

MARITAL RAPE: WHY INDIA NEEDS TO ELIMINATE THE EXCEPTION CLAUSE

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Abstract

Increasing incidence of marital rape unheeded due to its non-criminalisation, is an alarming concern as it regresses the emancipation of women in India. The purpose of this research paper is to expose the lack of action by the Indian legislature to strike down the marital rape exception clause and further, to spread social awareness about this wrongful act. The paper also focuses on the reasons behind the existence of the exception clause in the first place, and the implications of this act on the physical, mental and emotional health of women. Most of the victims of marital rape are unable to raise their voice against this crime because of the primacy attached to marriage in our society. Using history, statistical data, case laws and various other research mechanisms, this paper emphasises the need for change by adopting an all-inclusive definition of rape and the requisite punishments for the same. By drawing inspiration from international declarations, Indian judicial precedents and various Law Commission Reports, the paper attempts to highlight that criminalisation of this issue is the first step to eradicate prevalent social evils like marital rape from the Indian mindset. A review of other nations laws and cases reveals the backwardness of Indian legislation as far as change and amendment of existing laws is concerned. The research undertaken stresses upon the urgency of deleting the exception clause that refrains from criminalising marital rape in our country, thereby protecting the expression, rights and dignity of women, regardless of their marital status.

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“Apart from property matters and the availability of matrimonial remedies, one of the most important changes is that marriage is in modern times regarded as a partnership of equals, and no longer one in which the wife must be the subservient chattel of the husband. Hale’s proposition involves that by marriage a wife gives her irrevocable consent to sexual intercourse with her husband under all circumstances and irrespective of the state of her health or how she happens to be feeling at the time. In modern times any reasonable person must regard that conception as quite unacceptable.”

-Lord Keith, while pronouncing the judgement in *R v. R*,¹ which outlawed marital rape in England.

I. INTRODUCTION

Even in the modern era of the 21st century, women’s rights remain shackled to patriarchal notions of the yesteryears. The absence of these rights force women to battle challenges on their own that threaten to strip them of their dignity and mental peace. One of these challenges is marital rape, which is not criminalised in India. In fact, India is one of the thirty-six countries in the world which have still not criminalised marital rape, despite prolonged opposition.²

¹ [1991] UKHL 12, [1992] 1 AC (HL) 599 (appeal taken from Eng.).

² *Marital Rape in India: 36 countries where marital rape is not a crime*, India Today (Mar. 12, 2016), <https://www.indiatoday.in/education-today/gk-current-affairs/story/marital-rape-312955-2016-03-12>.

Rape, as defined by Section 375 of the Indian Penal Code (*hereafter, IPC*),³ includes all forms of sexual assault involving non-consensual intercourse with a woman. However, Exception 2 to Section 375 (*hereafter, the marital rape exception clause or the exception clause*)⁴ exempts unwilling sexual intercourse between a husband and a wife over fifteen years of age from the definition of “rape” under Section 375 and thus immunizes such acts from prosecution. This exception allows a husband to have sexual intercourse with his wife, with or without her consent.

Marital rape has rendered the concept of consent completely null and void. The IPC explains consent to mean “*an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specified sexual act.*”⁵ In the United Kingdom, the statutory definition of consent is “*if he agrees by choice, and has the freedom and capacity to make that choice.*”⁶ Consent is an important defence in cases of sexual assault, as it demonstrates the willingness of the aggrieved party to engage in sexual intercourse.⁷ However, the marital rape exception clause

³ Indian Penal Code § 375, No. 45 of 1860, India Code.

⁴ *Id.* § 375 Exception 2.

⁵ Indian Penal Code § 375 Explanation 2, No. 45 of 1860, India Code.

⁶ Sexual Offences Act 2003, § 74 (UK).

⁷ Christina M Tchen, *Rape Reform and a Statutory Consent Defense*, 74 J. Crim. L. & Criminology 1518 (1983), <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=6408&context=jclc>.

assumes consent to be rooted in the system of marriage itself.⁸ As a result, a wife in India cannot legally prosecute her husband for engaging in sexual intercourse with her, contrary to her consent.

In a country with a prominent history of patriarchy, this exception clause is misused as a conscious process of intimidation and assertion of the superiority of men over women. The UN Population Fund states that 35% of married Indian women, aged 15-49 have experienced physical violence by their husband.⁹ In the present day, studies indicate that 10-14% of married women are raped by their husbands: the incidents of marital rape soars from one-third to half among clinical samples of battered women. 25% of rapes are committed by one's spouse.¹⁰ In light of these shocking statistics, a number of writs challenging the constitutionality of this exemption have been filed in Indian courts, but none have yet succeeded in abrogating this draconian law.¹¹

II. BACKGROUND

⁸ Noor Ejaz Choudhary, *Marital Rape: A South East Asian Perspective*, U. C. Lahore Human Rights Rev.,

https://uclhumanrightsreview.wordpress.com/volume-i-student-articles/marital-rape-a-south-east-asian-perspective/#_ftn1.

⁹ United Nations Population Fund India, *Health and social consequences of marital violence: A synthesis of evidence from India*,

<https://india.unfpa.org/sites/default/files/pub-pdf/ViolenceReport-25-11-10.pdf>.

¹⁰ Priyanka Rath, *Marital Rape and the Indian legal scenario*, India Law Journal (2007),

https://www.indialawjournal.org/archives/volume2/issue_2/article_by_priyanka.html.

¹¹ *RIT Foundation v. Union of India* Writ Petition (Civil) 284 of 2015.

“For the husband cannot be guilty of a rape committed by himself upon his lawful wife for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband which she cannot retract.”

-Matthew Hale, in *Pleas of the Crown*.¹²

With this cryptic pronouncement, the seventeenth century jurist, Matthew Hale, laid the foundation for the common law marital rape exemption.¹³ This exemption views marriage between the spouses to be the bedrock of consent, one which cannot be revoked later, thus immunising the husband from being prosecuted for rape of his wife. Hale's contract and consent theory for marital rape exemptions relied on marital status law.¹⁴ Marital status rules fixed marital rights and obligations automatically so that 'opting-out' was not a choice while the marriage existed. The fact that a husband or wife did not wish to abide by, or attempted to contract around, these default state rules was legally irrelevant. The only opportunity for actual agreement or, in this case, a woman's consenting or not consenting to sex, was the initial decision to marry. However, this decision subjected wives and husbands to very different obligations and rights, giving the husband a right of sexual

¹² Matthew Hale, *History of the Pleas of the Crown* 629 (In the Savoy, Printed by E. and R. Nutt, and R. Gosling for F. Gyles, 1736).

¹³ Comment, *The Marital Exception to Rape: Past, Present and Future*, 13 Det. C. L. Rev. paras. 261, 262 (1978).

