EXIGENCY FOR EXPANDING THE CONTOURS OF RAPE: A JUXTAPOSITION OF INDIVIDUAL'S RIGHT TO PRIVACY AND THE INSTITUTION OF MARRIAGE

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INTRODUCTION

Criminal Law of a country, in its legitimate pursuit to preserve social or solidarity, not only prescribes a set of norms of human behaviour but also outlaws the human conduct that exhibits impudence to these norms and stipulates punitive 'sanction' for the perilous outlawed.[1]

However, the kind of conduct to be 'forbidden and of the formal penal 'sanction' considered as best calculated to prevent the officially outlawed conduct depends upon the 'social setting' and 'socio-moral-legal ethos' of a community. In this sense, the Penal law of a country, therefore, needs to be appreciated and comprehended in the backdrop of its prevailing social, moral & cultural values and political ideologies.

The Indian Penal Code, 1860 (hereinafter IPC), drafted by T. B. Macaulay and his colleague law commissioners is still operative in India by virtue of Article 372 of the Constitution of India. The IPC, like any other criminal law, reflecting the then prevailing sexual mores in India, *inter alia*, criminalizes 'rape'.

As per the observations of Hon'ble Supreme Court of India in *Bodhisattwa Gautam* v. *Subhra Chakraborthy*,[2] "Rape is a crime against basic human rights and a violation of victim's most cherished of fundamental rights, namely, the right contained in Article 21." The question being considered in this paper is whether legislative provisions and criminal delivery system are reflective of the above grave concern.

Perusal and analysis show that rape is condemned in the most eloquent of word far from

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[1] K.I. Vibhute, *Rape And The Indian Penal Code , At The Crossroads Of The New Millennium: Between Patriarchiast And Gender Neutralist Approach*, 43:1 JOURNAL OF ILI, 25 (2001).
[2] (1999) 1 SCC 490

recognizing rape as a heinous assault against married women's right their own bodily autonomy and sexuality. Marital rape refers to rape committed when the perpetrator is the victim's spouse. The definition of rape remains the same, i.e. sexual intercourse or sexual penetration when there is lack of consent.[3]

It is worth highlighting that at present; only fifty two countries have laws recognising marital rape as a crime.[4] In many jurisdictions across the world, including India, marital rape is not recognised as a crime by law and society. Even though these countries recognise and criminalise rape and prescribe penalties for the same, however, they exempt the application of the rape law when a marital relationship exists between victim and perpetrator. This is often referred to as 'marital rape exception clause'.

The aim of this paper is to examine rape and physical violence together by analyzing the case of marital rape. Part I of the paper traces the history of this marital rape exemption in England in addition to law and debates in the Parliament of India ('Parliament') pertaining to the criminalisation of marital rape. Further, in Part II, we have analysed the lack of criminalisation of marital rape *vis-a-vis* violation of fundamental rights of married women. Part III of the paper highlights the International conventions which India has signed and ratified and is thereby under an obligation fulfil its international commitments. Lastly, in the final section of the paper, after having built a case for criminalisation of marital rape, we have provided some of the suggestions to facilitate the same.

STATEMENT OF PROBLEM

Rape traditionally describes the act of male forcing a female to have sexual intercourse with him. However, this position has substantially changed with the efflux of time. The problem under investigation is how law manages to differentiate symbolically between a woman raped by her husband and raped by some other man. Law has not proved to be an efficient mechanism to control such violence.

A HISTORY OF HUSBAND'S IMMUNITY FROM MARITAL RAPE

The foundation of the marital rape exemption rule is generally attributed to Sir Matthew Hale. Writing extra-judicially, it was stated by him that: "the husband cannot be guilty of a

[3] Indian Penal Code, 1860, No. 45, India Code, § 376, 1860 (India)
[4] UN Women, *2011-2012 Progress of the World's Women*, 17, (2011)

rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself in this kind unto her husband, which she cannot retract." [5]

Despite the dearth of authority, it was not until 1888 that Hale's doctrine was judicially considered in the English case of *R.* v. *Clarence*.[6] Still later came the first recorded prosecution of a husband for the rape of his wife in the 1949 decision of *R* v. *Clarke*.[7] The majority of the judges were of the view that there was no unlawful act occasioning grievous bodily harm and that consent negatived what would otherwise have been an assault.

