

# MARITAL RAPE: EFFECTS OF THIS UNRESOLVED CRIME ON MARITAL RELATIONSHIPS AND THE NEED FOR ITS CRIMINALIZATION IN INDIA

*Written by Nandini Rajesh*

*3rd Year BA LLB Student, School of Law, Christ University*

---

## ABSTRACT

In the traditional Indian context, the institution of marriage is considered as one that is to be cherished for a lifetime. It is the coming together of two individuals, two souls and two families. It is a pious institution that is grounded on trust, belief and sanctity. Marriage generates a perception of confidence in the wife that her husband will provide safety and respect her dignity, and when he commits a forceful intercourse with his wife, it disturbs this confidence and breaches the trust of the wife. The real question here is whether husbands should be granted immunity from committing rape solely based on their status? Rape is rape and it violates a woman's bodily integrity, self-determination and freedom. Rape is considered a crime in India under Section 375 of the Indian Penal Code. Despite the existence of this law, there is an exception in India where certain men can have sex with women against their will. Marital rape is an intimate form of violence which involves unwanted intercourse obtained by force or threat of force or when the wife is unable to consent. This shows how the prevalent existing laws grant absolute freedom from the criminal offence of marital rape solely based on the idea of the institution of marriage. India is that nation where equality and dignity are given foremost importance as the fundamental rights of an individual and the very concept of 'Marital Rape' is in indirect violation of the Indian Constitution and the very existence of marital rape is equivalent to mocking it. The Author demonstrates how the existence of this concept is in complete opposition to the existing laws that seek to protect the rights and dignity of women. This Paper highlights the grave and heinous consequences of marital rape in marital relationships. The Author also draws attention to the immediate need to criminalize marital rape in India by drawing parallels of the existing situation in India to foreign nations that have

criminalized the crime. The Author champions throughout for the rights of married women and argues against the idea that the contract of marriage is presumed as an irrevocable consent to sexual relations. The Paper finally explores alternative solutions to women who have endured marital rape through the establishment and provision of comprehensive services.

**Keywords:** Marital rape, India, Dignity, Criminalization, Indian Constitution

## INTRODUCTION

*“A quick turn around a corner  
and my planet becomes sand  
on the shore of a dying Universe.”<sup>1</sup>*

*A life of subordination, violence, abuse, taunts, labour and submission: Such is thy life, O woman!*

In the words of Simone de Beauvoir, French writer, feminist and existentialist philosopher, *“One is not born, but rather becomes, a woman.”*<sup>2</sup> No better example than India can be used to exemplify this statement. In the ancient times, women were held in extremely high esteem and worshipped in India. Though the Constitution of India guarantees equal rights to both the genders, with the changing circumstances, the status of women in the Indian scenario has been deteriorating. It is a fact that women in India are now much educated. However, the condition of women scream a completely different reality today. They are made to submit to the male-dominated patriarchal society. The patriarchal theory of the home being a women’s ‘real domain’ and a marital bond being her ‘ultimate destiny’ is very much prevalent even in today’s world.

This brings us to the institution of marital relationship. Marriage is said to be an institution which admits men and women into a family life. It is a stable relationship in which a man and a woman are socially permitted to have children implying the right sexual relations. It is the physical, mental and spiritual congregation of two souls. The institution of marriage generates

---

<sup>1</sup> S. Kelley Harrell, *The Journey of Healing: Wisdom from Survivors of Sexual Abuse: A Literary Anthology*

<sup>2</sup> Simone de Beauvoir, *The Second Sex* 32 (Vintage Books, 1989)

within a woman a sense of confidence that her husband will provide safety and respect her dignity. When he indulges himself in an act whereby he commits a forceful sexual intercourse with his wife, it breaks the confidence and breaches the trust of the wife. The question here is that in such a situation, why is there a provision that grants immunity to the husband from raping his own wife?