¹⁴ Janet Hong, *Marital Rape*, Civil Liberties in the United States (July 29, 2012), <https://uscivilliberties.org/themes/4098-marital-rape.html>.

access to his wife and imposing an obligation to submit by the wife.¹⁵

The notion that marriage entailed the wife's 'irrevocable' or 'implied' consent to sex once she made the decision to marry, failed to acknowledge the potential divergence between this decision and her actual state of mind at any point within the marriage.¹⁶ Therefore, according to Hale, a woman's marriage triggered the enforcement of the legal presumption of consent to sex with her husband, an idea that formed the basis for the common law marital rape exemption.¹⁷

Among other theories legalising marital rape, the property rationale and marital unity theories are also significant.¹⁸ In common law, a woman, including her sexuality, was considered the property of her husband, and the law did not recognize any crime in a husband violating the woman who legally belonged to him.¹⁹ Similarly, in India when the IPC was drafted in 1860, a married woman was not considered an independent legal entity.²⁰ Rather, she was considered to be an object of her husband.²¹ As a result, she did not possess the rights guaranteed to an

independent legal entity, and could not file a complaint against another using her own identity.²² This doctrine of merging the woman's identity with that of her husband largely paved the way for the marital rape exemption.

Many would argue that these archaic ideas are inconsistent with contemporary notions of equality. Yet, the glaring reality in India is the continuation of marital rape with no visible efforts to outlaw it. A prominent reason behind it is that lawmakers fear that criminalising marital rape can potentially destroy the institution of marriage and disrupt the family system.²³ Marriage is viewed as a sacrosanct tradition in Indian society, a society which is already plagued by issues of illiteracy and poverty. In such a scenario, the government feels that criminalising marital rape can result in the breakdown of this institution.²⁴ It echoed the same sentiment in response to a plea in the Delhi High Court.²⁵ The government feared that the institution of marriage can 'de-

¹⁵ *Id.*

¹⁶ Jill Elain Hasday, *Consent and Contest: A Legal History of Marital Rape*, 88 Calif. L. Rev. 1373-1505 (2000).

¹⁷ *Id.*

¹⁸ Hong, *supra* note 15.

¹⁹ Maria Pracher, *The Marital Rape Exemption: A Violation of a Woman's Right of Privacy*, 11 Golden Gate U. L. Rev. (1981), <http://digitalcommons.law.ggu.edu/ggulrev/vol11/i1ss3/1>.

²⁰ Makkar, *supra* note 5.

²¹ *To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99(6) Harv. L. Rev. 1255, 1256 (1986).

²² *Id.*

²³ Department-Related Parliamentary Standing Committee On Home Affairs, *One Hundred And Sixty Seventh Report On The Criminal Law (Amendment) Bill, 2012*, Parliament Of India Rajya Sabha (March 2013), <https://www.prsindia.org/uploads/media/Criminal%20Law/SCR%20Criminal%20Law%20Bill.pdf>.

²⁴ Nita Bhalla, *Men may suffer if marital rape becomes crime- India government*, Reuters (Asia, 31 August 2017), <https://in.reuters.com/article/india-rape-marriage/men-may-suffer-if-marital-rape-becomes-crime-india-government-idINKCN1BB1UH>.

²⁵ *RIT Foundation v Union of India* Writ Petition (Civil) 284 of 2015 is a petition filed in the High Court of Delhi which challenges the validity of the marital rape exception in the IPC. *See infra* Part V.

stabilize' if marital rape is declared illegal.²⁶ It could also provide a tool to make men vulnerable to harassment by their wives.²⁷ However, these reasons are not convincing enough to let the oppressive act of marital rape occur without legal consequences, given its horrifying ramifications.

III. IMPLICATIONS OF MARITAL RAPE

There are a plethora of reasons why the silence on such a mentally and physically traumatizing act should be penalized. We aim to highlight a few of these reasons in the following part, which will continue to persist if the marital rape exception clause is not struck down.

Acts of oppression against women are quite prominent. According to statistics of the World Health Organization, lifetime prevalence rate of violence against women ranges from 16% to 50%; at least one in five women suffer rape or attempted rape in their lifetime.²⁸ The probability of this violence increases in a marriage as it is treated to be a private space where the state does not intrude.²⁹

²⁶ Bhalla, *supra* note 25.

²⁷ Sumedha Choudhury, *Why Is Outlawing Marital Rape Still a Distant Dream in India*, *The Wire* (Oct. 28, 2018), <https://thewire.in/law/india-marital-rape-criminal-law>.

²⁸ World Health Organization, *Gender and women's mental health*, https://www.who.int/mental_health/prevention/genderwomen/en/.

²⁹ Vidhu Verma, *Non-discrimination and Equality in India: Contesting Boundaries of Social Justice* (Routledge, 2012); Saptarishi Mandal, *Right to Privacy in Naz Foundation: A Counter-Heteronormative Critique* 525 (2 NUJS Law Review, 2009).

The act of rape, be it within the confines of marriage or outside, is a forced act. Forced means obtained or imposed by coercion or physical power.³⁰ Therefore, forced acts are those which are carried out against one's personal decision and will. The distinctive characteristic of a human act is the exercise of free will.³¹ Since every human act occurs out of free will, every human act is voluntary. Anything that takes away an agent's use of his or her intellectual faculties also takes away the voluntariness of his or her action.³²

This leads to the realization that the act of rape within the confines of marriage goes against the free will of the woman who presumably relinquishes it to her husband, thereby taking away the voluntariness of her action. If the wife is legally held to be a victim of sexual intercourse in a marriage (an act that should be in the context of love and genuine concern for the partner), it will enable the man to consider the possible consequences of his words and actions. When moral consideration for the same is lacking, legal consequences will limit if not eliminate this social evil for fear of criminal action.

The wife's role has traditionally been understood as submissive, docile and that of a homemaker.³³ Sex has been treated as an obligation in a marriage. Women are expected to be 'good wives', to silently serve and not

³⁰ Angus Stevenson, *Oxford Dictionary of English* (OUP 3rd ed., 2010).

³¹ Timothy O'Connor & Christopher Franklin, *Free Will*, (2020), <https://plato.stanford.edu/entries/freewill/>.

³² *Id.*

³³ Rath, *supra* note 11.

question misogynistic norms, making the act of seeking help seem impossible.³⁴ Moreover, thousands of women accept this brutality without knowing that it is their choice to say 'no' within the confines of marriage. Not criminalising such an act takes away the voice of the wives in a culture where they are already at a disadvantaged position when it comes to marriage. The government's irrational correlation between saving the institution of marriage and not criminalising marital rape does not help the situation. It is tough to comprehend how rape by the husband is any less brutal than other contentious acts that discriminate against women.³⁵ The victims of marital rape can file a complaint under the Protection of Women from Domestic Violence Act 2005 (PWDVA) which came into force in 2006.³⁶ However, the judicial system merely offers a civil remedy between the partners for the offence.³⁷

Apart from being a chief concern in the field of women's rights, marital rape also holds significance in the constitutional field as it violates several constitutional provisions like rights to equality³⁸ and dignity.³⁹ A country's growth and development can be assessed by looking at the position and respect that it gives to its women.⁴⁰ In ancient times, marital rape

had legal and social backing which entitled the husband to have sexual intercourse with his wife.⁴¹ From India's point of view, it is an exceedingly patriarchal declaration which can be further stressed upon through the statistical reports on marital rape.