In *Clarke*, Byrne J. accepted Hale's proposition of the law as generally correct. No authority was cited but it is clear the judge relied on the dicta of Hawkins J. in Clarence. The only direct authority on the marital rape exemption rule is *R.* v. *Miller*.[8] Lynskey J., after an examination of the authorities, came to the conclusion that Hale's proposition of the law was correct. Accordingly, he held that the husband had no case to answer on the charge of rape. Lynskey J. indicated that his decision would have been different had there been an agreement to separate, particularly if it contained a non-molestation clause as that, in his view, would also have revoked the wife's consent.

However, it is equally pertinent to recall that recently in 1991 the Court of Appeal[9] and the House of Lords[10], doubting propriety in the 20th century of the marital rape exemption premised on the Justice Hale's proposition that a wife cannot retract the consent to intercourse which she gave upon marriage, have ruled that marital rape is an offence. The common law rule of marital rape exemption, according to their Lordships, was based on an absurd, anachronistic and offensive fiction. The English law, thus, through judicial interpretation, has completely abolished the doctrine of husband's immunity for marital rape.[11]

A History of the Marital Rape Exception in the Indian Context

The Indian Penal Code ('IPC') in §375 criminalises the offence of rape. It is an expansive

[5] Tan Cheng Han, *Marital Rape - Removing The Husband's Legal Immunity*, MALAYA LAW REVIEW, 31:1, 112 (1989).
[6] (1888) 22 Q.B.D. 23.
[7] (1949) 2 All E.R. 448.
[8] (1954) 2 All E.R. 529.
[9] R v. R, (1991) 2 All E.R. 257.
[10] R v. R, (1991) 4 All E.R. 481.
[11] *Supra* note 1, at 41.

definition which includes both sexual intercourse and other sexual penetration such as oral sex within the definition of 'rape'.

However, in Exception 2, it excludes the application of this section on sexual intercourse or sexual acts between a husband and wife. Thus, a wife under Indian law does not have recourse under criminal law if a husband rapes her.

Without wishing in any manner to overstate the case, it is pointed out that Exception 2 of §375 of the IPC ('exception clause') unreservedly fails to state any reason for the exclusion of sexual intercourse or sexual acts between a man and his wife from the purview of rape.[12] While the law does not criminalise marital rape, a specific form of marital rape is criminalised, *i.e.* non-consensual sexual intercourse when the wife and husband are living separately on account of judicial separation or otherwise.[13]

This is open for speculation and an analysis of the trajectory of legislative debates and reports of the Law Commission of India ('Law Commission') surrounding marital rape aids us in understanding the reasons behind the exception clause in India.

The first report to deal with this issue was the 42nd Law Commission Report.[14] This report highlighted the presumption of consent that operates when a husband and wife live together and the differentiation between marital rape and other rape, where the former is appallingly viewed as less serious. This report, however, failed to comment on the exception clause itself, *i.e.* whether the exception clause must be retained or deleted.[15]

The Law Commission was directly confronted the question regarding the validity of the exception clause in the 172nd Law Commission Report.[16] Here, in the course of consultation rounds, resilient arguments were advanced regarding the validity of the exception clause itself. It was urged that when other instances of violence by a husband toward wife were criminalised, there was no reason for rape alone to be shielded from the operation of law.[17] The Law Commission rejected this argument since it feared that criminalisation of marital rape would lead to *"excessive interference with the institution of marriage"*. In general terms,

[12] *Independent Thought* v. *Union of India*, AIR 2017 SC 4904
[13] Indian Penal Code, 1860, No. 45, India Code, § 376 B, 1860 (India)
[14] Law Commission of India, *Indian Penal Code*, Report No. 42 (June 1971)
[15] *Id*., ¶16.115
[16] Law Commission of India, *Review of Rape Laws*, Report No. 172 (March 2000)
[17] *Id*., ¶3.3.