Rape can be considered as one of the most heinous crimes that can be imposed on a person. It violates the right of dignity of a woman. It is a violation of a woman's human rights that cannot be justified in any form or matter, but the sad truth is that in today's world brutality against women is embedded within the society so deeply to such an extent that it often fails to gauge the censure of the public.

A recent study by the United Nations Population Fund and the International Center for Research on Women conducted in 2014 found that the concept of "masculinity" for an average Indian man is about acting in a tough manner by exercising his privilege to lay down the rules that are to govern the personal relationships and to control women.

A very distinguishing repercussion of living in a patriarchal society is that we are surrounded by a layer of atmosphere encompassing male dominated customs and conventions, which brings along with it innumerable atrocities and torment against women.

## **EXISTING SCENARIO OF MARITAL RAPE IN THE INDIAN CONTEXT**

Marital rape is the most common and repugnant form of masochism with respect to the Indian context, it is cleverly hidden behind the iron curtain of marriage. India is a patriarchal society and women are subject to the patriarchal phantoms of the society. However, it is also to be noted that the Indian culture holds a special status for the women and regards them in high esteem. Despite this, it is very regretful to note that even then marital rape is not criminalized in India.

According to the UN Population Fund, about two-thirds of married women in India, aged 15 to 49, have been beaten or forced into sexual intercourse by their spouses. The International Men and Gender Equality Survey conducted in 2011, revealed that one in five has forced their

wives or partner to have sex. Furthermore, the United Nations published a report that stipulated that 69% of women believe that occasional violence was justified, for instance when a meal hasn't been prepared in time or when sex has been refused. Further an overall statistical research on the aspect of marital rape in India reveals that 9% to 15% of married women are subjected to rape by their husbands.

This paper aims to establish the idea of abandonment of the concept of "implied consent" in a marriage which grants a man complete legal license to use and control his wife's body to satisfy his whims and fancies.

In a marital relationship, women are said to be subservient and obedient and as a result they are vulnerable and subject to violence of all sorts from their husbands. Most cases of emotional violence, sexual abuse, mental traumatization and physical assault takes place behind the closed doors of the institution of marriage that grants complete immunity to husbands from raping their wives. According to the age old notion of marital relationships in India, marriage is a sacrosanct institution. The prevalent situation does not view marital rape as an offence in India and believes that it exploits and uses the societal customs and religious beliefs as a medium to endorse the regressive policies and actions. It legally sanctions sexual abuse of husbands on their wives.

Cruelty endured by a wife in a marital relationship is recognized as a ground for divorce by the Hindu Marriage Act and various other personal laws existing in our nation. Despite this fact, it is highly regretful to note that forced sexual intercourse which includes other forms of sexual torture within an established marital relationship is not recognized as a valid and legitimate reason to treat it as a crime.<sup>3</sup> According to the Indian philosophy, men officially possess the legal license to rape their wives with impunity. Moreover, the very act of denying sex, according to the religious and traditional beliefs, completely goes against the already laid out paradigm of the duties of an 'ideal wife'. It is disturbing to note that despite being a breach of an individual's fundamental principle of bodily integrity and also the violation of the sanctity and trust in a relationship, marital rape is still not a criminal offence in India. Frederich Engels propounded the idea that marriage is a man-made institution established merely to secure and

---

<sup>3</sup> The PWDVA Act 2005 defines sexual violence under the definition of domestic violence, however, a woman can seek Protection Order and not a criminal remedy under this law.

possess power along with the ownership of property.<sup>4</sup> Under the conventional practices of marriage that has always been existing in India, the entire control of a woman is exchanged from her father to her husband. Women are reduced to being powerless creatures that are mere objects of pleasure. Hence, we can derive from the current Indian scenario that sex is an unchallenged act which is common in a marital relationship.