IV. STATISTICS AND UNREPORTED CASES

In 2013, a United Nations survey found that nearly a quarter of 10,000 men questioned in six Asia-Pacific countries, including India, admitted to having raped a female partner.⁴² The sad belief that they are entitled to sexual intercourse even without their partner's consent is a common motivation, the study found. A majority of these men experienced no legal consequences.⁴³

For the average Indian man, masculinity is about "*acting tough, freely exercising his privilege to lay down the rules in personal relationships, and, above all, controlling women*",⁴⁴ found a 2014 study by the United

<https://www.worldbank.org/en/news/speech/2018/03/17/women-indias-economic-growth>.

⁴¹ Angeliki E Laiou, *Consent and Coercion to Sex and Marriage in Ancient and Medieval Societies*, Dumbarton Oaks Research Library and Collection (1993), <https://www.hup.harvard.edu/catalog.php?isbn=9780884022626>.

⁴² United Nations Development Programme, *UN survey of 10,000 men in Asia and the Pacific reveals why some men use violence against women and girls* (Sept. 10, 2014), <https://www.undp.org/content/undp/en/home/presscenter/pressreleases/2013/09/10/un-survey-of-10-000-men-in-asia-and-the-pacific-reveals-why-some-men-use-violence-against-women-and-girls-.html>.

⁴³ *Id.*

⁴⁴ UN Women Global Database on Violence against Women, <https://evaw-global-database.unwomen.org/en>.

³⁴ *Id.*

³⁵ Choudhury, *supra* note 28.

³⁶ Protection of Women from Domestic Violence Act § § 12-29, No. 43 of 2006, India Code.

³⁷ India Today, *supra* note 2.

³⁸ India Const. art. 14.

³⁹ India Const. art. 21.

⁴⁰ Annette Dixon, *Women in India's Economic Growth*, The Economic Times Women's Forum, Mar. 16, 2018,

Nations Population Fund and the International Centre for Research on Women. The study found that 60% of men admitted to using violence—kicking, beating, slapping, choking, burning—to establish dominance.⁴⁵ The UN Women Global Database also reports that the proportion of women aged 18-74 experiencing intimate partner physical and/or sexual violence at least once in their lifetime is as high as 35%.⁴⁶

These findings tie in with the 2005-06 National Family Health Survey, which found that the commonest source of violence for married women was spouses.⁴⁷ The survey emphasized that only one in every four abused women has ever sought help. It further states that women are much less likely to seek help for sexual violence than for physical violence. When they do seek help, they would rather go to family members than the police.

A small margin of about six of every hundred sexual violence acts committed by men other than husbands actually get reported, says a report by Aashish Gupta of Rice Institute, a non-profit research organization. “*Most incidence of sexual violence, however, were committed by husbands of the survivors: the number of women who experienced sexual violence by husbands was forty times the number of women who experienced sexual*

violence by non-intimate perpetrators”, noted the report.⁴⁸

Lastly, dealing only with Indian State statistics, the International Institute of Population Sciences, Mumbai claimed that 26% of women in Pune, 23% in Bhubaneswar, and 16% in Jaipur often have sex with their husbands against their will. The study found a direct link between alcoholism and sexual abuse. One-fifth of the women surveyed said their husbands were often intoxicated while forcing sex.⁴⁹ This shows us the revolting reality of Indian marriages in the 21st century, made uglier by taking away a woman’s right to prosecute her husband for marital rape.

V. VIOLATION OF INTERNATIONAL INSTRUMENTS

India has ratified the Convention on the Elimination of All Forms of Discrimination Against Women (*hereafter, CEDAW*),⁵⁰ the International Covenant on Civil and Political Rights (*hereafter, ICCPR*),⁵¹ and the International Covenant on Economic, Social

⁴⁸ Ashish Gupta, *Reporting and incidence of violence against women in India*, Research Institute for Compassionate Economics (Sept. 25, 2014), <http://riceinstitute.org/wordpress/wp-content/uploads/downloads/2014/10/Reporting-and-incidence-of-violence-against-women-in-India-working-paper-final.pdf>.

⁴⁹ Mihika Basu, *Marital rape is an ugly reality*, The Indian Express, Apr. 30, 2013, <http://archive.indianexpress.com/news/marital-rape-is-an-ugly-reality/1109618/>.

⁵⁰ Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

⁵¹ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ National Family Health Survey, NFHS-3, vol I (2005-06).

and Cultural Rights (ICESCR).⁵² Additionally, India is a signatory of the Universal Declaration of Human Rights (UDHR).⁵³ Marital rape violates the right to life and the right to live with human dignity, an important component of all these declarations.⁵⁴ The Committee on the Elimination of Discrimination against Women is a UN body composed by independent experts in charge of reviewing a country's implementation of the Convention on Elimination of Discrimination Against Women, an international human rights treaty containing state's responsibilities towards women's human rights. It becomes an agenda for national action once a State signs and ratifies it.⁵⁵ India signed the CEDAW on 30 July 1980 and ratified it on 9 July 1993 with two declarations and one reservation.⁵⁶ This convention is complemented by the Declaration of the Elimination of Violence against Women.

Article 2 of the *Declaration of the Elimination of Violence against Women*

⁵² Core International Human Rights Treaties, Optional Protocols & Core ILO Conventions Ratified by India, Nat'l Human Rights Commission, India, A Handbook on International Human Rights Convention (2012), http://nhrc.nic.in/sites/default/files/A_Handbook_on_International_HR_Conventions.pdf.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ UN Women Asia and the Pacific, <https://asiapacific.unwomen.org/en/countries/india/cedaw>.

⁵⁶ Madhu Mehra, *India's CEDAW story, in Women's Human Rights: CEDAW in International, Regional and National Law* 385–409 (Anne Hellum & Henriette Sinding Aasen eds., 2013), <https://www.cambridge.org/core/books/womens-human-rights/indias-cedaw-story/AABFB0A7A4039B4D128EC396EC6D6A13>.

Violence against women shall be understood to encompass, but not be limited to, the following:

(a) *Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital, mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation; ...*⁵⁷.

This includes marital rape explicitly in the definition of violence against women. Emphasis on these provisions is not meant to tantalize, but to give the victim and not the criminal, the benefit of doubt.

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Article 16 of the *CEDAW General Recommendation No. 19: Violence against Women*⁵⁹ states that family violence is one of the most back handed forms of violence against women. It is prevalent in all societies. Across the age spectrum, women are subjected to violence of all kinds which are perpetuated by traditional attitudes within their family.

⁵⁷ G.A. Res. 48/104, art. 2(a) (Dec. 20, 1993).

⁵⁸ Rath, *supra* note 11.

⁵⁹ UN Convention on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 19: Violence against women*, 11th Session (1992), <https://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>.