this report sheds light on the interplay between marital rape and the sanctity of the institution of marriage.[18]

Later in 2012, marking a stern departure from the tone of previous discussions, a committee constituted under Justice J.S. Verma (Retd.) advocated for the criminalisation of marital rape. The committee published the 'Report of the Committee on Amendments to Criminal Law' ('J.S. Verma Report') in 2012.[19] One of the suggestions given in this report was that marital rape ought to be criminalised.[20] One of the preliminary recommendations was simply that the exception clause must be deleted. The second suggestion was that the law must specifically state that a marital relationship or any other similar relationship is not a valid defence for the accused, or is not relevant while determining existence of consent and that it was not be considered a mitigating factor for the purpose of sentencing.[21]

In *lumen* of this, the Criminal Law Amendment Bill, 2012 ('Amendment Bill, 2012') was drafted.[22] The Amendment Bill, 2012 did not take into account the suggestions laid down in the J.S. Verma Report. The Parliament Standing Committee on Home Affairs in its 167th Report ('Standing Committee Report') reviewed this Amendment Bill, 2012 and also organised public consultations.[23] In this report, it was proposed that §375 must be appositely amended to delete the exception clause. However, the Standing Committee refused to accept this recommendation. The Standing Committee Report argued that, first, if they did so, the "entire family system will be under greater stress and the committee may perhaps be doing more injustice".[24] Second, the Committee reasoned that sufficient remedies already existed since the family could itself deal with such issues and that there existed a remedy in criminal law, through the concept of cruelty as under §498A of the IPC.

Looking at the reasons advanced by the Government and the holistic evaluation undertaken by various Law Commission reports, upon the final analysis, there are three broad themes in the arguments against criminalisation of marital rape. The first is with regard to the objective of protecting the institution of marriage and as an extension, not interfering with it to ensure

[18] *Id*., ¶ 3.1.2.1.
[19] Justice J.S. Verma Committee, Report of Committee on Amendments to Criminal Law (January 23, 2013).
[20] *Id*., 113-117.
[21] *Id*., ¶79 (ii).
[22] The Criminal Law Amendment Bill, 130 of 2012.
[23] Standing Committee On Home Affairs, Fifteenth Lok Sabha, Report on The Criminal Law (Amendment) *Bill, 2012*, One Hundred and Sixty Seventh Report, 45, (December 2015).
[24] *Id*., 47.

that the institution remains sacred. The above line of thought is manifest in the IPC as well as the Law Commission reports. The second deals with the alternative remedies that already exist for a woman to seek recourse through, within the family and in the law itself such as §498A of the IPC, the Protection of Women from Domestic Violence Act, 2005 ('PWDVA, 2005') and various other personal laws dealing with marriage and divorce.

MARITAL RAPE EXCEPTION CLAUSE: CONSTITUTIONAL PERSPECTIVE

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 seemingly hesitant to disturb this delicate space. Marital rape is a violation of the fundamental rights of a woman, specifically under Articles 14 and 21 of the Constitution of India ('Constitution'). In this Part, we argue that the lack of criminalisation of marital rape infringes the fundamental rights of a woman.

Marital Rape Exemption Clause Violates Art. 14

Perusing the anatomy of Exception II to Section 375 of IPC reveals that it like any other criminal law, reflects, through the eyes of T. B. Macaulay and his fellow colleagues, the then prevailing sexual mores in India. It assumes that a woman, through marriage, forgoes forever her right to refuse sexual intercourse with her husband and the husband, thereby, acquires an unconditional & unqualified licence to force sex upon his wife.[25]

However, the idea of marriage has witnessed numerous changes with the efflux of time. Lord Keith, in the landmark judgement of *R* v. *R*[26] succinctly summarises the above line of thought:

> *"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."*

Further, the same proposition is outlined under various provisions of codified matrimonial laws. The codified legislations such as Hindu Marriage Act, 1955[27] (HMA), Hindu Adoption and Maintenance Act, 1956[28] (HAMA), Dissolution of Muslim Marriage Act, 1939[29], Indian

[25] *Id*. at 28.
[26] (1991) 4 All ER 481.
[27] Hindu Marriage Act, 1955, No. 25, Acts of Parliament, 1955 (India).
[28] Hindu Adoption and Maintenance Act, 1956, No. 78, Acts of Parliament, 1956 (India).
[29] Dissolution of Muslim Marriage Act, 1939, No. 08, Acts of Parliament, 1939 (India).