### ***Adverse effects of marital rape on marital relationships***

Marital rape can have absolute adverse effects on a marital relationship. It goes without stating that the shaky grounds of a patriarchal foundation of marriage is the main cause of marital rapes all over the world, especially in India. This is clearly visible from the Laws of England that are prevalent during the 18<sup>th</sup> century as these guide the Indian legal system. The Blackstone's Commentaries<sup>5</sup> therefore still inspire the ideologies determined by the courts in India. The Blackstone's commentaries highlighted that marital contract is based on the superiority of the husband as a 'lord', 'master' or a 'provider' and puts wife in the subjugated position.<sup>6</sup>

Rape alone has long term consequences on the individual being raped. Certain specific effects entirely depend on the victim herself and also on how the society perceives the rape and their reactions to it. Most women who have experienced the violation of rape will suffer effects that are often extremely severe, such as physical injury, anger, depression, fear and loss of interest in sexual activities.<sup>7</sup> Marital rape is said to be more traumatic and abusive than stranger rape.<sup>8</sup> As mentioned before, the suffering of a woman at the hands of her husband, who is ideally her source of care and trust, produces feelings of pure betrayal, disillusionment and isolation within the woman. Another major aspect in this situation is that the wife is not able to secure protection unilaterally and quickly and as a result she needs to wait for the divorce procedures to take its course. This is the only way in which the wife is entitled to legal sanctity and relief but throughout the entire procedure and till the time she has received relief, her life is endangered. From this very notion, we can conclude that the rape law exemption completely removes a woman's right to abstain from sexual relations with her spouse in a marital relationship and

---

<sup>4</sup> Engels Friedrich, *The Origin of Family, Private Property and State*, Moscow: (Progress Publishers, 1973).

<sup>5</sup> William Blackstone (1769) *Of Husband and Wife, Commentaries on the Laws of England* Book 1, Chapter 5.

<sup>6</sup> Ibid 5

<sup>7</sup> Ann W. Burgess & Lynda I. Holmstrom, *Rape Trauma Syndrome*, American Journal of Psychiatry, 131, no. 9 (September 1974): 981-986; (Katz and Mazur, New York).

<sup>8</sup> D. Russell, *Rape in Marriage* 198 (1982).

throws her into the clawed hands of the dangers that await her as a result of sexual violence. These aspects currently prevalent in the Indian scenario stems from the English Law, as mentioned before. Sir Matthew Hale, a respectable figure in the English Judicial system stated that he subscribed to the idea of a marital relationship being an implied mutual matrimonial consent as it had been accepted throughout history.<sup>9</sup> He emphasized on the contractual terms of the agreement of the marriage, advocating that the marriage contract assumed irrevocable agreement to sexual relations.<sup>10</sup> However as the years progressed, a series of English cases formed a substantial debate in refining the absolute rigid implied consent theory as proposed by Hale.<sup>11</sup> There followed a series of cases which provided insights into the beginning of the trend relating to the exceptions of in spousal immunity laws.

The case of *R v. Clarence*,<sup>12</sup> the defendant was charged with the assault causing bodily harm after he transmitted gonorrhoea to his wife. This is the case which initiated the validity and substantive aspect of the soundness of Hale's theory. However, it was held that marital rape could be possible if the wife refuses a sexual intercourse and the husband has all the rights to use violence to force the sexual act upon the wife.

The case of *R v. Clarke*,<sup>13</sup> allowed for the indictment of the husband for the rape of his wife when they were living apart from each other. However, In *R v. Miller*,<sup>14</sup> the court regressed from its holding in *R v. Clarke* and declared that a husband was only guilty of assault, not rape, when he forced his wife to have sex with him after she filed a petition for divorce. From this we can understand that the effects of marital rape has a long standing punch on the marital relationship of the raped individual.

---

<sup>9</sup> Freeman, *But If You Can't Rape Your Wife Whom Can You Rape? The Marital Rape Exemption Re-examined*, 15 (1981).

<sup>10</sup> Backhouse & Schoenroth, *A Comparative Study of Canadian and American Rape Law*, 7 CANADA-U.S. L.J. 173, 174 (1984).

<sup>11</sup> *To Have and To Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99 HARV. L. REV. 1255, 1256 (1986).

<sup>12</sup> 22 Q.B.D. 23 (1888).

