



INTERNATIONAL JOURNAL OF CREATIVE RESEARCH THOUGHTS (IJCRT)

An International Open Access, Peer-reviewed, Refereed Journal

MARITAL RAPE: A DICHOTOMY OF CONSENSUAL AND COMPELLED SEX

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Abstract: The concept of violence against women is not novel and has existed since time immemorial. Women have been subjected to violence in the forms of harassment, cruelty, dowry death, child marriage, domestic violence, sexual assault, and rape to name a few. Rape is a sexual activity that is illegal and typically involves having sex against one's will, against the threat of harm, with a minor, or with someone who is unable of giving their consent voluntarily due to mental illness, mental disability, intoxication, unconsciousness, or deception. It exploits the victim physically and sexually but also mentally and emotionally. Marital rape or spousal rape is the act of sexual intercourse with one's spouse without the spouse's consent. It has been in much debate across the globe and in our country. Some countries have criminalized it and in a few of them, there is still an ongoing debate about whether it is protected under the shield of the right to conjugal rights and right to privacy. This paper covers the various aspects of marital rape, the evolution of the concept, its constitutionality in other countries, the legal framework in India, the *Doctrine of Coverture*, *Bodily Autonomy*, and *the Theory of Implied Consent*. It also analyses the arguments for and against the criminalization of Marital Rape in the latest case pending before the Supreme Court.

Index Terms- *Doctrine of Coverture, Bodily Autonomy, Theory of Implied Consent.*

INTRODUCTION

Marital rape in layman's terms can be explained as a spouse having sexual intercourse with their spouse without their consent. According to Section 375 of the Indian Penal Code. A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions: —

(First) — Against her will.

(Secondly) — Without her consent.

(Thirdly) — With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

(Fourthly) — With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

(Fifthly) — With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

(Sixthly) — With or without her consent, when she is under sixteen years of age.

Explanation. —Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

(Exception) —Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.¹

However, the exception provides that if non-consensual sexual intercourse takes place between a married couple, in that case, it will not amount to rape. This loophole in law encourages men in a marital alliance to exploit their wives sexually and emotionally. She is subjugated to rape but has no legal recourse in the criminal law. **According to Justice Ahmad** in the stated that this “*cruel act, in turn, destroys the entire psychology of a woman and pushes her into deep emotional crises*”²

Under the Protection of Women from Domestic Violence Act, 2005, the definition of domestic violence is given under Section 3(a) which says that “*harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse, and economic abuse*”.³ Sexual abuse mentioned under this definition includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of a woman, which in turn gives a chance to wives to initiate legal proceedings. The downside of this Act is that it is civil in nature. It does not provide for a period of imprisonment. Rather it provides for compensation, pecuniary penalty, and restraining and protective orders.

The idea for the marital exemption clause is based on Sir Matthew Hale’s statement made in 1678 that “the husband cannot be guilty of rape committed by himself upon his lawful wife, for their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract”.⁴ His work was published in 1736, nearly sixty years after his death. This theory was also supported by John Frederick Archbold in his book, whereby he said that no man can be claimed to be guilty of the rape of his wife.⁵

Additionally, it has been observed that the Indian Judiciary has a similar attitude as the Legislature toward making marital rape a crime. Although the constitutionality of the exception clause in S. 375 has never been explicitly upheld, there have been cases where courts have simply avoided this issue, rejected requests to have the exception clause struck down, or used the exception clause in other ways to avoid dealing with the issue of whether a husband raped his wife. In 2018, the Gujarat High Court⁶ ordered that the marital rape exemption must be completely repealed from the law. The court stated that this is the first step in educating societies that demeaning treatment of women will not be tolerated and that marital rape is not a privilege granted to husbands but rather a violent act and an injustice that needs to be criminalized. Justice Pardiwala observed:

“A law that does not give married and unmarried women equal protection creates conditions that lead to the marital rape. It allows the men and women to believe that wife rape is acceptable. Making wife rape illegal or an offence will remove the destructive attitudes that promote the marital rape. Such an action raises a moral boundary that informs the society that a punishment results if the boundary is transgressed. The total statutory abolition of the marital rape exemption is the first necessary step in teaching societies that dehumanized treatment of women will not be tolerated and that the marital rape is not a husband’s privilege, but rather a violent act and an injustice that must be criminalized”⁷

¹ Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860 (India).

² Bodhisattwa Gautam v. Subhra Chakraborty (1996) 1 SCC 490.