Divorce Act, 1869[30] and Special Marriage Act, 1954[31] (SMA) confer equal rights upon both husband and wife.

The Hon'ble Apex Court of our country has reiterated the same principle in various landmark judgements *inter alia*, *Shayara Bano* v. *Union of India*[32], *Joseph Shine* v. *Union Of India*[33], *Independent Thought* v. *Union of India*[34].

In *Joseph Shine* v. *Union of India*[35], the Apex Court declared Section 497[36] of the IPC as ultra vires to Article 14 of the Constitution as it was premised on the belief that women were subservient chattel of the husband. The court opined:

> *"...The aforesaid classifications were based on the historical context in 1860 when the I.P.C. was enacted. At that point of time, women had no rights independent of their husbands, and were treated as chattel or property of their husbands. The said classification is no longer relevant or valid, and cannot withstand the test of Article 14, and hence is liable to be struck down on this ground alone."*

Thus, the presumption of inequality of women before men in marriage fails to withstand the requirements of Article 14.

Presumption of Irrevocable consent: Unreasonable and arbitrary

Exception II to Section 375 is premised on the presumption of irrevocable consent of wife for sexual intercourse in marriage. This presumption it is argued, is unreasonable and manifestly arbitrary.

The test of manifest arbitrariness is rooted in Indian jurisprudence. In *E P Royappa* v. *State of Tamil Nadu*[37], Bhagwati J. characterised equality as a "dynamic construct" which is contrary to arbitrariness and observed as follows:

> *"Equality is a dynamic concept with many aspects and dimensions and it cannot be 'cribbed, cabined and confined' within traditional and doctrinaire limits. From a*

[30] Indian Divorce Act, 1869, No. 4, Acts of Parliament, 1869 (India).
[31] Special Marriage Act, 1954, No. 43, Acts of Parliament, 1954 (India).
[32] AIR 2017 SC 4609.
[33] AIR 2018 SC 4898.
[34] AIR 2017 SC 4904.
[35] AIR 2018 SC 4898.
[36] Indian Penal Code, 1860, No. 45, India Code, § 497, 1860 (India).
[37] AIR 1974 SC 555.

> *positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies."*

It is worth emphasizing that the State itself has recognized the revocable nature of consent for sexual intercourse in the institution of marriage and the same can be substantiated by virtue of Protection of Women from Domestic Violence Act, 2005[38] wherein the wife can obtain a decree for judicial separation, in case of non-consensual sexual intercourse by her husband as the same constitutes sexual abuse within the meaning of Section 3.[39] Similarly, Section 376-B of IPC, 1860 stipulates the significance of consent for intercourse between spouses when the wife lives separately, whether under a decree of separation or otherwise. Thus, the presumption that a woman upon marriage gives an irrevocable consent to sexual intercourse is bad in law.

Differentia between a married and unmarried woman is not reasonable

State has power to positively discriminate on the basis of reasonable classification which inherently separates such person from others.[40] However, Exception II to Section 375 of IPC, 1860 is not intelligible, and antithetical to the judgment of Hon'ble SC in *Anwar Ali Sarkar* v. *State of W.B.*,[41] as marital status of the women does not form a reasonable basis for classification, underlined in Article 14.

More recently in *Independent Thought* v. *Union Of India*[42] the SC while partially reading down Exception II to Section 375 to the extent that it granted immunity to marital rape committed on wife being a girl between 15 to 18 years of age, on page 4904 of the reports held thus:

> "In our opinion sexual intercourse with a girl below 18 years of age is rape regardless of whether she is married or not. The exception carved out in the IPC creates an unnecessary and artificial distinction between a married girl child and an unmarried girl child and has no rational nexus with any unclear objective sought to be achieved. The artificial distinction is arbitrary and discriminatory."