<sup>13</sup> [1949] 2 All E.R. 448.

<sup>14</sup> [1954] 2 Q.B. 282.

## EXISTING LEGAL POSITION OF MARITAL RAPE IN INDIA

### *Constitutional perspective*

The Indian legal system is a compilation of archaic and draconian concepts that govern marital relationships such as 'restitution of conjugal rights'. This particular concept sanctions and completely permits rape within marriage. Women have been subjected to harsh violence and have been victimized due to this particular humiliating and torturous law that prevails in the country.

The exception of marital rape is considered as an exemplary epitome of hypocrisy. The doctrine of marital exemption to rape fails to fall under the ambit of the basic structure of the Constitution of India. Articles 14, 21 and 51A (e) protect the rights of individuals being violated. Article 51A (e) states that it is the fundamental duty of every citizen of India to denounce practices derogatory to the dignity of women.

In the case of *Bodhisattwa Gautam v. Subhra Chakraborty*<sup>15</sup> the Supreme Court used provisions of the criminal law in order to rule out the judgement whereby the appellant had persuaded a woman to have sexual intercourse with him on the promise of marriage. The historic judgement observed that offences such as rape were crimes against the person's most basic cherished human rights, namely Article 21, Right to Life. Another case, *The Chairman, Railway Board v. Chandrima Das*<sup>16</sup> held that rape is a violation of Article 21 of the Indian Constitution and it was also held that it is the right of a woman to life and human dignity as enshrined in the Constitution. Rape is rape, irrespective of the marital status of women.

In the very famous case of *Harvinder Kaur v. Harmender Singh*<sup>17</sup> while upholding Right to Equality and Right to Life under the Articles of 14 and 21 of the Indian Constitution, stated that "Introduction of Constitutional law in the home is most inappropriate. It is like introducing bull in China shop. It will be a ruthless destroyer of the marriage institution and all that it stands for. In the privacy of the home and married life, neither Article 21 nor Article 14 have any

---

<sup>15</sup> 1996 SCC (1) 490.

<sup>16</sup> (2000) 2 SCC 465: AIR 2000 SC 989.

<sup>17</sup> AIR 1984 Delhi 66.

place. In a sensitive sphere which is at once most intimate and delicate, the introduction of cold principles of Constitutional Law will have effect on weakening of marriage bond.”

### *Criminal law perspective*

Section 375 of the *Indian Penal Code, 1860* states the provision and definition of ‘Rape’. However, it is to be noted that the main contention here is not the definition, but the exception provided for the commitment of rape. The exception is as follows- “*Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.*” From this we can clearly gather that only two groups of married women come under the ambit of the protection provided by the rape legislation. The two groups of women those under the age of 15 years and those who are separated from their husbands, whether under the decree of separation or otherwise. However, once the age barrier of 15 years has been crossed, the acts of sexual intercourse without the consent of the wife is in direct infringement of the Human Rights Regulation.

In *Sree Kumar vs. Pearly Karun*,<sup>18</sup> the Kerala High Court observed that an offence under Section 376A of the IPC will not be attracted in this instance as the wife was not living separately from her spouse under a decree of separation or any other prevalent custom or usage, even if she is subject to sexual intercourse by her husband against her will and without her consent. Here, there was an ongoing dispute on divorce between the parties. Thereafter, a final settlement was reached between the husband and wife and the parties agreed to continue to reside together. However, the wife stayed with the husband for two days within which she alleged that she was subject to forced sexual intercourse by her husband completely against her will and consent. Despite this act of the husband, he was held not guilty of raping his wife though he was de facto guilty of having done so just due to the fact that they were in a marital relationship and they resumed residing together after settling the dispute.

Even the case of *State v. Vikash*,<sup>19</sup> was completely against women by acquitting the accused husband who drugged and later raped his wife as the Judge substantiated that “*Indian rape laws don’t apply to married couples*”.

---

<sup>18</sup> 1999 (2) ALT Cri 77.

<sup>19</sup> State v. Vikash (2014), SC No. 1/14.