³ The Protection of Women from Domestic Violence Act, 2005, S 3(a), No. 43, Acts of Parliament, 2005 (India).

⁴ Sir Mathew Hale quoted in Rosemarie Tong, *Women, Sex and the Law*, 94 (1994).

⁵ J. F. Archbold, *A Summary of the Law Relating to Pleading and Evidence in Criminal Cases*, Sweet and Maxwell, 1822.

⁶ Nimeshbhai Bharatbhai Desai v. State of Gujarat, 2017 SCC OnLine Guj 1386.

⁷ *Id.*, Para 130.7.

In *X v. Y*,⁸ A Division Bench of **Justice A. Muhamed Mustaque** and **Justice Kauser Edappagath** while hearing a matter on marital rape, held that “*a husband's licentious disposition disregarding the autonomy of the wife is marital rape, albeit such conduct cannot be penalised, it falls in the frame of physical and mental cruelty.*” The Bench sympathized with the situation of the wife and similarly placed women who continued to endure such harassment for the sake of marriage.

Further, it was determined that marital rape happens when the husband feels entitled to his wife's body. However, the court determined and claimed that such a notion has no place in contemporary social jurisprudence and that husbands and wives are now considered as equal partners and that the husband cannot establish any superior privilege over the wife with regard to her body or with reference to individual status. “*Treating a wife's body as something owing to husband and committing sexual acts against her will is nothing but marital rape.*”⁹

In a marriage, both spouses are entitled to this privacy as priceless personal freedom. Because of this, marital privacy is fundamentally and intimately linked to human autonomy, and any physical or other intrusions into this area would reduce privacy. Fundamentally, this would be cruel and inhumane.

Recently, in *RIT Foundation v. UOI and other connected matters*¹⁰ the Delhi High Court passed a split verdict on the petitions challenging the exception clause to Section 375 of the Indian Penal Code. In the aforesaid verdict, Justice Rajiv Shakhder held that the exemption of the husband from the offence of marital rape is unconstitutional. He stated,

“The impugned provisions in so far as they concern a husband having intercourse with his wife without consent are violative of Article 14 and are therefore struck down”.

However, Justice C Hari Shankar did not agree with him. Justice Harisankar was of the view that Exception 2 to Section 375 does not violate Constitution and that the exception is based on an intelligible differentia. The opinion of both the judges vastly differed from one another and there seemed a fundamental disagreement on the topic of consent. Justice Shankar ignores fundamental ideas of equality, agency, and autonomy while Justice Shakhder depends on the notion that the basis of a modern marriage is equality between spouses. Currently, an appeal from that judgment is pending before the Supreme Court.

LEGAL STATUS THROUGHOUT THE WORLD

The most pious connection in human existence is one that is based on trust and faith. In the event of marital rape, this notion is irrevocably destroyed, and the ensuing dread might never be cured. A certain school of thought has opined that “*knowing that the perpetrator and the victim are spouses was shown to alter beliefs about both parties involved in conflictual interactions.*”¹¹

In a report published in 2006, the United Nations Task Force on Violence Against Women and the UN Secretary-General contend that intimate partner violence is the most prevalent type of violence experienced by women worldwide.¹² According to another study, more than 40% of women who experience assault were once or twice forced into having sex by their male partners.¹³

⁸ <https://www.livelaw.in/top-stories/kerala-high-court-upholds-marital-rape-as-a-ground-for-divorce-under-cruelty-179010> (last visited on July 27, 2022).

⁹ *Id.*

¹⁰ 2022 LiveLaw (Del) 433.

¹¹ J. Langhinrichsen-Rohling et al., “Attributions About Perpetrators and Victims of Interpersonal Abuse Results from an Analogue Study”, *Journal of Interpersonal Violence*, 2004, vol. 19, issue 4, pp. 484-493.

¹² UN Women, *Ending violence against women. From words to action. Study of the Secretary-General*, United Nations Publication, 2006, p. 43.

¹³ J. C. Campbell, P. Alford, “The Dark Consequences of Marital Rape”, *The American Journal of Nursing*, 1989, vol. 89, issue 7, p. 946.

Furthermore, several men do not even hesitate to admit to their crimes. Instead, they take satisfaction in confessing to raping their partner. This was found in a South African study where 14.3 percent (241 out of 1681) men reported to having raped their partners and spouses.¹⁴ As per findings of another study conducted in Bangladesh, 10% of urban males and 15% of rural men acknowledged to initiating forced sex with their spouses.¹⁵ Let us take a look at the legal status of marital rape in various countries.

