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# **MARITAL RAPE – BALANCING THE SCALES**

AUTHORED BY - BRINDA KUNDU

& KUNISHKA SHARMA

## **Abstract**

*“I say nothing, not one word, from beginning to end, and neither does he. If it were lawful for a woman to hate her husband, I would hate him as a rapist.”*

- Philippa Gregory, *The Red Queen*

Marital rape is perhaps the only form of rape that is not a crime. It is a social evil if acknowledged and a commonality if *unacknowledged*. This paper delves into the discourse and narratives on marital rape, which has been identified as a prevailing issue in the institution of marriage only recently, and then proceeds to shed light on the counter arguments put forth when the questions related to its criminalization are raised. The dichotomy between rape and *marital* rape has been elaborated upon in the backdrop of the Indian Penal Code, 1860 (Act 45 of 1860), the Code of Criminal Procedure, 1973 (Act 2 of 1974) and the Constitution of India, 1950. This paper also unveils the obscurities of the term ‘consent’ and how the repercussions change with the marital status of a person. Lastly, the international legal mechanism is perused to determine if any possible way out can be inferred from the same.

## **Introduction**

What society accepts as crime and its constituents depends on the society itself - the values on which it is erected and the values it aspires to inculcate and rise up to. Society is characterised and recognised by its institutions, and one of the oldest institutions is that of marriage. Marriage is the bedrock which bolsters and regulates the procreation and proliferation of future generations in a civil and organised society. Hence, it is crucial to elaborate upon one of the glaring and often unaddressed affairs surrounding the same – violence, in every form, propagated by and among spouses.

The most common form of violence experienced by women globally is ‘intimate partner violence’ including ‘a range of sexually, psychologically and physically coercive acts.’<sup>1</sup> The gravity of the issue of spousal violence is more often than not overlooked and brushed aside to preserve the positive connotations accompanying the institution of marriage.

One of the most disturbing instances of such violence is marital rape. India remains one of the thirty-six countries wherein marital rape continues to remain outside the purview of crime.<sup>2</sup> This is a matter of great concern and beckons to the institutional framework for redressal. However, the dynamics surrounding the same are multi-faceted, and the first step is to arrive at a definition. This task is rather difficult as there are multiple discrepancies in the definitions drawn up, as most fail to grasp the complete nature of the act of marital rape. To begin with, the Gujarat High Court in the case of *Nimeshbhai Bharatbhai Desai v. State of Gujarat*,<sup>3</sup> defined the term ‘marital rape’ as ‘unwanted intercourse by a man with his wife obtained by force, threat of force, or physical violence, or when she is unable to give consent. It is a non-consensual act of violent perversion by a husband against the wife where she is abused physically and sexually’.

The lack of a uniform definition of marital rape forces us to come up with one on our own. For that, it is essential to consider the necessary ingredients which comprise marital rape. A basic understanding can be gathered by considering it as forced sexual acts including intercourse, oral or anal sex committed by a person upon their spouse causing humiliation, pain, and mental trauma. Thus, marital rape is the act of non-consensual sexual intercourse between two individuals who are legally married or in a domestic partnership. It involves one spouse forcing or coercing the other into sexual activity without their consent or against their will. Any act of sexual intercourse or sexual penetration, including vaginal, anal or oral sex, forcibly or under threat of force or coercion, perpetrated against a person's will or without their freely given consent, when the perpetrator is the person's spouse, irrespective of the length of their relationship or the nature of their cohabitation, is termed as marital rape.

In order to comprehend the acknowledgement of marital rape within the public domain and the

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<sup>1</sup> Secretary General, In-depth study on all forms of violence against women, paras. 112-113 UN Doc. A/61/122/Add.1 (July 6, 2006) (emphasis added) [hereinafter UNSG VAW Study]. See also Human Rights Council Res. 23/25, UN Doc. A/HRC/RES/23/25 (June 25, 2013).

<sup>2</sup> Marital Rape in India: 36 Countries Where Marital Rape Is Not A Crime, INDIA TODAY (last visited on March 28, 2023).

<sup>3</sup> *Nimeshbhai Bharatbhai Desai v. State of Gujarat*, 2018 SCC OnLine Guj 732 (India).

consequential debates, it is imperative to understand the historical context and series of events that led to its recognition.