## REMEDIES THAT EXIST IN LAW TO PROVIDE REDRESS TO MARITAL RAPE VICTIMS

It is to be noted that there are certain aspects in criminal and civil law that provides a recourse to the victims of marital rape. While analyzing the lack of remedies that are presently available in criminal law, we emphasis on the importance of the very need for criminalization of rape in marital relationships as opposed to criminalizing violence against women in a marriage.

### *Criminal law*

The only recourse that women have so far is Section 498-A of the Indian Penal Code, 1860, which deals with cruelty. This particular Section protects the women from the “*perverse sexual conduct by the husband*”. Despite this, the implementation of this particular provision is not in full force as there is a lot of ambiguity relating to the measurement of the terms of ‘perversion’ or ‘unnatural’.

With respect to Section 498-A, we can clearly state that there are two aspects that render this Section inadequate to deal with rape cases and further, those of marital rape:

The first reason is that there is a clear disparity between cruelty and rape. The very nature and act of rape distinguishes it from the offence of cruelty. The second reason is that this section is not adequate to deal with cases of rape as the elements needed to establish cruelty is insufficient to prove the existence of rape.

There is no straightjacket definition of cruelty that has been laid down and it is only the explanation to Section 498 defines ‘cruelty’. What would amount to cruelty is purely a question of fact and varies from case to case.<sup>20</sup> There are various other factors such as the matrimonial relationship between husband and wife, state of health and their interaction in daily life that would be essential in determining cruelty.<sup>21</sup> Furthermore, mental cruelty as a concept is one such that varies from person to person depending on the intensity of the degree of endurance to withstand such a form of cruelty. As a result, each case has to be decided on its own facts in

---

<sup>20</sup> Mohd Hoshan v .State of Andhra Pradesh, 2002 CrLJ 4124 (SC).

<sup>21</sup> Sarojakshan Shankarah Nayar and Ors v. State of Maharashtra 1995 CrLJ 340 (Bom).

order to decide whether mental cruelty was established and it is still very difficult and tricky to bring in cases of rape within this section. Furthermore, it is also pertinent to note that Section 498-A does not have specific aspects within its provisions in comparison to Section 375.

The maximum punishment prescribed under Section 498-A is only three years with or without fine. However, the maximum punishment for rape is life imprisonment.<sup>22</sup> This major difference in the punishment in itself clearly implies that the concept of cruelty cannot in any manner deal with an offence such grave as that of marital rape.

### *Civil law*

The remedies that currently exist in civil law hold an uneasy place in issues centered on gender based violence. One of the main reasons for this is that the belief that focusing on civil remedies will only serve to aid the public and private dichotomy since it makes gendered violence a matter between the perpetrator and victim as opposed to an act of violence against the State itself.<sup>23</sup>

*The Protection of Women from Domestic Violence Act, 2005* can be considered a temporary reasonable substitute as it protects women from the physical and mental cruelties endured by women within a marital relationship, including sexual abuses. Article 2 of the *Declaration of the Elimination of Violence against Women* explicitly includes marital rape in the definition of violence against women.

All personal religious laws recognize 'cruelty' as a ground for divorce. However, it is to be noted that there is no specific mention of 'sexual violence' as a ground for divorce. This leads to a highly complex scenario in law. A suggestion would be to include 'sexual violence' under the category of 'cruelty'. For example, Section 13(1)(i)(ia) of the Hindu Marriage Act could be amended to state that cruelty includes sexual violence. Again, the necessity of this can be challenged on two grounds. First, since the PWDVA, 2005 talks about sexual violence in its

---

<sup>22</sup> See The Indian Penal Code, 1860, §§375 and 376.

<sup>23</sup> Lauren M. Gambier, *Entrenching Privacy: A Critique of Civil Remedies for Gender-Motivated Violence*, 87 NYU L. REV. 1934-1937 (2012).

definition of domestic violence. Second, due to the gender neutrality of the term 'cruelty' in family law, it will not be appropriate to include sexual violence within cruelty.