Lack of economic independence forces many women to stay in violent relationships. These forms of violence put women's health at risk and impair their ability to participate in family life and public life on a basis of equality.⁶⁰

This Committee⁶¹ and the Special Rapporteur on Violence against Women⁶² have called on the Indian government to remove the exception for marital rape and define marital rape as a criminal offence in 2014⁶³ which has not yet been adhered to. This has further been supported by the Indian Judiciary and various Law Commission reports with special emphasis on the Justice Verma Committee Report reiterated below. Despite the decisions taken by courts that reflect the existence of marital rape, its criminalisation is impending.

IV. INDIAN JUDGEMENTS CONCERNING MARITAL RAPE

The following section includes some prominent judgements of Indian courts with respect to the issue of marital rape and women's rights. By analysing these judgements, we aim to highlight the importance of criminalising marital rape in our country.

⁶⁰ *Id.*

⁶¹ UN Convention on the Elimination of Discrimination Against Women (CEDAW), *UN Committee on the Elimination of Discrimination against Women: Concluding Comments, India*, 37th Session (Feb. 2, 2007), <https://undocs.org/CEDAW/C/IND/CO/3>.

⁶² Rashida Manjoo, *Report of the Special Rapporteur on violence against women, its causes and consequences*, Mission to India (2014), para. 78(c).

⁶³ Amnesty International, *India: Submission to the UN Committee on the Elimination of Discrimination against Women*, 58th session (June 2014), <https://www.refworld.org/docid/53c7cae34.html>.

1. *RIT Foundation v. Union of India*⁶⁴

In this case, the petitioners challenged the constitutionality of the marital rape exception clause. In a historic judgement, the Delhi High Court upheld that married partners can say no to physical relations, thus taking away the presumption that marriage gives one the unquestionable right to have sexual relations with their partner, with or without their consent. The Court also observed that apart from physical force, husbands can monopolize financial power to pressurize their wives into having sex. *Hence, a man would have to prove that the wife was a consenting party in order to rule out rape.*⁶⁵

The petitioners submitted that every adult has the right to sexual autonomy.⁶⁶ They supported that marital rape should be declared void ab initio under Article 13 by virtue of being inconsistent with Part III of the Constitution.⁶⁷ They submitted that Exception 2 to Section 375, Section 376B of IPC⁶⁸ and Section 198B of the Criminal Procedure Code, 1973⁶⁹

⁶⁴ Writ Petition (Civil) 284 of 2015.

⁶⁵ ET Online & Agencies, *Marriage doesn't mean consent for sex: Delhi HC on marital rape*, Economic Times, July 18, 2018, <https://economictimes.indiatimes.com/news/politics-and-nation/marriage-doesnt-mean-wife-always-ready-for-sex-delhi-high-court-on-marital-rape/articleshow/65034722.cms>.

⁶⁶ *Justice KS Puttaswamy v. Union of India*, (2017) 10 SCC 1 (India).

⁶⁷ *Peerless General Finance v. Reserve Bank Of India*, (1987) 1 SCC 424 paras. 48, 50 (India); *Romesh Thappar v. The State of Madras*, (1950) SCR 594 para. 13 (India); *State Of Punjab v. Dalbir Singh*, (2012) 3 SCC 346 paras. 27-29 (India).

⁶⁸ Indian Penal Code § 376B, No. 45 of 1860, India Code.

⁶⁹ Code of Criminal Procedure § 198B, No. 2 of 1972, India Code.

classify rape victims into three categories based on their marital status i.e. married, married but separated, and unmarried. However, there is no intelligible differentia present here between the harms they suffer and without a plausible rational nexus to an object sought to be achieved by the criminal law, thus leading to the violation of Article 14.⁷⁰ They argued that the exception clause assumes non-retractable consent of women to sexual intercourse upon marriage, thus violating Article 15(1).⁷¹ The petitioners also submitted that a woman's physical integrity flows directly from the right to life and liberty under Article 21,⁷² which is violated by marital rape.

The respondent opposed criminalisation of marital rape on several grounds like- violation of right to privacy of the married couple by allowing state intervention, obstruction in their sexual relationship and harassment of husbands by unprincipled wives,⁷³ believing

all this would lead to the destabilization of marriage.⁷⁴ A major argument cited before the Court was “*what may appear as marital rape to an individual wife, it may not appear so to others*”, which stems from the basic structure of criminal law prescribing the standard of ‘reasonableness’ or ‘reasonable person’ as one of its cornerstones.⁷⁵

However, the Court agreed with the petitioners that marital rape violates women's rights to equality, freedom, and the right to live with dignity as provided under the Constitution, and hence, should be declared illegal.⁷⁶ Since the striking down of the exception clause is a legislative function which will lead to the creation of a new offence, it is the duty of the government to act promptly. Two years have lapsed since this judgement was delivered, but the inaction of the government regarding this issue is quite disappointing. It shows that the main hurdle in criminalising marital rape in India continues to be our society's orthodox and patriarchal mindset.

2. *Independent Thought v. Union of India*⁷⁷

In this landmark judgement, the Supreme Court of India criminalised sexual relations with a wife between 15 and 18 years of age.⁷⁸ Sexual relations with a minor girl is a criminal

⁷⁰ *Budhan Choudhary v. State of Bihar*, (1955) 1 SCR 1045 (India); *Anuj Garg & Ors v. Kotwal Association of India & Ors*, (2008) 3 SCC 1 paras. 46-47 (India); *Dr Subramanian Swamy v. Director, CBI*, (2014) 8 SCC 682 para. 57 (India); *Air India v. Nargeesh Meerza & Ors*, (1981) 4 SCC 335 paras. 71, 82 (India).

⁷¹ *Anuj Garg & Ors v. Kotwal Association of India & Ors*, (2008) 3 SCC 1 paras. 21, 26 (India).

⁷² *Suchita Srivastava v. Chandigarh Administration*, (2009) 9 SCC 1 (India); *Justice KS Puttaswamy v. Union of India*, (2017) 10 SCC 1 paras. 167, 198 (India); *Francis Coralie Mullin v. Administrator, Union Territory of Delhi & Ors*, (1981) 1 SCC 608 para. 8 (India); *Bodhisattwa Gautam v. Subhra Chakraborty*, (1996) 1 SCC 490 paras. 9, 10 (India); *Prahlad v. State of Haryana*, (2015) 8 SCC 688 para. 17 (India); *Vishaka v. State of Rajasthan*, AIR (1997) SC 3011 paras. 12-13 (India); *National Legal Services Authority v. Union of India*, AIR (2014) SC 1863 para. 75 (India).

⁷³ Himani Goyal, *Marital Rape: A Murder of Patience*, 3(1) Jus Imperator (Sept. 2019),

<http://journal.jusimperator.org/wp-content/uploads/2019/07/HIMANI-GOYAL.pdf>.

⁷⁴ Economic Times, *supra* note 66.

⁷⁵ Choudhury, *supra* note 28.

⁷⁶ Udai Singh Sidhu, *The Careful Questioning of Socio-Legal Premises: A Step Towards Criminalising Marital Rape*, 4(3) J. of Legal Stud. & Res. (June 2018), <http://thelawbrigade.com/wp-content/uploads/2019/05/Udai.pdf>.