## Marital Rape – Revisiting Narratives & Discourse

While the whole of history proves the existence of unequal relations between spouses in almost all types of societies, the sole acknowledgement of marital rape was seen in the case of erstwhile Union of Soviet Socialist Republics (USSR). The Soviet Union (USSR) was one of the first countries in the world to recognize marital rape as a criminal offence. In 1922, the Bolsheviks, who led the Communist Revolution in Russia, decriminalized homosexuality and abolished all laws that restricted sexual behaviour between consenting adults. In 1933, the Soviet government passed a criminal code that included a provision criminalizing marital rape. However, this was an exception and not the law. The notion of women being equated to ‘chattel’ belonging to her husband was highly prevalent and well accepted to the point that marriage carried with it the implied consent to engage in sexual intercourse with the spouse. This meant that marital rape was not considered to be any different from consensual sexual intercourse between spouses. Rather, marriage was deemed to be an exception to the offence of rape. Sir Matthew Hale (1609–1676) in *History of the Pleas of the Crown*,<sup>4</sup> explicitly mentioned that ‘...the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual consent and contract, the wife hath given up herself during this kind unto her husband, which she cannot retract...’ The prevailing notion which was reflected in judicial thought and legal dictum was that ‘in return for support and protection, the wife owed her husband a consortium of legal obligations, which included sexual intercourse’. As per *Black’s Law Dictionary*, marital rape has been defined as ‘a husband’s sexual intercourse with his wife by force or without her consent’.<sup>5</sup>

In coming times, active steps have been taken to change the narrative. In 1991, in the case of *R v. R*,<sup>6</sup> Lord Keith of Kinkel held that there was no justification for the exception of marriage while pertaining to the offence of rape. The marital exemption in rape was declared to no longer form part of the law of England by the House of Lords. In the same year, the High Court of Australia, in the case of *R. v. L.*,<sup>7</sup> ruled that ‘if it was ever the common law that by marriage a

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<sup>4</sup> Sir Matthew Hale, *History of the Pleas of the Crown* (1736).

<sup>5</sup> BLACK’S LAW DICTIONARY (8<sup>th</sup> Ed. 2004).

<sup>6</sup> *R v. R*, [1991] 4 All ER 481 at p.484 (United Kingdom).

<sup>7</sup> *R. v. L.*, (1991) 174 CLR 379 (Australia).

wife gave irrevocable consent to sexual intercourse by her husband, it is no longer the common law.' In another case, *C.R. v. United Kingdom*,<sup>8</sup> the marital immunity clause was removed. In 2002, the Supreme Court of Nepal in the case of *Forum for Women, Law and Development (FWLD) v. His Majesty's Government/Nepal (HMG/N)* found the marital rape exemption to be unconstitutional and contrary to the International Covenant on Civil and Political Rights and the Convention on the Elimination of All Forms of Discrimination against Women.<sup>9</sup> In 2003, the introduction of the Criminal Code (Sexual Offences and Crimes against Children) Act, 2002 in Papua New Guinea abolished marital immunity in relation to rape.<sup>10</sup>

In India, Member of Parliament, Shashi Tharoor introduced the Women's Sexual, Reproductive and Menstrual Rights Bill, 2018<sup>11</sup> in the Lok Sabha to amend certain enactments to emphasise on the agency of a woman in her sexual and reproductive rights and to guarantee menstrual equity for all women by the State. § 2 (Chapter II) of the Bill<sup>12</sup> suggests an amendment to § 375 of the Indian Penal Code, 1860 ('IPC'),<sup>13</sup> seeking the omission of the second exception. It seeks the substitution of the words "Fourthly. — With her consent, when the man knows that he is not the person she believes she has given consent to engage in sexual intercourse or sexual acts and that her consent is given because she believes that he is another man with whom she wants to engage in sexual intercourse or sexual acts" in § 375(a) IPC, 1860.

Marital rape has been declared to be a form of cruelty and therefore a valid ground for claiming divorce by the High Court of Kerala in 2021.<sup>14</sup> The Division bench comprising Justice A.

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<sup>8</sup> *C.R. v. United Kingdom*, ECHR 22 Nov 1995 : (1995) 21 EHRR 363 (United Kingdom).