Therefore it can be explicitly stated that the legislative framework of India has absolutely no provision to support the plight and sufferings of a married woman who is subject to sexual violence from her husband due to the prejudicial notion and perspective of the Indian society which considers sexual intercourse as an obligation.

## **JUSTIFICATIONS TO MARITAL RAPE EXEMPTIONS**

The exemption of marital rape from the Indian legal system can be viewed as the heights of hypocrisy. According to the Indian society, the notion of sex, whether forced or not is to be viewed as a marital obligation. The role of the wife in an Indian family is to traditionally remain as a homemaker who is obedient and caring towards the family and husband, in particular.

According to Section 122 of the *Indian Evidence Act, 1872* no communication during marriage is to be disclosed in a court except in situations when one married partner is being persecuted for an offence against another spouse. However, this evidence is invalid and futile. It is entirely inadmissible due to the fact that marital rape is not an offence in India.

It is also believed that the removal of the marital rape exception would give exceptional powers to the wives which could be misused by them in order to get her demands fulfilled. Moreover, it can also be used to ruin the sacred institution of marriage by hampering the equality granted for both the genders through the removal of the marital rape exemption.

Moreover, it is also said to not be applicable in the Indian context simply due to the prevalence of factors like poverty, illiteracy and religious beliefs. As mentioned earlier, it is purely based on the mindset of the society to treat the marriage as a sacrament.

## COMPARATIVE ANALYSIS OF MARITAL RAPE LAWS IN VARIOUS OTHER COUNTRIES

The main contention here is how is it that the legal age of consent for marriage in India is 18 years and the law of the nation protects only those individuals up to the age of 16 and beyond the age of 16 years there is absolutely no remedy that a married woman can resort to, in case she feels sexually violated in a marital relationship.

### *United States of America:*

In the United States of America, when the researchers examined the prevalence of rape in marital relationships, it was found that it accounts for approximately 25% of all rapes.<sup>24</sup> Until recently, the general rule prevalent in the USA was that a husband could not be convicted of the offence of raping his wife as he believes that it is his marital right to have sexual intercourse with her at his own will. However, in 1993, marital rape was finally judged to be a crime in all fifty States of USA, at least under any one section of the sexual offence code. There are still certain exemptions which provide immunity to the husbands in rape prosecutions. From this very aspect we can clearly gauge that the existence of any spousal exemption indicates a clear and explicit acceptance of the archaic understanding of the concept of women being mere properties of their husbands and that marriage is a contract to have sex.

### *United Kingdom:*

In England, the general rule is such that a woman is unable to retract the implied consent for a sexual intercourse which comes along with the contract of marriage.<sup>25</sup> However, in 1991, the exemption to marital rape was abolished in its entirety. In the case of *R v. R*<sup>26</sup>, the House of Lords held that the rule whereby that a husband could not be guilty of raping his wife if he forced her to have sexual intercourse against her will was an “anachronistic and offensive common-law fiction”, which no longer represented the position of a wife in present-day society, and that it should no longer be applied.

---

<sup>24</sup> National Violence Against Women Survey, NCJ 172837, Washington, DC: US Department of Justice.

<sup>25</sup> Halsbury's Laws of England, 4th Edn., Vol. 11(1), para 495.

<sup>26</sup> (1992) 1 AC 599 : (1991) 4 All ER 481.

**Canada:**

Canada rejects the marital rape exemption through statutory abolition. Canada's criminal code originally defined rape to include the usual spousal exemption. Thus, according to the statute, a man could not rape his wife; no exceptions existed. Moreover, as of 1983, no reported cases existed where the accused and complainant were married at the time of the sexual act. Therefore, the only way to abolish or reduce the scope of the exemption was through statutory amendment. In 1983, the Parliament of Canada amended the criminal code to abolish the exemption. This represents clear progress for the married women of Canada.