⁷⁷ (2017) 10 SCC 800 (India).

offence in India.⁷⁹ But earlier, when a man married a girl between 15 and 18 years, sexual relations with the wife was not considered to be rape, according to the marital rape exception clause. However, it was recognized in the judgement that such an artificial distinction is arbitrary and contrary to the spirit of Articles 14,⁸⁰ 15(3)⁸¹ and 21⁸² of the Indian Constitution. The judgement analysed in depth the fatal effect of early marriages, which allowed a man to violate the physical, mental and reproductive rights and dignity of the female. The Supreme Court was not pleased with the argument of the Union of India that such practices were a by-product of tradition, and hence, should be allowed to continue. While taking into account that rape is a crime not only against a woman but against society,⁸³ the apex court declared that the law has to evolve and change with the needs of the society. Hence, the outlawing of marital rape for a girl between 15 and 18 years of age was the most desirable solution to protect the dignity of these females.

While it was reiterated by the court multiple times during the pronouncement of this

judgement that they would only be dealing with the issue of marital rape of girls aged between 15 and 18 years and not the broad spectrum of marital rape, several pertinent observations made in the course of the courts analysis can be used as strong arguments to outlaw marital rape for women above 18 years of age as well. The court took into account cases like *C.R. v. UK*⁸⁴ and *Eisenstadt v. Baird*⁸⁵ to uphold that a rapist remains a rapist and marriage with the victim does not convert him into a non-rapist. Under Article 21 of the Indian Constitution,⁸⁶ rape violates not only the dignity⁸⁷ and bodily integrity⁸⁸ of a female, but also her right to reproduction and privacy.⁸⁹ The IPC punishes cruelty by the husband against his wife,⁹⁰ but not rape. It punishes rape of an unmarried woman, but not marital rape.⁹¹ Such double standards, no doubt, prove that the arbitrariness of Exception 2 to Article 375 of IPC is violative of Article 14 of the Constitution.⁹² Hence, the exception clause allowing marital rape is clearly discriminatory and liable to be struck down.

⁷⁸ Krishnadas Rajagopal, *Sex with minor wife, despite consent, is rape: Supreme Court*, The Hindu (Oct. 11, 2017), <https://www.thehindu.com/news/national/sex-with-minor-wife-is-rape-says-supreme-court/article19-838085.ece#:~:text=The%20Supreme%20Court%20on%20Wednesday,husband%2C%20the%20Supreme%20Court%20held.>

⁷⁹ Indian Penal Code § 375, No. 45 of 1860, India Code.

⁸⁰ India Const. art. 14.

⁸¹ India Const. art. 15(3).

⁸² India Const. art. 21.

⁸³ *Bodhisattwa Gautam v. Subhra Chakraborty*, (1996) 1 SCC 490 (India).

⁸⁴ *CR v. UK*, Eur. Ct. H.R. (1995).

⁸⁵ *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

⁸⁶ India Const. art. 21.

⁸⁷ *The Chairman, Railway Board v. Chandrima Das*, (2002) 2 SCC 465 (India).

⁸⁸ *Suchita Srivastava v. Chandigarh Administration*, (2009) 9 SCC 1 (India).

⁸⁹ *State of Maharashtra v. Madhukar Narayan*, (1991) 1 SCC 57 (India).

⁹⁰ Indian Penal Code § 498A, No. 45 of 1860, India Code.

⁹¹ Indian Penal Code § 375, No. 45 of 1860, India Code.

⁹² *Indira Nehru Gandhi v. Raj Narain*, (1975) 2 SCC 159 (India); *Kesavananda Bharati v. State of Kerala*, AIR (1973) SC 1461 (India); *EP Royappa v. State of Tamil Nadu*, (1974) 4 SCC 3 (India); *Maneka Gandhi v. Union of India*, (1978) 2 SCR 621 (India).

3. *Nimesh Bhai Bharatbhai Desai v. State of Gujarat*⁹³

In this judgement, the Gujarat High Court examined the law relating to sexual offences. It admitted that keeping in mind the prevailing law in the country, the wife cannot prosecute her husband for rape under Section 376 of the IPC. Nevertheless, Justice Pardiwala made several strictures upon the issue of marital rape and how it ought to be criminalised within India, while giving examples of other nations where it has been declared illegal.⁹⁴

As observed by the court:

“A husband does not own his wife’s body by reason of marriage. By marrying, she does not divest herself of the human right to an exclusive autonomy over her own body and thus, she can lawfully opt to give or withhold her consent to marital coitus.⁹⁵ Marital rape is in existence in India, a disgraceful offence that has scarred the trust and confidence in the institution of marriage. A large population of women has faced the brunt of the non-criminalisation of the practice.”⁹⁶

The court agreed that marital rape is not a husband's privilege, but rather a violent act and an injustice that must be criminalised.⁹⁷ Only the total statutory abolition of the marital rape exemption can edify societies that dehumanized treatment of women will not be

tolerated.⁹⁸ Thus, criminalization of marital rape is cardinal to preserve women’s rights in our society.

4. *Sree Kumar v. Pearly Karun*⁹⁹

In this case, the Kerala High Court observed that as the wife was not living separately from her husband under a decree of separation, any custom or usage, even if she is subject to sexual intercourse by her husband against her will and without her consent, the offence under Section 376A, IPC will not be attracted. In this case, there was an ongoing dispute on divorce between the parties. Thereafter, a settlement was reached between the husband and wife and the parties agreed to continue to reside together. After staying with her husband for two days, she alleged that she was forced to have sexual intercourse with her husband against her will and consent. Hence the husband was held not guilty of raping his wife though he was de facto guilty of having done so.¹⁰⁰ Although the wife continued to stay with the husband, sexual intercourse without consent was not implied and the realization of the same is essential. Further when the wife files a complaint regarding marital rape in later stages of the marriage, it does not imply that the said complaint is dubious.¹⁰¹ Proper guidelines and criminalisation of marital rape in a detailed manner is essential.

⁹³ *Nimeshbhai Bharatbhai Desai v. State of Gujarat*, (2018) SCC OnLine Guj 732 (India).

⁹⁴ *Id.* para. 73.

⁹⁵ *Id.* para. 116.

⁹⁶ *Id.* para. 7.

⁹⁷ *Id.* para. 130.

⁹⁸ *Id.*

⁹⁹ *Sree Kumar v. Pearly Karun*, 2 ALT Cri 77 (1999) (India).

¹⁰⁰ *Id.* para. 6.

¹⁰¹ *Dhanus Nair & Ors v. State of Kerala Rep by Public Prosecutor Anr*, (2018) SCC OnLine Ker 16139 (India).

Hence, in keeping with this and the other judgements listed above, it is imperative for lawmakers to fight against this patriarchal outlook and work towards removing the marital rape exception clause. It is unconstitutional as it violates several fundamental rights of a woman. The same has been recognized by prominent government reports, some of which are discussed in the subsequent section.