<sup>9</sup> United Nations, Handbook for Legislation on Violence Against Women, 27 (2009), <https://www.un.org/womenwatch/daw/vaw/handbook/Handbook%20for%20legislation%20on%20violence%20against%20women.pdf>.

<sup>10</sup> *Ibid.*

<sup>11</sup> Women's Sexual, Reproductive and Menstrual Rights Bill, § 2, Bill No. 255 of 2018 (India).

<sup>12</sup> 2. In section 375 of the Indian Penal Code, 1860,— (a) for the words "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", the words "Fourthly.— With her consent, when the man knows that he is not the person she believes she has given consent to engage in sexual intercourse or sexual acts and that her consent is given because she believes that he is another man with whom she wants to engage in sexual intercourse or sexual acts."; shall be substituted;

(b) Exception 2 shall be omitted; and (c) after the proviso to Explanation 2, the following proviso shall be inserted, namely:— "Provided that the women's ethnicity, religion, caste, education, profession, clothing preference, entertainment preference, social circle, personal opinion, past sexual conduct or any other related grounds shall not be a reason to presume her consent to the sexual activity."

<sup>13</sup> Indian Penal Code, § 375, No. 45, Acts of Parliament, 1860 (India).

<sup>14</sup> Hannah M Varghese, 'Husband's Licentious Disposition Disregarding Autonomy Of Wife Is Marital Rape': Kerala High Court Upholds Marital Rape As Valid Ground To Claim Divorce, *LIVELAW* (March 28, 2023)

Muhammed Mustaque and Justice Kauser Edappagath recorded their findings and held that ‘treating wife's body as something owing to husband and committing sexual act against her will is nothing but marital rape. A husband's licentious disposition disregarding the autonomy of the wife is a marital rape, albeit such conduct cannot be penalised, it falls in the frame of physical and mental cruelty. Marital rape is alien to our penal jurisprudence.’

Thus, while other countries have taken the initiative to establish marital rape as a crime, India is not among them. The reasons for maintaining such stance needs to be peeled layer by layer through a deep dive into the statistics and legal arguments accompanying the dialogue on marital rape.

## Statistical and Legal Analysis

The Indiana Coalition Against Sexual Assault (INCASA), in its brochure on marital rape, concluded the following:

- A national survey found ten percent of all sexual assault cases reported by women involved a husband or ex-husband attacker. (Source: Rape in America, 1992, National Victim Centre).<sup>15</sup>
- Thirty-three percent of rapes are committed by a current or former spouse, boyfriend, or girlfriend.<sup>16</sup>

The statistical investigations done by the National Coalition Against Domestic Violence (NCADV) point out the following:

- On average, nearly 20 people per minute are physically abused by an intimate partner in the United States.<sup>17</sup>
- 1 in 4 women and 1 in 9 men experience severe intimate partner physical violence.<sup>18</sup>

The National Family Health Survey (2019-2021) conducted in India revealed that nearly 1 in every 3 Indian women between the ages of eighteen to forty-nine have suffered from some

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<https://www.livelaw.in/top-stories/kerala-high-court-upholds-marital-rape-as-a-ground-for-divorce-under-cruelty-179010>.

<sup>15</sup> RAINN.org, Perpetrators of Sexual Violence: Statistics, <https://rainn.org/statistics/perpetrators-sexual-violence> (last visited on March 29, 2023).

<sup>16</sup> Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, National Crime Victimization Survey, 2010-2016 (2017).

<sup>17</sup> National Intimate Partner and Sexual Violence Survey: 2010 Summary Report, [https://www.cdc.gov/violenceprevention/pdf/nisvs\\_report2010-a.pdf](https://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf) (last visited on March 29, 2023).

<sup>18</sup> Jennifer L. Truman & Rachel E. Morgan, *Nonfatal Domestic Violence, 2003-2012*, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, 2014, <https://bjs.ojp.gov/content/pub/pdf/ndv0312.pdf> (last visited on March 29, 2023).

form of spousal abuse and around six percent have suffered from sexual abuse.<sup>19</sup> Eighty-three percent report their current husband and thirteen per cent report a former husband as perpetrator.<sup>20</sup>

These statistics are proof that marital rape is not a mere contemporary topic raised recently but is a real challenge and ordeal being faced by countless married women worldwide. The prudent mind, in light of this revelation, seeks answers as to whether law has progressed enough to provide safeguards and acknowledge this grave concern. The legal scenario so far is grim.