UNITED STATES OF AMERICA

In the USA, all states have criminalized marital rape. Broadly speaking, it is illegal in some and semi-legal in some (read with few exceptions). The changes in the marital rape laws were brought forth in the United States in the 1970s when marital rape charges were brought into the picture only when spouses lived separately. In 1978 in the case of *Oregon V Rideout*¹⁶ the first husband in American history to go to trial for raping his wife while they were living together. At the time Oregon was one of the few states that did not recognize “marital privilege” as a rape defense. It led many other states to abolish marital and cohabitation exemptions to rape. Later in the case of *People v. Liberta*¹⁷ in 1984 the court held that “Rape is not simply a sexual act to which one party does not consent. Rather, it is a degrading, violent act that violates the bodily integrity of the victim and frequently causes severe, long-lasting physical and psychic harm. To ever imply consent to such an act is irrational and absurd. A marriage license should not be viewed as a license for a husband to forcibly rape his wife with impunity. A married woman has the same right to control her own body as does an unmarried woman.”¹⁸ Due to nation-wide demands by feminist activists, North Carolina was the first state to criminalize it in the 1980s. However, there was still a long way to go. The legislation in different states provided shorter penalties for marital rape in comparison to rape. However, by 1993, all the exemptions were either withdrawn or were declared unconstitutional by the court.

UNITED KINGDOM

The origin of marital rape exemption in UK stems from the statement of Matthew Hale in *History of the Pleas of the Crown. R v Clarke*¹⁹ was the first effort to prosecute a husband for raping his wife. Instead of attempting to counter Hale's logic directly, the court concluded that consent had been revoked in this case by an order of the court for non-cohabitation. It was the first of several decisions in which the courts determined that the exemption should not be applied, for example in *R v. Steele*²⁰ on the basis of a husband's promise to the court not to abuse his wife and in *R v. Roberts*²¹ due to the existence of a formal separation agreement.

Subsequently, there were a few recorded instances of a husband successfully relying upon the exemption in England and Wales. The first was *R v Miller*²², where it was held that the wife had not legally revoked her consent despite having presented a divorce petition. *R v Kowalski*²³ and *R v Sharples*²⁴, and *R v J*²⁵ the husbands were instead convicted of assault. *R v Kowalski*²⁶, the husband was found guilty of indecent assault because the court determined that his wife's "implied consent" from their marriage only applied to vaginal sex and no other sexual acts. Later, in *R v Sharples*²⁷ the husband was accused of raping his wife in 1989. The judge refused to recognize that rape could lawfully occur even though the wife had a family protection order before the alleged rape, saying that the

¹⁴ R. Jewkes et al., “Gender Inequitable Masculinity and Sexual Entitlement in Rape Perpetration South Africa: Findings of a Cross-Sectional Study”, *PLoS One*, 2011, vol. 6, issue 12, p. 5.

¹⁵ R. T. Naved et al., *Men’s Attitudes and Practices Regarding Gender and Violence Against Women in Bangladesh*, icddr, b Special Publication No. 135, 2011.

¹⁶ *Oregon v. Rideout*, 5 FAM. L. REP. (BNA) 2164 (1978).

¹⁷ *People v. Liberta*, 90 A.D.2d 681 (N.Y. App. Div.: 1982).

¹⁸ *Id.*

¹⁹ (1949) 2 All ER 448.

²⁰ (1976) 65 Cr. App. R. 22.

²¹ (1986) Crim LR 188.

²² (1954) 2 QB 282.

²³ (1988) 86 Cr. App. R. 339.

²⁴ (1990) Crim LR 198.

²⁵ 1991.

²⁶ (1988) 86 Cr. App. R. 339.

²⁷ (1990) Crim LR 198.

order had not taken away the woman's implicit consent. The court stated that: "it cannot be inferred that by obtaining the order in these terms the wife had withdrawn her consent to sexual intercourse".²⁸

The marital rape exception was abolished in England and Wales in 1991 by the House of Lords. *R v R*²⁹ is the leading judgment where the bench unanimously approved the wrong notion of implied consent of the wife due to her marital obligation. Lord Keith of Kinkel stated that the absurdity of the rule was demonstrated by the creative techniques used in lower courts to avoid applying the marital rights exemption, and held that "the fiction of implied consent has no useful purpose to serve today in the law of rape"³⁰ and that the marital rights exemption was a "common law fiction" which had never been a true rule of English law.