III. RECOMMENDATIONS OF LAW COMMISSION OF INDIA & OTHER REPORTS

The issues of rape and marital rape have been dealt with in varying degrees by different Law Commission Reports and recommendations of Committees. In the following part, we aim to bring to light a few of these Reports and recommendations.

1. 42nd Law Commission Report

This Report was the first to deal with the issue of marital rape.¹⁰² It gives us an insight into how the issue of marital rape was viewed by the Law Commission in the earlier days. The Report did not explicitly comment on the validity of the exception clause, i.e., whether it should be retained or deleted. However, it made two suggestions.

First, it recommended that in cases where husband and wife are judicially separated, 2nd exception to Article 375 must not apply.¹⁰³ The explanation offered was that “*in such a case,*

the marriage technically subsists, and if the husband has sexual intercourse with her against her will or her consent, he cannot be charged with the offence of rape. This does not appear to be right.”¹⁰⁴ Despite being a meritorious suggestion, the Report fails to elaborate on why this is not right. The lack of explanation shows that in the eyes of the Law Commission, a wife’s consent to sexual intercourse with her husband is implied when they live together, but it cannot be presumed when they are separated. Yet again, this points to the flawed understanding of consent in Indian society, where a woman’s ‘no’ does not matter once she is married because of her duty to honour her husband’s wishes as part of the marital contract.

Second, it suggested that punishment for non-consensual sexual intercourse with women aged between twelve and fifteen must be put into a separate section and preferably not be termed rape.¹⁰⁵ A striking characteristic of the second suggestion is the readiness to classify marital rape as a lower type of sexual misdemeanour, rather than rape itself.¹⁰⁶ Hence, this shows how the Law Commission attempted to downplay the gravity of marital rape as an offence when compared to rape in general. It failed to recognize that marital rape is just as, if not more, horrifying than rape by a

¹⁰² Law Commission Of India, *Indian Penal Code*, Law Com. No. 42 (1971).

¹⁰³ *Id.* para. 16.115.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

stranger because here, the woman is assaulted by someone she knows intimately and trusts.¹⁰⁷

2. 84th Law Commission Report

The 84th Report indicated that the government had asked the Law Commission to make a special study of the laws relating to rape in view of the series of discussions regarding the Mathura rape case judgment that had taken place in the press and in other forums on the inadequacy of the law to protect women who have been victims of rape. Against this backdrop, the Law Commission Report considered:

“Rape is the ultimate violation of the self. It is a humiliating event in a woman’s life which leads to fear for existence and a sense of powerlessness. The victim needs empathy and safety and a sense of reassurance.”

We agree with the following observations of the Report:

“It is often stated that a woman who is raped undergoes two crisis, the rape and the subsequent trial. While the first seriously moves her dignity, curbs her individual, disturbs her sense of security and may often ruin her physically, the second is no less potent of a mixture, in as much as it not only forces her to relive through the traumatic experience, but also does so in the grudge of publicity in a totally alien atmosphere, with the whole apparatus and paraphernalia of

*the criminal justice system focused upon her.”*¹⁰⁸

According to the Law Commission, the statutory definition of rape in India emphasised the element of absence of consent. In fact, absence of consent is an important aspect. Barring cases where consent is irrelevant and the age of the girl is the only crucial factor (because of the statutory requirement of minimum age), want of consent becomes infructuous as a determining factor in most prosecutions for rape. It is also the factor to which the law has devoted its most detailed attention.¹⁰⁹ This Report impresses upon the importance of consent for sexual relations and the absence thereof that leads to a violation of the women’s rights even in the context of a marriage.

3. 172nd Law Commission Report

The 172nd Report was prepared by the Law Commission¹¹⁰ in response to the directions of the Supreme Court in the case of *Sakshi v. Union of India*,¹¹¹ whereby the petitioner (*hereafter, Sakshi*) wanted the apex court to declare that the definition of rape included under Section 375 of IPC was not only limited to forcible penile/vaginal penetration, but also included all forms of forcible penetration. The issues in this case required a thorough examination for which the court solicited the

¹⁰⁷ David Finkelhor & Kersti Yllö, *License to Rape: Sexual Abuse of Wives* (Henry Holt & Co 1st ed., 1985).

¹⁰⁸ Law Commission Of India, *Rape and allied offences: Some questions of substantive law, procedure and evidence*, Law Com. No. 84 (1980).

¹⁰⁹ *Id.* para. 7.

¹¹⁰ Law Commission Of India, *Review of Rape Laws*, Law Com. No. 172 (2000).

¹¹¹ (1999) 6 SCC 591 (India).

help of the Law Commission. One of these issues was marital rape, and the NGO, Sakshi, advocated for the deletion of the exception clause. However, the Law Commission did not concur with this view. As stated in the Report, Sakshi's reasoning behind this was that if the husband is adequately punished for causing physical injury to his wife, then he should not be exempted from being punished for rape.¹¹² This points out to the discrepancy in law where marriage is considered to be an extenuating factor solely for the offence of rape. The Law Commission did not accept this view, believing that the deletion of the exception clause "*may amount to excessive interference with the marital relationship.*"¹¹³

Even while considering sexual assault of a wife by her husband when they were living separately under a decree of separation or under any custom or usage, it was recommended by Sakshi that the clause prescribing a lesser punishment to the husband in such a case ought to be deleted.¹¹⁴ Their reasoning was the same as above, that the husband should not be favoured over a stranger while determining punishment of sexual assault as it is arbitrary and discriminatory.¹¹⁵ This recommendation was once again rejected by the Law Commission because in their view, "*even in such a case the bond of marriage remains unsevered.*" Nevertheless, the Commission accepted that

the punishment for this particular offence should be enhanced.¹¹⁶ Hence, this Report also failed to make any substantial recommendations with respect to the validity of the marital rape exception clause.

4. Justice Verma Committee Report

In 2012, as an aftermath of the Delhi gang rape case, the Justice Verma Committee was constituted to recommend amendments to criminal law so as to provide for quicker trial and enhanced punishment for criminals accused of committing sexual assault against women. The Committee submitted its Report on 23 January 2013, giving the following views regarding marital rape:¹¹⁷

- i. *The exception for marital rape be removed.*
- ii. *The law ought to specify that:*
 - a) *A marital or other relationship between the perpetrator or victim is not a valid defence against the crimes of rape or sexual violation;*
 - b) *The relationship between the accused and the complainant is not relevant to the inquiry into whether the complainant consented to the sexual activity;*
 - c) *The fact that the accused and victim are married or in another intimate relationship may not be regarded as a*

¹¹² Law Commission Of India, *Review of Rape Laws*, Law Com. No. 172 (2000), para. 3.1.2.1.

¹¹³ *Id.*

¹¹⁴ *Id.* para. 3.3.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ The Justice Verma Committee, Report of the Committee on Amendments to Criminal Law, at 79 (2013).