The One Hundred Seventy-Second Law Commission Report, 2000 on Review of Rape Laws, headed by B. P. Jeevan Reddy,<sup>21</sup> while deliberating upon the suggestions put forth by 'Sakshi', an organisation interested in the issues concerning women, on amendments to §§ 375 and 376 IPC, 1860,<sup>22</sup> adopted a rather orthodox stand when the bone of contention related to deletion of the second exception to § 375 was raised. The Report refused to recommend the deletion of the second exception to § 375 to prevent 'excessive interference with marital relationship.'<sup>23</sup> Dismissing the suggestion on deletion of the second proviso to § 376(1) IPC, 1860 which provides for a discretionary power on the court for awarding lesser punishment than the minimum punishment prescribed otherwise, the Commission remarked that 'it was not satisfied that there were any good reasons for doing so'.<sup>24</sup> The Commission also did not deem appropriate raising the age of the person assaulted referred to in clause 'sixthly' in § 375 IPC, 1860 and in the second explanation to §§ 375 and 376(1) IPC, 1860, where the age of the wife is referred to, to eighteen years.

The direness of the state of affairs elevated significantly with the partial implementation of the suggestions put forth by the Justice J. S. Verma Committee Report, 2012,<sup>25</sup> which also recommended removal of exception of marital rape. Paragraph 79 of the Report reads as follows:

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<sup>19</sup> THE TIMES OF INDIA, <https://timesofindia.indiatimes.com/india/nearly-1-in-3-women-have-suffered-spousal-sexual-physical-violence-family-health-survey/articleshow/91491367.cms> (last visited on March 29, 2023).

<sup>20</sup> THE HINDU, <https://www.thehindubusinessline.com/data-stories/data-focus/marital-rape-most-married-women-are-sexually-abused-by-their-husbands-says-nfhs-data/article65409875.ece> (last visited on March 29, 2023).

<sup>21</sup> 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 March 29, 2023).

<sup>22</sup> Indian Penal Code, § 376, No. 45, Acts of Parliament, 1860 (India).

<sup>23</sup> *Supra* note 21, ¶ 3.1.2.1.

<sup>24</sup> *Id.*, ¶ 3.2.2.

<sup>25</sup> Justice J.S. Verma Committee, Report of Committee on Amendments to Criminal Law (January 23, 2013).

79. We, therefore, recommend that:

i. The exception for marital rape be removed.

ii. The law ought to specify that:

a. A marital or other relationship between the perpetrator or victim is not a valid defence against the crimes of rape or sexual violation;

b. The relationship between the accused and the complainant is not relevant to the inquiry into whether the complainant consented to the sexual activity;

c. The fact that the accused and victim are married or in another intimate relationship may not be regarded as a mitigating factor justifying lower sentences for rape.

The recommendations of the Committee Report have not been implemented so far, however, some deliberations of the Hon'ble Supreme Court in the case of *Independent Thought v. Union of India*<sup>26</sup> are noteworthy. In this case, the division bench comprising Justices Deepak Gupta and Madan B. Lokur ruled down Exception 2 to § 375, IPC as a violation of Article 14,<sup>27</sup> 15<sup>28</sup> and 21<sup>29</sup> of the Indian Constitution, 1950. The question for consideration arose that whether sexual intercourse between a man and his wife; his wife being a girl between fifteen and eighteen years of age is rape. The bench was of the opinion that sexual intercourse with a girl below eighteen years of age is rape regardless of whether she is married or not. The Court took note of the artificial distinction created due to the Exception 2 to § 375, IPC and held it to be violative of Articles 14, 15(3), and 21 as the same created an unfair and arbitrary distinction between married underage girls and unmarried underage girls, thereby taking away the right to live a dignified life.

The abovementioned case creates a new benchmark for the aspects the judiciary successfully acknowledged, which are reiterated for the sake of clarity as follows:

- The Supreme Court acknowledged that it cannot cross its jurisdictional threshold and enter the realm of law-making by creating a new offence.
- The Supreme Court held Exception 2 to § 375 as liable to be struck down due to it being violative of the married girl child's well-being, her reproductive and mental health and

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<sup>26</sup> *Independent Thought v. Union of India*, [2017] 10 SCC 800 : AIR 2017 SC 4904 (India).