Criminal Justice and Public Order Act of 1994 established a new definition of the crime of "rape," extending it to include anal intercourse.³¹ The Sexual Offences Act of 2003 broadened the term even further to include oral sex. Since the abolition of the marital exception in 1991, the law against rape has not provided for any different punishments based on the relationship between the parties. However, in 1993, in *R v W*³², the court ruled: "It should not be thought a different and lower scale automatically attaches to the rape of a wife by her husband. All will depend upon the circumstances of the case. Where the parties are cohabiting and the husband insisted upon intercourse against his wife's will but without violence or threats this may reduce sentence. Where the conduct is gross and involves threats or violence the relationship will be of little significance."³³

AUSTRALIA

Since Australia is a member of the Commonwealth, it's laws are derived from the British Common Law and treats marital rape in the same manner as the United Kingdom. In this case, marriage was viewed as an agreement for sex or union where the wife's consent to sex was irrelevant. For physical abuse, battering, and assault, there were remedies available, but not for rape in marriage. Feminist influences were felt in the Press and in the Government, and in South Australia the progressive Dunstan commissioned a Special Report,³⁴ led by Her Honor Justice Roma Mitchell, to investigate sexual assault, including marital rape. The Mitchell Report strongly condemned the idea that a married woman had committed herself to indefinite vaginal (and anal) sex. But the Report did not suggest that the husband should lose his immunity: rather, it suggested that cases of marital sexual violence should be handled through the Family Court. The government of South Australia partially removed the exception in 1976 even while the spouses still lived together. The Attorney-General noted, 'a woman should have the protection of the criminal law regardless of whether she was married, unmarried, living with the spouse or not'. *Criminal Law Consolidation Act Amendment Act 1976* read: "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".³⁵ But this was not adequate as physical violence had to couple with non-consensual sexual intercourse. The main argument against the criminalization of marital rape was that it would lead inevitably to family breakdown. Another excuse for protecting a husband's immunity was that rape, as a crime, would be impossible to prove. In the end, marital rape was criminalized in all Australian jurisdictions, starting with a partial criminalization in South Australia in 1976, with full criminalization starting in New South Wales and Victoria in 1981. Queensland was the last state to criminalize marital rape in 1989, with the Northern Territory following in 1994. In 1991, in *R v L*, the High Court of Australia 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."

²⁸ *Id.*

²⁹ *Regina v. R.*, 1 AC 599 (1992).

³⁰ *Id.*

³¹ S. 142

³² *1993 14 Cr App R (S) 256*

³³ *Id.*

³⁴ Andrew Mack, *A Rocky Road to Democracy: Don Dunstan and the Forces of Darkness — Part 2*, Vol. 80, JSTOR, Pg.9, 9-14, (2008).

³⁵ Indian Penal Code, 1860, S. 73, No. 45, Acts of Parliament, 1860 (India).

HISTORY IN INDIA

Presently the law regarding marital rape in India as contained in Section 375 Exception 2 of IPC states —Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape. However, the age of consent has now been read as eighteen years due to the 2017 decision of the supreme court in *Independent Thought v. Union of India and Another*.³⁶

Section 376B deals with intercourse by husband upon his wife during separation. It states- Whoever has sexual intercourse with his own wife, who is living separately, whether under a decree of separation or otherwise, without her consent, shall be punished with imprisonment of either description for a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine.

Explanation-In this section, “sexual intercourse” shall mean any of the acts mentioned in clauses (a) to (d) of Section 375.]³⁷

However, there seems to be an absurdity in law. The law presumes the consent of the wife while cohabiting while does not do so if living separately. This classification has no rational basis and seems rather illogical. Tracing back the history of the discussion on legislation on the topic, the first report to deal with this issue was the 42nd Law Commission Report³⁸. This report made two important suggestions. Firstly, that in instances where the husband and wife were judicially separated, the exception clause must not apply.³⁹ It stated 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 offense of rape.” Again, this suggestion seems to be preposterous for the reasons stated in the above paragraph. It seems like they viewed marital rape not as grave as rape in general. The second suggestion made in this report was regarding non-consensual sexual intercourse between women aged between twelve and fifteen. It stated that the punishment for such offenses must be put into a separate section and preferably not be termed rape. The report did not state anything about marital rape.