[38] Protection of Women from Domestic Violence Act, 2005, No. 43, Acts of Parliament, 2005 (India).
[39] *Nimeshbhai Bharatbhai Desai* v. *State of Gujarat*, R/Criminal Misc. Application Nos. 26957, 24342 of 2017 and R/Special Criminal Application No. 7083 of 2017.
[40] State of Rajasthan v. Shankar Lal Parmar, AIR 2012 SC 1913.
[41] AIR 1952 SC 75.
[42] *Supra* note 34.

Relying upon the reasonable classification doctrine the SC in *Independent Thought,* justly observed that differential treatment to the girl on the basis of marriage is unconstitutional as marriage is no basis of reasonable classification. Therefore, we argue that the exception clause in §375 of the IPC stands in violation of Article 14 of the Constitution.

Marital Rape Exemption Clause Violates Art. 21

Personal Autonomy is intrinsic to Right to Life under Article 21

An individual is entitled to sexual autonomy, notwithstanding the marital status, and the same is an integral part of right to privacy protected under Art. 21 of the Constitution which guarantees protection of personal autonomy of an individual.

The Supreme Court has adjudicated upon the jurisprudence of the right to individual autonomy on numerous occasions. A nine judge Bench of the Supreme Court in the case of *K.S. Puttaswamy* v. *Union of India*[43], opined that the Right to Privacy in the Indian context includes "the privacy of choice, which protects an individual autonomy over fundamental personal choices." In *Navtej Singh Johar and Ors.* v. *Union of India*[44], the Court held that personal autonomy encompasses the domain of Sexual autonomy.

The authors argue that self-determination of sexual desire is an exercise of autonomy. Accepting the role of human sexuality as an independent force in the development of personhood is an acknowledgement of the crucial role of sexual autonomy in the idea of a free individual.[45] Therefore, any interference in the exercise of sexual autonomy amounts to a violation of Article 21.

Marital Rape Amounts To Violation Of The Right To Privacy

The view that constitutional rights are inapplicable to the marital sphere as the same constitutes an interference in the "private sphere" is merely use of privacy as a veneer for patriarchal domination and abuse of women. Further, it is submitted that the distinction between "public and private sphere" for the purpose of application of fundamental rights is a farce.

[43] (2017) 10 SCC 1.
[44] AIR 2018 SC 4321.
[45] David A. J. Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 1000, 1003.

Addressing the argument, a Constitution bench of the Hon'ble Supreme Court in *Joseph Shine* v. *Union of India*[46], remarked:

> *"Constitutional protections and freedoms permeate every aspect of a citizen's life - the delineation of private or public spheres become irrelevant as far as the enforcement of constitutional rights is concerned. Therefore, even the intimate personal sphere of marital relations is not exempt from constitutional scrutiny. The enforcement of forced female fidelity by curtailing sexual autonomy is an affront to the fundamental right to dignity and equality."*

Elucidating upon the supremacy of Personal Autonomy as is guaranteed under Article 21 of the Constitution of India, over the "private and public spaces", Chandrachud J. in the authority of *K.S. Puttaswamy* v. *Union of India*[47] propounded that:

> *"While the legitimate expectation of privacy may vary from the intimate zone to the private zone and from the private to the public arenas, it is important to underscore that privacy is not lost or surrendered merely because the individual is in a public place. Privacy attaches to the person since it is an essential facet of the dignity of the human being."*

Thus, sexual autonomy of an individual is a constituent of Right to Privacy guaranteed under Article 21 of the Constitution of India and Exception II to Section 375 of the Indian Penal Code, 1860 is violative of the said constitutional guarantee and is subject to constitutional scrutiny.