*mitigating factor justifying lower sentences for rape.*¹¹⁸

The Committee cited various court judgments in different countries, “*Our view is supported by the judgment of the European Commission of Human Rights in C.R. v. UK,*¹¹⁹ which endorsed the conclusion that a rapist remains a rapist regardless of his relationship with the victim.” It stated “*the exemption for marital rape stems from a long outdated notion of marriage, which regarded wives as no more than the property of their husbands.*”¹²⁰ The Committee brought to light the criminalisation of marital rape in various countries, among other things, and the urgency for India to follow suit.

IV. A REVIEW OF CRIMINALISATION OF MARITAL RAPE IN OTHER NATIONS

A number of nations around the world have recognized marital rape for the draconian act that it is and provided for its criminalisation. Following are some examples of the same, representative of different continents around the globe.

1. United Kingdom

The issue of marital rape in the United Kingdom gained currency at a political level in the 1970s. The exemption of marital rape had never been a rule of statute, having been promulgated first in 1736 by Matthew Hale whereby he stated that a woman’s consent to

intercourse upon marriage is irrevocable by virtue of the marital contract.¹²¹

At last, it was in 1991 that the marital rape exemption was finally abolished by the Appellate Committee of the House of Lords in England and Wales in the case of *R v. R*.¹²² In this case, the Lordships disregarded the myth that a wife is deemed to have consented irrevocably to sexual intercourse with her husband upon marriage. While pronouncing this judgement, Lord Keith stated that the distortion by the lower courts to avoid applying the marital rights exemption were indicative of the absurdity of the rule, and held, agreeing with earlier judgments in Scotland¹²³ and in the Court of Appeal in *R v. R*, that “*the fiction of implied consent has no useful purpose to serve today in the law of rape*” and that the marital rights exemption was a “*common law fiction*” which had never been a true rule of English law. Hence, R’s appeal was dismissed and he was convicted of raping his wife.

Following this landmark judgement, a corresponding amendment to statutory law was made through Section 142 of the Criminal Justice and Public Order Act, 1994. The European Court of Human Rights upheld the same in *S.W. v. UK*¹²⁴ and *C.R. v. UK*.¹²⁵ Thus, marital rape has been explicitly criminalised in the United Kingdom,

¹¹⁸ *Id.*

¹¹⁹ *CR v. UK*, Eur. Ct. H.R. (1995).

¹²⁰ The Justice Verma Committee, Report of the Committee on Amendments to Criminal Law, at 72 (2013).

¹²¹ Hale, *supra* note 13.

¹²² [1991] UKHL 12, [1992] 1 AC (HL) 599 (appeal taken from Eng.).

¹²³ *S v. HM Advocate* (1989) SLT 469 (Scot.).

¹²⁴ *SW v. UK*, Eur. Ct. H.R. (1995).

¹²⁵ *CR v. UK*, Eur. Ct. H.R. (1995).

recognized even by the Sexual Offences Act 2003.

2. Australia

The criminalisation of marital rape in Australia began in all states and territories, by both statutory and case law, from the late 1970s to the early 1990s. South Australia was the first Australian state to deal with marital rape. The changes that came in 1976 only partly removed the exemption. The Criminal Law Consolidation Act, 1935¹²⁶ which was amended in 1976 states: “*No person shall, by reason only of the fact that he is married to some other person, be presumed to have consented to sexual intercourse with that other person.*”¹²⁷

In the case of *R v. L*,¹²⁸ the court ruled that if it was ever the common law that by marriage a wife gave irrevocable consent to sexual intercourse by her husband, it is no longer the common law.¹²⁹ It further asserted that that a husband could be found guilty of raping his wife.

The first Australian jurisdiction to completely remove the marital exemption was New South Wales in 1981.¹³⁰ The same happened in Western Australia, Victoria in 1985; and Tasmania in 1987. The loss of a husband’s

immunity went some way to acknowledging a woman’s individual bodily autonomy and her right to consent to each and every act of sex.¹³¹

3. USA

Since the 1970s, there has been an increase in discussions that address women’s rights to bodily autonomy, dealing with domestic abuse and rape. By the late 1980s and 1990s, academicians began to focus on the confluence of these issues: rape in marriage.¹³²

The case in the United States that first challenged this cohabitation clause was *Oregon v. Rideout* in 1978.¹³³ Although the husband was acquitted of raping his wife, it spurred the movement towards reform. By 1993 marital rape was a crime in all 50 states.¹³⁴ Still, in the 1990s, most states continued to differentiate between the way marital rape and non-marital rape was viewed and treated. The laws have continued to change and evolve, with most states reforming their laws in the 21st century.¹³⁵

4. Nepal

Under Nepali criminal law, Sub-Section (4) of Section 219 states, “*If a man rapes his wife when he is still in marital relationship with her, he shall be sentenced to upto five years in*

¹²⁶ Criminal Law Consolidation Act 1935 (SA) (Austl.).

¹²⁷ Criminal Law Consolidation Act Amendment Act 1976 s 12 (SA) (Austl.).

¹²⁸ *R v. L*, (1991) 174 CLR 379 (Austl.).

¹²⁹ *Id.*

¹³⁰ Lisa Featherstone, *Rape in marriage: Why was it so hard to criminalise sexual violence?*, Australian Women’s History Network (Dec. 7, 2016), <http://www.auswhn.org.au/blog/marital-rape/>.

¹³¹ *Id.*

¹³² Joann M Ross, *Making marital rape visible: a history of American legal and Social movements criminalising rape in marriage* (Dec, 2015), <https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1085&context=historydiss>.

¹³³ Finkelhor & Yllö, *supra* note 108.

¹³⁴ Jennifer Bennice & Patricia Resick, *Marital Rape: History, Research, and Practice*, 4 *Trauma Violence & Abuse* 228-246 (July 2003).

¹³⁵ Ross, *supra* note 138.

*jail.*¹³⁶ Marital rape is a consequence of poverty, illiteracy, backwardness and the presence of a male-dominated culture in the country.

Nepal's government amended the law against rape to include 'marital rape' in 2008. In the case of *Forum for Women, Law and Development v. His Majesty's Government/Nepal*,¹³⁷ the Nepalese Supreme Court found the failure to criminalise marital rape in the 'Muluki Ain', the General Code of Nepal, as unconstitutional and against the principles of the ICCPR.¹³⁸ Being a party to various international instruments, Nepal is under a duty to abide by the obligations arising through those instruments.

After this judgement, the Muluki Ain was amended in 2006, criminalising marital rape under Section 3 of the chapter on rape. A husband was subject to 3 to 6 months of imprisonment if found guilty of raping his wife. The sentence has been increased on realising the severity of the crime in the amendment to the criminal law as stated above.¹³⁹

5. South Africa

¹³⁶ The Muluki Criminal (Code) Act (2017) (Nepal).

¹³⁷ *Forum for Women, Law and Development v. His Majesty's Government/Nepal*, Writ No 55 of the year 2058 BS (2001-02) (Nepal).

¹³⁸ ICCPR, *supra* note 52.