The Law Commission in its 172nd Law Commission Report⁴⁰ was directly addressed the issue dealing with the validity of the exception clause. It stated -*Marital rape: explanation (2) of section 375 of IPC should be deleted*. Forced sexual intercourse by a husband with his wife should be treated equally as an offence just as any physical violence by a husband against the wife is treated as an offence. It was suggested that when other forms of violence of the husband against the wife are punishable then rape should also be criminalized as it is a form of violence and that too in gravest forms. The Law Commission rejected this argument fearing that criminalization of marital rape would lead to “excessive interference with the institution of marriage”. This report elucidates the interplay between marital rape and the sanctity of the institution of marriage.

Later in 2013, J.S. Verma Report⁴¹ suggested that marital rape ought to be criminalized⁴². A two-fold recommendation to this effect was made. The preliminary recommendation was simply that the exception clause must be deleted⁴³. The second suggestion was that the law must specifically state that a marital relationship or any other similar relationship is not a valid defense for the accused, or relevant while determining whether consent existed or not and that it was not be considered a mitigating factor for the purpose of sentencing.⁴⁴ This report highlighted how the immunity granted in case the perpetrator is the husband of the victim stemmed from the

³⁶ *Independent Thought v. Union of India and Another* (2017) 10 SCC 800.

³⁷ Indian Penal Code, 1860, S.376B, No. 45, Acts of Parliament, 1860 (India).

³⁸ Law Commission of India, *Indian Penal Code*, Report No. 42 (June 1971), available at <http://www.lawcommissionofindia.nic.in/1-50/report42.pdf> (last visited on July 25, 2022).

³⁹ *Id.*

⁴⁰ Law Commission of India, *Review of Rape Laws*, Report No. 172 (March 2000), available at <http://www.lawcommissionofindia.nic.in/rapelaws.htm> (last visited on July 26, 2022).

⁴¹ Justice J.S. Verma Committee, *Report of Committee on Amendments to Criminal Law* (January 23, 2013).

⁴² *Id.* 113-117.

⁴³ *Id.* 79 (i).

⁴⁴ *Id.*, 79 (ii).

outdated notion of women being the property of men and irrevocably consenting to the sexual needs of their husband.⁴⁵ Even in *Joseph Shine v Union of India*⁴⁶ the court held struck down the criminalization of adultery under Section 497 of IPC as unconstitutional quoted Lord Keith in *R V. R* declared: 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 and Lord Denning states: -A wife is no longer her husband's chattel. She is beginning to be regarded by the laws as a partner in ail affairs which are their common concern.

This issue arose innumerable times however without much success.

ARGUMENTS IN FAVOUR OF CRIMINALISING

1. **Violation of Constitutional Provisions-** There is no justification for making a distinction between married and unmarried men who force women into sexual intercourse. It is violative of Article 14 as it creates an unreasonable, discriminatory and manifestly arbitrary classification. Merely satisfying the test of intelligible differentia is not sufficient to pass muster of Article 14. There should be intelligible differentia between classes, and there must be a rational nexus with the legitimate objects sought to be achieved. The exception suffers from irrationality and manifest arbitrariness as it provides immunity from prosecution for rape to a man who has forcible sex with his wife but not to a man who has forcible sex with a woman who is not his wife. Further, a married woman has the same right to control her own body as does an unmarried woman. Furthermore, it violates Article 19(1)(a) of the Constitution. Article 19(1)(a) of the Constitution guarantees freedom of expression to all citizens. The concept of implied consent in marriage violates the right of the wife to say no to sexual intercourse with her husband. Also, intimate sexual acts are a part of an individual's right to freedom of expression as already decided by the Supreme Court.⁴⁷
2. **Right to Bodily Autonomy-** Another argument in favour of the criminalization of marital rape is that it violates the right to life and personal liberty.⁴⁸ The woman's right to physical integrity stems from Article 21 and protect right to life, dignity, and bodily privacy. An element of personal liberty is the ability to make reproductive decisions, therefore a woman has the freedom to decline to engage in sexual activity.⁴⁹ A woman is the owner of her own body, and all decisions regarding it are to be made by her alone, without the interference of anyone. She has the right to refuse to have sex with anyone, and nobody can force her to do so. According to the IPC, forcing a woman who refuses to have sex into it is considered rape, while forcing a married woman into sex by her own husband is not rape. Because marriage does not automatically indicate that consent is not required for having sexual relations, the exemption to Section 375 is a violation of a married woman's right to control her own body. Therefore, the exemption of Marital Rape under Section 375 of the Indian Penal Code is a violation of Articles 14 & 21 of the Indian Constitution. This exemption does not pass the tests of "just, fair, and reasonable law" and the test of reasonable classification because and is discriminatory towards married women and makes a distinction towards them. The Domestic Violence Act and Section 498A of the IPC are the only legal remedies available to women who have been the victims of marital rape because this exemption is antiquated and does not need to be included in the IPC. Instead, India should take strict measures to protect the rights of married women. The Supreme Court in the case of *State of Maharashtra v. Madhukar Narayan Mandikar*⁵⁰ held that "A prostitute had the right to refuse sexual intercourse if she is being forced and the same is being done without her will; not withholding the same will amount to Rape." This was held in light of her right to bodily autonomy and the right to take decisions pertaining to her physical and mental privacy.