Through the very brief description of the repealment of the marital rape exemption laws from the above mentioned nations of United States of America, United Kingdom and Canada, we can clearly see that even in this 21<sup>st</sup> century, when we are so advanced, it is highly regretful to note that we still follow the archaic rules and laws set down by our predecessors that have absolutely no substantiate value where everyone is educated and aware of the moral ethics of righteousness and the inherent rights possessed by an individual.

**NEED FOR CRIMINALIZATION OF MARITAL RAPE IN INDIA: THE LACUNAE IN THE INDIAN LAW**

The immediate need of the hour is to embrace the concept of consent in a marital relationship. It is highly essential to view marriage as an equal partnership between the husband and the wife. There is an immediate need to reform the Indian justice system with relation to the prevalence of the marital rape exemption while addressing the existing fundamental structural inequalities. In the current scenario, the legal rules and regulations favour the perpetrators rather than the survivors. This definitely needs to be questioned.

There is a clear need for the criminalization of marital rape in India. The current oppressive system needs to be replaced by a structure that celebrates womanhood to the fullest, promotes equality of women, sexual autonomy, dignity, self-determination and physical integrity.

As mentioned earlier in the paper, there is a clear lacunae in the law that needs to be addressed. The entire problem revolving around the legal aspects relating to the marital rape exemption is filled with paradoxes.

The Supreme Court has increased the ambit of Article 21 of the Indian Constitution by leaps. However, marital rape is a clear violation of the right to live with dignity of a woman and hence it can be explicitly stated that the exception provided under Section 375 of the Indian Penal Code, 1860 is a clear breach of Article 21.

The exception of marital rape clearly infringes Article 14 as there is a demarcation between the spouses and it evidently discriminates against the wife. It is the fundamental duty of every citizen to protect the dignity of women by renouncing practices that are derogatory to the dignity of the woman. However, with the current exemption, it seems like marital rape does not violate the dignity of women in any manner.

*The United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*, of which India is a signatory, has viewed that this sort of discrimination against women violates the principles of equality of rights and respect for human dignity. Further, the Commission on Human Rights, in its Resolution entitled “The elimination of violence against women” recommended that marital rape should be criminalized.

The law prevents a girl below 18 years from marrying, but on the other hand, it legalizes non-consensual sexual intercourse with a wife who is just 15 years of age. The Indian Penal Code, 1860 states that it is rape if the girl is not the wife of the man involved and is below 16, even if she consents. But if she is a wife, not below 15 and does not consent, it is not rape. Another paradox is that according to the Indian Penal Code, 1860, it is rape if there is a non-consensual intercourse with a wife who is aged between 12 and 15 years. However, the punishment may either be a fine or an imprisonment for a maximum term of 2 years or both, which is quite less in comparison to the punishment provided for rape outside the marriage.

Hence, from the above mentioned reasons it is mandatory that marital rape is criminalized in India as the prevailing laws are completely filled with paradoxes and there is a lot of lacunae that exists within its framework that needs to be changed by criminalizing marital rape in India.

## MODEL FOR CRIMINALISATION OF MARITAL RAPE

The main aim of this Section is to provide with a draft legislation that will ensure that the complexities of consent, burden of proof and evidence are further taken into consideration while proving the essentials of marital rape.

The J.S. Verma Report is the landmark report that reignited the debate on marital rape. The committee gave a four-tier suggestion to effectively criminalize marital rape.<sup>27</sup> It asked for the removal of the exemption clause, to specifically mention that it is not a defence, that there would not be a presumption of consent and lastly, that the quantum of punishment is the same. However, in direct contrast to this, the 42<sup>nd</sup> Law Commission Report suggested that marital rape be put into a separate section, and not be called 'marital rape' and also have a different punishment. Since there are conflicting opinions on the same, it is essential that we decide what model suits the Indian scenario the best.

### *A. The law must specify that the relationship of marriage is not a defence*

It is pertinent to note that the mere removal of the exception clause in Section 375 of the IPC will not be sufficient to deal with the various circumstances relating to marital rape as it will lead to excess judicial discretion. It is essential that higher evidentiary requirement is placed on cases relating to marital rape due to the intensity and nature of the offence committed.