MARITAL RAPE EXEMPTION VIS-À-VIS INDIA'S INTERNATIONAL OBLIGATIONS

India has ratified the Convention on the Elimination of All Forms of Discrimination Against Women, the International Covenant on Civil and Political Rights ("ICCPR"), and the International Covenant on Economic, Social and Cultural Rights ("ICESCR"). India is also a signatory of the Universal Declaration of Human Rights ("UDHR").[48] The CEDAW

[46] *Supra* note 34.
[47] (2017) 10 SCC 1
[48] *Core International Human Rights Treaties, Optional Protocols & Core ILO Conventions Ratified by India*, *IN* NAT'L HUMAN RIGHTS COMMISSION, INDIA, A HANDBOOK ON INTERNATIONAL HUMAN RIGHTS CONVENTION 22-25 (2012),

Committee has identified that gender-based violence nullifies various other rights guaranteed under international treaties, including the right to be free from discrimination, the right to life, right to liberty and security, right to equality in the family, and right to health and well-being.

The due diligence requirement under international law treaties, specifically under CEDAW, requires states to "take all appropriate measures" to eliminate all forms of discrimination against women. Furthermore, Article 2(b) of CEDAW mandates states to adopt all legislation necessary to eliminate all forms of discrimination against women. Under the international obligation regarding prevention of violence against women, states are required to prevent, investigate, prosecute, and compensate with due diligence. As such, it has been established that the due diligence requirement under CEDAW requires the criminalization of marital rape under national law.[49]

Marital rape is an infringement on the right to life. The right to life is an essential right guaranteed by all human rights treaties and customary international law. Specific guarantees to the right to life can be found in the ICCPT and the UDHR.[50] Marital rape also violates the right to liberty and security of person. The right to liberty is again guaranteed by the ICCPR and UDHR.[51] Additionally, gender-based violence infringes on the right to equality in the family guaranteed under international obligations.[52] Under the CEDAW, States are required to change social and cultural patterns in order to eliminate prejudices that perpetuate stereotypes between men and women. Maintaining an exception for marital rape perpetuates stereotypes that a woman is the sexual property of her husband negating any semblance of equality within the family.[53]

Criminalizing marital rape refutes the idea that women are the sexual property of their husbands and indicates that marriage should be built on equal grounds between both spouses. As such, eradicating the exception to marital rape is necessary to uphold India's obligation to

[49] Krina Patel, The Gap in Marital Rape Law in India: Advocating for Criminalization and Social Change, 42 FORDHAM INT'L L.J. 1519 (2019).
[50] Melanie Randall & Vasanthi Venkatesh, *The Right to No: The Crime of Marital Rape, Women's Human Rights, and International Law*, 41 BROOK. J. INT'L L. 153, 194 (2015).
[51] *Id*. at 186.
[52] *Id*. at 192.
[53] *Id*. at 193.

promote equality within the family.[54]

Lastly, criminalizing marital rape is tantamount in upholding India's international obligation to protect the right to health and well- being. Protection of health and well-being is mandated by the UDHR and ICESCR.[55] The Committee on Economic, Social, and Cultural are required to diminish women's health risks by protecting them from domestic violence.[56] Intimate partner sexual violence can cause a number of health consequences physically and psychologically.[57] Maintaining an exception to marital rape jocularly infringes on a state's obligation to protect the health and well-being of women.

CONTINUING EFFORTS TO COMBAT MARITAL RAPE: SUGGESTIONS

It is legitimate to state, clearly and without false pathos that marital rape is a prevalent issue faced by India and there are several actions that need to be taken in order to properly combat its pervasiveness. After arguing for criminalization of marital rape, in this section of the paper, we have proposed certain amendments in the criminal law of the country so as to give legitimate and legislative recognition to marital rape in India. In addition to this, we have presented a number of suggestions which would inevitably aid the State's efforts to constructively combat this indefensible and horrendous crime.

Repealing the Marital Rape Exemption

At the very least, the marital rape exception, not to put too fine a point on it, needs to be eliminated making rape within a marriage a criminal offense and effectively removing marriage as a defense to rape. It is imperative that the marital rape exception be entirely eradicated from the Indian Penal Code.[58] Similarly, the Code should affirmatively define marital rape as a criminal offense, which would also effectively prevent marriage from being used as a defense to rape claims.[59] Laws are enacted in order to punish unsocial behaviors, provide deterrent against the socially unacceptable actions and generally educate society

[54] *Supra* note 51, at 1542.