⁴⁵ *Id.*, 72.

⁴⁶ 2018 SCC Online SC 1676.

⁴⁷ Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.

⁴⁸ India Consti. Art 21.

⁴⁹ K. S. Puttaswamy v. Union of India (2017) 10 SCC 1, Suchita Srivastava and Anr Vs Chandigarh Administration (2009) 9 SCC 1.

⁵⁰ State of Maharashtra v. Madhkar Narayan, AIR 1991 SC 207.

3. **Immunity in other kinds of rape committed in marriage-** Rape is a heinous crime that has multiple consequences including mental trauma and severe adverse medical effects. It would be arbitrary to decriminalize marital rape on the ground that by entering into matrimony, a woman consents to a continued sexual relationship from which she cannot retract. The fact that the husband is not liable for marital rape also means that he cannot be held liable or gang rape⁵¹ (if committed by husband and some other person) or putting the victim into vegetative state.⁵² This immunity makes the rationale behind rape laws redundant.
4. Granting immunity to the husband who is cohabitating with his wife and punishing the husband if the wife is living separately, is an irrational classification. The right to conjugal rights end where bodily integrity begins. Either of the spouse can claim for restitution of conjugal rights however, while enforcing a decree of restitution of conjugal rights between a married couple, the court can direct either party i.e., husband or wife to cohabit but it cannot force them to have sexual intercourse.
5. **Implied Consent and Contract Theory-** Consent in sexual relations between spouses is the issue while discussing about the heinous crime of marital rape. The absence of consent or qualified consent is the foundation for all sexual offences. Since the crime's essential component is consent, the implied consent argument is one we should take seriously. The British jurist, Lord Mathew Hale propounded the theory of implied consent and marital contract. His famous quote said that 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 has given up herself in this kind unto her husband, which she cannot retract.⁵³
Hale also stated that marriage is a contract between a man and a wife that takes effect the day it is consummated.⁵⁴ He claims that the establishment of sexual relations between the contract's parties, or the spouses, is one of its provisions. The wife grants her husband her implied and irrevocable consent to have sexual intercourse while they are entering into the contract, which is the incident of the solemnization of the marriage ceremony.⁵⁵ Therefore, since consent is always assumed to exist in a marriage, rape can never take place in one. Unfortunately, this is the most widely given rationale for justifying the marital rape exception. This theory was, thus, critically analyzed in various case laws and juristic opinions thereafter. The theory proposed by Hale is rigid compartmentalization of the consent of married women as her nemesis and characterizes women as property. Though it dilutes the sanctity of marriage to a mere contract. Hale's concept was popular and respected, nonetheless, and many jurisdictions founded their concepts and laws either on the foundation of his theory or the criticism of it. In the modern society of today, where each community's rights have advanced significantly since this theory's inception, this notion has no place.
6. **Higher standard of burden of proof-** The mere fact that it is committed within the confines of the four walls and requires a high standard of burden of proof does not mean it should not be criminalized. An individual has fundamental rights, in both public and private spaces and it is the constitutional obligation of the court to preserve these rights.
7. **Only civil remedy-** Another problem with the current situation of marital rape is that the victim only has a civil remedy and cannot initiate criminal proceedings because of the marital immunity. A female subjected to marital rape can only file a complaint for sexual assault or cruelty. However, rape is rape, a crime and the perpetrator should not get leeway because of his status or identity. Further, rape is also a not ground for divorce in any personal laws, and even the Special Marriage Act, 1954. Thus, the women remain helpless and keep suffering in silence.