### *B. Whether consent should be presumed in instances of marital rape*

It is to be noted that as the J.S. Verma Committee stated, the existence of marriage should not lead to the presumption of consent. It is the duty of the accused to establish consent. Consent is solely understood on the basis of circumstantial evidence.<sup>28</sup> Due to the private nature of the crime, very often, the only proof will be that of the wife's testimony. In such instances, it is extremely important to look for other forms of evidence to corroborate charges of rape. This means that if the husband has had patterns of cruelty, domestic violence, it will be relevant while determining whether the husband has committed rape. It

---

<sup>27</sup> J.S. VERMA REPORT, pg. 117.

<sup>28</sup> Uday v. State of Karnataka, (2003) 4 SCC 46; Pradeep Kumar alias Pradeep Kumar Verma v. State of Bihar, (2007) 7 SCC 413; Dilip v. State of Madhya Pradesh, (2013) 14 SCC 331.

need not be a mandatory factor but must work as a contributing factor. This will be in conflict with Sections 53 and 54 of the Indian Evidence Act, 1872 as past bad character is not relevant. However, in cases of marital rape, this might sometimes be the only significant source of corroborative evidence to prove a history of assault. For example, if a wife applies for protection under the PWDVA, 2005 on the basis of being a victim of 'sexual assault', this must be treated as admissible evidence.

### ***C. Sentencing policy***

It is a proposition that Section 376-B be repealed as there should be absolutely no difference in the sentencing policy. Section 376-B that lays down the punishment for rape specifically with husband and wife living separately has a different sentencing policy with the punishment between two years and seven years. This clearly shows that the intention was to bring about a lesser standard for punishing rape when the husband was the convict. This is violative of Article 14 of the Constitution. There should exist no justification for having a lesser punishment policy merely due to the existence of a marital relationship.

### ***D. Reforms required in the IPC and the Evidence Act***

Removal of the exception clause in Section 375 of the IPC and adding another explanation clause mentioning that marriage is not a defence is very essential. Further, Section 376 has to be repealed. With respect to the Indian Evidence Act, 1872, Section 54 has to be amended and Section 114-B has to be inserted.

Section 114-B is to be read as: *“No presumption of consent in prosecutions of rape: There shall be no presumption of consent in prosecutions of rape, even if the accused is the husband of the woman.”*

## **CONCLUSION**

In note of all the above mentioned information and aspects of marital rape, this paper would like to conclude on a final closing remark that irrespective of whether one is married or not, rape is rape and it is agreed upon to be a grave and heinous crime. This paper aimed to establish that it is absolutely immaterial to take note of whether the woman is married or unmarried



while recording the crime of rape. It is absolutely pathetic to notice that on one hand there are discussions and talks held on empowering of the Indian women, whereas on the other hand, we are not protecting the human dignity and right to life of women by enforcing the marital rape exemption. Marriage should not be considered a consent to have sexual intercourse with one's spouse. This paper completely and wholeheartedly supports the amendment of Section 375 of the Indian Penal Code, 1860 in light of all the arguments raised above. In this 21<sup>st</sup> century, it is absolutely regretful to note that the concept of marital rape is still exempted from the Indian legal system under the pretext of it being part of the age-old traditions and religious beliefs. Poverty and lack of education cannot be cited as reasons to enforce this particular exemption. It is also futile and redundant to view a marriage as a sacrosanct institution and to permit marital rape within it. It is a highly traumatic condition being a victim of rape by someone known, such as a family member, and all the more worse to have to cohabit with him. It is high time that we broke the age old chauvinistic viewpoint by criminalizing the grave offence and sin of marital rape. Once criminalized, it also to be noted that marriage or an intimate relationship should not be mitigating factor in reducing sentences for rape. The legislative framework of India has no provision to aid the plight of a married woman who constantly faces the evil because of the detrimental notion of the Indian society considering sex as an obligation and this needs a change.