[55] International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, **S.** Treaty Doc. No. 95-10, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3, art. 12

[56] *Supra* note 52, at 194.

[57] WORLD HEALTH ORG., UNDERSTANDING AND ADDRESSING VIOLENCE AGAINST WOMEN 7 (2012).

[58] SHALU NIGAM, THE SOCIAL AND LEGAL PARADOX RELATING TO MARITAL RAPE IN INDIA: ADDRESSING STRUCTURAL INEQUALITIES 18 (2015).

[59] Pranesh Prasad, *A Strategy For Criminalizing Marital Rape in India*, HUFFINGTON POST (Sept. 25, 2016),

regarding the overarching consensus on moral and social conduct.[60] By not criminalizing such conduct and providing marriage as an affirmative defense to rape allegations, the State effectively relates to society that forced conjugal relations, even violent encounters, are socially acceptable behaviors.[61]

A shift from General Evidentiary rules

Owing to its private nature, proof of marital rape could require a review of the existing rules of evidence and criminal law. For instance, the general rule that force is not a relevant factor might not practically work in cases of marital rape. Statistically speaking, most cases of marital rape are in sync with signs of physical injury or other forms of cruelty, including mental cruelty. Thus, the general rule of lack of force nor being relevant in rape cases will face a shift in cases of marital rape. In the United States of America, thirty-three states have some qualifications regarding the amount of force required to prove marital rape.[62]

Due to the private nature of the crime, very often, the only proof is that of the wife's testimony. In such instances, it becomes pertinent to corroborate charges of rape with other forms of evidence. For example, if the husband has had patterns of cruelty, domestic violence, it will be relevant while determining whether the husband has committed rape, and the Court would look upon it as a contributing factor. This will be in conflict with §§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.

Sentencing Policy

Thirdly, we agree that there must be no difference in the sentencing policy. §376 of the IPC lays down the sentencing policy. The punishment for rape is between seven years to life imprisonment. However, §376B deals specifically with husband and wife living separately has a different sentencing policy with the punishment between two years and seven years.

[60] Melanie Randall & Vasanthi Venkatesh, *Symposium on the International Legal Obligation to Criminalize Marital Rape Criminalizing Sexual Violence Against Women in Intimate Relationships: State Obligations Under Human Rights Law*, 109 AMER. J. INT'L L. 189, 195 (2015)

[61] *Supra* note 59, at 7

[62] Encyclopaedia of Rape, 169 (Merril D. Smith, 1st ed., 2004)

This clearly shows that the intention was to bring about a lesser standard for punishing rape when the husband was the convict. However, on grounds of equality as given in Article 14, we argue that this is unconstitutional. There is no justification for having a lesser punishment policy because of the relationship of existence of marriage. In light of this, we propose that §376B be repealed and the sentencing policy work as it does.

CONCLUSION

Thus, we have come at crossroads with the socially, politically and legally tainted discourse on rape in marriage, and the vehement need to safeguard a married woman's fundamental right to equality and individual autonomy. The time is ripe, when the State must shred the cloak of prejudice and bigotry, whilst relieving Constitution from its state of inertia.

Having continually advocated for the criminalisation of rape in marriage, we have clearly established how Exception 2 to Section 375 of the IPC, fails to qualify the test of reasonable classification under Article 14 and trespasses upon an individual's autonomy and right to privacy, which form the *raison d'etre* of Article 21.

A symbolic law, embodying certain values and expressing the consensus of the society to adhere to these values, nevertheless, undeniably generates a process of creating social consensus and consequential conditions that are conducive to mobilize such a change. The proposed reforms in the substantive rape law, therefore, would undeniably give a further momentum to the untiring efforts of women's organizations to do away with the 'pro-male', 'male-oriented' and 'gender biased' sexual morals reflected in the Indian law relating to rape. It, if favorably responded to by the legislature, would not only undeniably make the substantive rape law free from the century and a half old 'gender bias' assumptions and the familial colonial hangover but would also take the rape law in a new progressive direction in the new millennial.