⁵¹ Indian Penal Code, 1860, S. 376D, No. 45, Acts of Parliament, 1860 (India).

⁵² Indian Penal Code, 1860, S. 376A, No. 45, Acts of Parliament, 1860 (India).

⁵³ M. Hale, *The History of the Pleas of Crown*, S. Emlyn ed., 1778, p. 629.

⁵⁴ C. L. Mitra, "For She Has no Right of Power to Refuse Her Consent", *Criminal Law Review*, 1979, vol 9, p. 561.

⁵⁵ C. Backhouse, L. Schoenroth, "A Comparative Study of Canadian and American Rape Law", *Canada-United States Law Journal*, 1984, vol. 7, pp. 173-174.

ARGUMENTS AGAINST CRIMINALISING

1. **Unwarranted interference of the State in marital relationships-** Criminalizing marital rape would thwart the marriage institution and become an easier way for harassing spouses. Justice Dipak Misra, the former Chief Justice of India, said that *“in my opinion, marital rape should not be regarded as a crime in India, as it will create anarchy in families, and our country relies on its family platform for its success of upholding family values.”* The State and the Investigating Agencies would need to meddle in the personal relationship in order to gather evidence and conduct proceedings, which would be a blatant attack on the sacramental relationship of marriage.

2. **Private sphere space-** Marriage is considered to be a sacred institution that forms the bedrock of our society. It is viewed as deeply personal and the State is hesitant to disturb this delicate space. This is to maintain the privacy of citizens and the intrusion of the State in this sphere would disrupt this privacy. In the case of *Harvender Kaur v. Harmender Singh Choudhary*,⁵⁶ the Court opined that *“the introduction of constitutional law in the home is most inappropriate. It is like introducing a bull in a china shop and that neither Article 21 nor Article 14 had any place in the privacy of the home. In a sensitive sphere which is at once most intimate and delicate, the introduction of the cold principles of constitutional law will have the effect of weakening the marriage bond”*.⁵⁷
The application of constitutional law to a husband and wife's normal domestic relationship will penetrate the core of that relationship and be a ground for conflict. It will allow for continuous litigation in situations when it is evident that such relationships should be protected from such consequences as much as feasible. The court further held, *“The domestic community does not rest on contracts sealed with seals and sealing wax. Nor on constitutional law. It rests on that kind of moral cement that unites and produces ‘two-in-one-ship’”*⁵⁸

3. **Burden of proof-** Since the acts of sexual intercourse between the spouses is done in a private space and if an act of rape is committed, it would require a heavier burden of proof than in other cases of rape. The provision of the IPC when read along with Section 114A of the Indian Evidence Act, 1872 would have major repercussions if extended to husbands. The Evidence Act provides that in a prosecution for rape under various clauses of Section 376 of the IPC referred thereto where sexual intercourse by the accused is proved and the question which arises for consideration is as to whether or not it had the consent of the woman and if the woman states that she did not accord consent, the court shall presume that no consent was given by the woman.⁵⁹ The presumption of consent has the potential to damage marital relationships. Furthermore, it is extremely difficult for the defense to prove when the wife withdrew her consent.

4. **Reliance on International standards-** The issue concerning marital rape or spousal sexual violence requires consideration of various aspects including social, cultural, and legal and all the laws of the land are enacted keeping this into consideration. Therefore, if international norms and standards are to be followed, there is a global effort to pass gender-neutral laws regarding sexual assault. Moreover, the abuse of the provisions of Section 498A⁶⁰ has been recognized by the courts and, therefore, there is a need to introduce gender-neutrality in the sphere of sexual violence. Therefore, the repeal of the marital rape exception would simply aggravate the inequities and injustice currently present in society.

5. **No application of the Doctrine of Coverture-** It is often pointed out that marital rape is a colonial provision and baggage of the English Doctrine of Coverture under which the wife is treated as a mere property of the husband. However, there is no single report of the Law Commission that would demonstrate that after coming into force of the Constitution, the legislature has retained the marital

⁵⁶ *Harvender Kaur v. Harmender Singh Choudhary* AIR 1984 Del 66.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Indian Evidence Act, 1872, S. 114A, No. 1, Acts of Parliament, 1872 (India).