¹³⁹ Harsh Mahaseth, *Nepal's Parliament raises punishment for marital rape – but differentiates*, South Asia Monitor (Apr. 11, 2018), <http://southasiajournal.net/nepals-parliament-raises-punishment-for-marital-rape-but-differentiates/>; *Harsher punishment set for sexual harassment*, The Himalayan Times, Kathmandu, Aug. 15, 2018.

The South African law has been influenced and moulded by both Roman-Dutch civil law and English common law.¹⁴⁰ The South African courts began considering the issue of marital rape in 1992-93. Until then, husbands were legally entitled to rape their wives.

The defendant in the case of *S v. Ncanywa*¹⁴¹ appealed on the conviction of a marital rape charge, which was subsequently overturned by the Ciskei Appellate Division on the basis that a husband cannot be held criminally liable for raping his wife, even though they were no longer living together.¹⁴² The rationale stated by the judges pointed towards the fact that explicit Roman-Dutch civil law allowed marital rape, even though English common law had criminalised¹⁴³ it. Thus, the court was divided in its decision.

Finally in 1993, the South African legislature passed the Prevention of Family Violence Act¹⁴⁴ which explicitly criminalised marital rape by clearly stating that "*a husband may be convicted of the rape of his wife.*"¹⁴⁵ Hence, South Africa became one of the first countries

¹⁴⁰ Dr Nico P Swartz & others, *Is A Husband Criminally Liable For Raping His Wife? A Comparative Analysis*, International Journal of Academic Research and Reflection (2015), https://www.researchgate.net/publication/309862078_IS_A_HUSBAND_CRIMINALLY_LIABLE_FOR_RAPING_HIS_WIFE_A_COMPARATIVE_ANALYSIS.

¹⁴¹ 1992 (1) SACR 209 (Ck) (S. Afr.).

¹⁴² Swartz, *supra* note 147.

¹⁴³ *R v. R* [1991] UKHL 12, [1992] 1 AC (HL) 599 (appeal taken from Eng.).

¹⁴⁴ Prevention of Family Violence Act 133 of 1993 § 5 (S. Afr.).

¹⁴⁵ Anne Look, *In Africa, Criminalising Marital Rape Remains Controversial*, Voa News (Nov. 7, 2013), <https://www.voanews.com/africa/africa-criminalising-marital-rape-remains-controversial>.

in Africa to have criminalised marital rape. Currently, the Criminal Law (Sexual Offences and Related Matters) Amendment Act governs the offence of marital rape.¹⁴⁶

6. Colombia

Marital rape was criminalised in Colombia in 1996.¹⁴⁷ However, the law related to marital rape provided for a lesser punishment than for rape in general.¹⁴⁸ This difference in punishment was declared unconstitutional by the Constitutional Court of Colombia.¹⁴⁹

Hence, apart from explicitly recognising that sexual assault can take place in intimate relationships, the new Penal Code also made rape in spousal or intimate relationships *an aggravating factor to rape*, warranting a stricter punishment.¹⁵⁰

Despite the existence of comprehensive laws punishing violence against women, domestic and sexual violence continue to be highly

prevalent in Colombia. UN Women reported that 37% of women in Colombia will experience physical and/or sexual intimate partner violence at least once in their lifetime and over 50% of the Colombian men surveyed for a 2010 UN study admitted to abusing their female partners.¹⁵¹ Thus, this proves that legislation requires proper implementation in order to be successful, and countries which have criminalised marital rape still have a long way to go before they can completely eradicate this social evil.

V. CONCLUSION

The debate on whether any man who commits the heinous and inhuman crime of raping a woman may be immune from criminal law simply because he is her husband needs to end. Such a husband must be liable to the punishment for the offence he has committed. The existence of marital rape is unknown to the layman which is worse for a woman because she would silently adhere to her husband's actions.

On one hand, it is said that criminalisation of marital rape can lead to destruction of the institution of marriage, however on the other hand, the non-reporting of spousal rape can also lead to breakdown of marriage and that same glorified institution. A marital rape victim is psychologically more traumatized than a stranger rape victim.¹⁵² The safe and

¹⁴⁶ Swartz, *supra* note 147.

¹⁴⁷ Melanie Randall, Jennifer Koshan, Patricia Nyaundi, *The Right to Say No: Marital Rape and Law Reform in Canada, Ghana, Kenya and Malawi* (Hart Publishing 1st ed., 2017) 71.

¹⁴⁸ *Id.*

¹⁴⁹ Colombia Constitutional Court, decision C-285 of 1997, Presiding Judge Carlos Gaviria Diaz (action for unconstitutionality of Article 25 of law 294 of 1996) (Colom.); *See also* Centre for Reproductive Rights, *Bodies on Trial: Reproductive Rights in Latin American Courts* (New York, Centre for Reproductive Rights, 2003) 61.

¹⁵⁰ Colombia Ley 599 de 2000, Diario Oficial No 44097 del 24 de Julio de 2000, Art 211(5) (as amended by Art 30 de Ley 1257 de 2008) (Colom.); C Benninger-Budel & L O'Hanlon, *Violence against Women in Colombia*, Report Prepared for the Thirty-First Session of the Committee on Economic, Social and Cultural Rights, Violence Against Women: 10 Reports/Year 2003 (World Organization Against Torture (OMCT), 2004) 156.

¹⁵¹ *Combating Domestic and Sexual Violence in Colombia*, Vital Voices, <https://www.vitalvoices.org/2016/07/combating-domestic-and-sexual-violence-in-colombia/>.

¹⁵² Jennifer Bennice & others, *The Relative Effects of Intimate Partner Physical and Sexual Violence*

protective environment that marriage promises is not provided in such cases. The sense of mis-trust, isolation and fear felt by a rape victim, if forced to continue with the way things are, can result in the downfall of the entire family. Just because many crimes without witnesses are difficult to prove and are time consuming, this is no reason for making a crime 'not prosecutable'. Labelling all wives as potentially vindictive is also not correct and backed by no evidence.¹⁵³ When the state makes culture a reason to refuse to legislate on a serious criminal matter, the message that percolates down the line to the entire criminal justice system is that the non-criminalisation of such an act makes women vulnerable to being hurt over and over again by the man they call their husband.

There is an urgent need to translate some of the recommendations that the Law Commission has made into actual legal provisions. Inspiration can be drawn from the various representatives of continents around the globe in criminalising marital rape and emancipating the woman within a marriage. Training, awareness programmes and educating the masses will lead to social change as well.

Through the criminalisation of marital rape, India can curtail patriarchal banality, social stigma and stereotypes concerning women and strive towards excellence in all spheres of individual and collective activity so that the

nation constantly rises to higher levels of endeavour and achievement.¹⁵⁴ Therefore, the deletion of the marital rape exception clause is of paramount importance in broadening India's horizons in terms of both legal and social growth.

on *Post-Traumatic Stress Disorder Symptomatology* (Nov. 2015).

¹⁵³ *Independent Thought v. Union of India*, (2017) 10 SCC 800 (India).

¹⁵⁴ India Consti. art. 51A, cl. j.