, since it strikes upon the autonomy of women.⁸⁸ The existence of a provision like marital rape exemption in the laws of any nation is a testimony to the societal bias against the female gender. Therefore, the following suggestions can be considered to deal with the menace of marital rape legally and socially.

- (1) Various foreign jurisdictions such as Canada, South Africa and Australia have made Marital Rape a penal provision and similar provision can be incorporated in India also. The exception clause for Marital Rape should be repealed, with the provision clearly specifying that a marital or any other relationship between the accused and the victim shall neither act as a valid defense nor should it be of any relevance to the investigation in the trial of rape or sexual harassment. Further, it should be explicitly mentioned under the amended provision that marital relationship or any previous relationship between the accused and the victim shall not act as a mitigating circumstance during sentencing. Along with introducing an amendment under section

⁸⁷ *Ibid.*

⁸⁸ Indira Jaising, “Keynote Address to the J.S. Verma Committee”, available at: <https://www.lawyerscollective.org/wp-content/uploads/2013/01/Ms.-Jaising-Justice-Verma-Committee-Keynote-Address-Speech-19-jan.pdf> (last visited on November 25, 2020).

375 the IPC, there should also be an amendment under section 114A of the Indian Evidence Act 1872. Section 114A states that in case a woman alleges absence of consent in a trial for rape under section 376 of IPC, the court shall presume that there was no consent from the victim. An explanation should be added to section 114A stating that marital or any other relationship between the accused and the victim shall not nullify the presumption of absence of consent. Thus, by introducing the amendment it can be ensured that the accused does not take the defense that marriage automatically qualifies as consent for sexual intercourse.

- (2) There is a need to recognize Marital Rape as a ground for divorce as it amounts to physical and mental cruelty. Recognition as a ground of divorce will be the first step towards criminalization and will at least help already suffering women a chance to get rid of their trauma. The recent ruling by the Kerala High Court and its nuanced observation with regards to marital rape as a ground for divorce and the need to evolve divorce law according to modern society should be looked into by other courts and the legislature.
- (3) Along with bringing in changes in the law, women must also be encouraged to come out and speak up regarding their plight. A situation might arise that even after criminalization, women don't come out to register complaints since they will surely be abandoned by their husbands and even their parents might not take them back due to the stigma involved. This is coupled with the fact that a lot of them might not be literate or educated enough to be employed and therefore might not be financially independent. So, registering a complaint against their husband would render them homeless with nowhere to go. This fear will lead women to quietly suffer, accept their fate and not complain and speak up, which would defeat the purpose of criminalizing marital rape. Hence, it is important that apart from criminalization, shelter/rehabilitation homes be built by the Central/State governments for such women, where they can be taken to if their parents don't take them back. These shelter homes should have all the amenities required to live a dignified life and also have creche facility for women with children. Further, there should be regular medical checkups from doctors and psychological counseling for both the mother and child. Considering their financial situation, it would also be logical for them to be provided with legal aid. Lastly, they should be provided with vocational training inside these homes so that they become employable, financially independent and make a good life for themselves.

- (4) Lastly, along with bringing in institutional sensitivity, there is an urgent need to bring a change in the mindset of society in general. Prosecutors, investigators and judges need to be sensitive in their dealings of such cases, since they are not just dealing with a criminal offence but also with multiple sociological and personal layers of stigma. Also, merely making it a penal offence will not suffice. As mentioned above, marital rape is a societal problem and not just legal. A Man rapes his wife because he believes that she is her property with whom he can do as he pleases. It is this patriarchal notion that needs to be countered to completely abolish this menace from the society. For this, penalization maybe a solution in the short term but to completely erase it in the longer run, it is important to educate our younger generation about the opposite sex so that they can understand each other better. At present, what children, especially boys, learn from a young age is that the men are superior to women, which has been instilled since generations and has been consolidated into the minds of billions of men, young and old. Therefore, a subject called 'Gender' should be introduced in our schools where students are taught about the opposite sex so that they get rid of their misconceptions about the other sex.

VII. Conclusion

When the law does not protect married women and unmarried women equally by clothing them with equal protection, it provides the breeding ground for an environment of Marital Rape to flourish. It induces the belief amongst men that forceful sexual intercourse with their wives is acceptable and their right as well. It is of utmost importance that exception 2 to section 375 be repealed because doing so would help in getting rid of this destructive attitude. Making it a penal offence creates a boundary, and appraises the society that transgression of this boundary shall result in punishment. Statutory sanction and judicial precedents go hand in hand in deterring the vandals in the society from commission of crimes. Thus, the abolition of the Marital Rape Exemption clause is imperative and is the first step in creating a society which is more humane for women and sensitive towards their rights.

Dehumanization of women cannot be condoned; sexual intercourse with wife against her will is not the privilege of a husband, but a violent and inhumane act that has to be criminalized by the legislature at all costs. Along with being in contravention with right to Privacy and the Right to Equal Protection of Law, Marital Rape is an attack upon the entire being and dignity of a woman. In light of the *K.S. Puttaswamy* judgment, we should move away from 'societal morality' of the past and move towards 'constitutional morality' of the present and provide

women with the rights over her body, privacy and sexual autonomy which they rightly deserve. A progressive society is made not just on the basis of some percentage of GDP or economic growth. It is rather made by the growth of economy as well as the society. It is along this path that our country should tread if it wants to become the superpower.