⁶⁰ Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860 (India).

rape exception by relying upon the Doctrine of Coverture. This distinction is not founded on patriarchal considerations but has practical implications because it is very difficult to prove that consent was not granted due to the intimate bond between couples and perhaps the lack of eyewitness testimony. Further, the exception does not in any manner envisage or require a wife to submit to forced sex by the husband and does not encourage a husband to impose himself on the wife.

6. **Availability of an alternate remedy-** It is also argued that forced sexual intercourse between a husband and wife cannot be treated as rape. At worst, it can be treated as sexual abuse as is clear upon perusal of the definition of "cruelty" found in Section 3 of the Domestic Violence Act. The wife can also initiate proceedings for cruelty against the husband under section 498A. This is done to balance the rights of both parties, by adding a safeguard against the abuse of the law by the wife and at the same time giving her an adequate mechanism to seek a remedy.

CONCLUSION AND SUGGESTIONS

One of the deadliest forms of sexual abuse that takes place within a family is marital rape. The women victims often do not disclose their sufferings because of the nature of the activity, the concern regarding the privacy of relationships, patriarchal domination, and often because of their financial dependence on the husband. Due to the patriarchal mindset, the law has been blind to the suffering of battered wives and does not even recognize marital rape as an offence, much alone impose any punishments in such circumstances.

When patriarchal structures of injustice and persecution undermine constitutional freedom, constitutional courts must step in to restore the rights at stake. Instead of taking a paternalistic position by doing this, the court would be carrying out its obligation to give effect to the rights currently protected by the Constitution. It must uphold both the institution of marriage and individual dignity without sacrificing either. A gender-neutral approach to such issues should be consistent with the calls for gender equity. To maintain a balance between individual dignity and the potential for misuse of legal remedies, which could end up hurting a person's reputation or dignity, the state must intervene by legislative means. This is why we would like to make the following suggestions: -

1. Simply removing the exception clause in S. 375 is not sufficient to ensure that the peculiar circumstances in cases of marital rape are covered. This is because it will lead to an excess of judicial discretion. It is possible for the judiciary to treat cases of marital rape differently, by imposing a higher evidentiary requirement or presuming consent. This will lead to arbitrary consequences. Therefore, there is a clear need for legislative action on the concerned subject.
2. The concept of presumed consent should to be addressed by the legislature. The J.S. Verma Report recommended that the existence of a marriage does not lead to a presumption of consent. However, in practice, the judiciary will undoubtedly consider a certain level of force to address consent-related questions. Due to the private nature of the crime, the only proof will be 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. Consent is understood on the basis of circumstantial evidence and it has to be seen on the basis of the facts and circumstances of each case.
3. Since the concept of immunity to the husband in cases of marital rape originates from Common Law, the Legislature must consider the legal position of the same other countries, the reasons for criminalizing and not criminalizing, and accordingly enact a law. But while doing so, the Parliament must closely scrutinize the relevant data on the instance of marital rape and take action in line with the context of our country's societal needs.
4. The premise for the exception appears to be founded on an archaic practice, namely that women are the chattel of men or that once consent is given, it remains in effect. However, given the complexity of the current circumstances, a wider spectrum of the law needs to be addressed. It is important to keep in mind factors such the difficulties of determining the precise moment of consent withdrawal in such a private relationship, the absence of evidence to support the wife's testimony, and legal abuse. It is more crucial to balance

the rights of the spouses than to give either party a license so they can continue to abuse the law. For this purpose, conscious efforts must be taken to educate both the sexes on the subject of women rights, right to bodily autonomy and most importantly, respect for human rights.

5. To accomplish the desired goals, specific legal amendments are necessary. Even though a case of marital rape can qualify for a divorce based on “cruelty” or “rape,” it is best to get the legal position clarified. Although the wife may choose to demand a divorce, if she prefers to stay married rather than go that route, the marriage should be permitted to continue. Matrimonial laws should be amended accordingly. Above all, women must struggle for justice and free themselves from societal confines.

Therefore, in addition to judicial enlightenment, we most urgently need a generation of awareness. The criminals that committed this act are men. Equally crucial to taking legal action to defend women's human rights is educating boys and men to see women as valuable partners in life, in the advancement of society, and in the pursuit of peace. In a country like India, where the stigma surrounding the crime of rape, deeply rooted cultural notions, and shifting societal ideals are rampant, a lot of courage is required on the part of an Indian woman to speak about something as sensitive and private as marital rape. Thus, it is crucial to develop procedures that would encourage women to report their abusive spouses.