<sup>27</sup> INDIA CONST. art. 14.

<sup>28</sup> INDIA CONST. art. 15.

<sup>29</sup> INDIA CONST. art. 21.

privacy; and it being violative of fundamental rights enshrined in Articles 14, 15 and 21 as it fails to protect and redress those married underaged girls who are above fifteen years of age but below eighteen years of age from their husbands who could commit non-consensual intercourse with them and get away scot-free.

- The Supreme Court refused to take a stand on the marital rape with respect to women above the age of eighteen years.
- The Supreme Court noted the discrepancy between the age of consent with respect to other enactments, such as the Protection of Children from Sexual Offences Act, 2012 and the Prohibition of Child Marriage Act, 2006.

The debate intensified with the split verdict given in the case of *RIT Foundation v. Union of India*<sup>30</sup> by the High Court of Delhi by Justice C. Hari Shankar and Justice Rajiv Shakdher. The said judgment is a landmark one as it encompasses the both sides of the coin and elaborately and intricately shows how complex the dynamic of the debate really is.

The main issue of law before the Hon'ble bench was whether a husband should be held criminally liable for raping his wife who is not under 18 years of age.

While the part of the judgment delivered by Justice C. Hari Shankar has been discussed on its merits in the following section of this paper, it is important to appreciate Justice Rajiv Shakdher's verdict on the bone of contention, which can be summarized as follows.

The judgment begins into the brief history of rape laws, the Doctrine of Coverture and Sir Matthew Hale's commentaries, following which, the Court considers the aspect of child marriage which was prevalent in India in the medieval and colonial times. The erstwhile Clause 359 aimed to provide a safeguard to husbands who were married to girl children before they had attained the age of puberty.<sup>31</sup> The underage girl remained with her parents till she attained adulthood and it was presumed that her parents, being her natural guardians, would prevent her husband from exercising his conjugal right to sexual intercourse prematurely.<sup>32</sup> However, the said exception was not to apply in cases where the wife was under the age of ten years. This age limit has been increased and presently stands at fifteen years. While further developments and amendments to §§ 375 and 376, IPC took place, the present age of consent for unmarried

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<sup>30</sup> *RIT Foundation v. Union of India*, 2022 SCC OnLine Del 1404 (India).

<sup>31</sup> *Id.*, ¶ 108.

<sup>32</sup> *Id.*

girls stands at eighteen, the age of majority in India. Thus, a dichotomy is created whereby the married girl child would be subjected to non-consensual sexual intercourse which would not be considered rape. Thus, by the blanket protection of the matrimonial bond, the crime of rape stands legalised. The observations of the Apex Court in the *Independent Thought* case were noted by the Hon'ble Justice Rajiv Shakti as well.

Regarding the argument of the judiciary impinging on the domain of the legislature, Hon'ble Justice Rajiv Shakti held that 'the Doctrine of Separation of Powers and the Doctrine that the Legislatures are Delegates of the People (which is the basic doctrine of the US Constitution) do not form part of the Constitution of India.'<sup>33</sup> The Doctrine of Separation of Powers was held to be a *nuanced* doctrine. On the grounds of exercise of judicial restraint, it was held that 'the Doctrine of Judicial Self-Restraint is not applicable in cases which involve the determination of controversies that involve alleged infractions of fundamental rights by the State, in the context of violation of civil rights/human rights. Side-stepping such issues would be akin to the court seeking an *alibi* for refusing to decide a legal controversy, which it is obliged in law to decide.'<sup>34</sup>

With respect to the main altercation itself, i.e., Exception 2 to § 375, IPC, the Hon'ble Justice Rajiv Shakti observed that 'every woman victim, except a married woman, has the right to trigger criminal proceedings against the offender if she is subjected to forced sexual activity.'<sup>35</sup> The Marital Rape Exception ('MRE') was held to be violative of Article 21, as 'rape, as an offence, deserves societal disapprobation in the strongest terms, notwithstanding, the fact that the rapist is in a marital relationship with the victim.'<sup>36</sup> The MRE was also held to be violative of Articles 15 and 19(1)(a) of the Constitution of India, 1950, as 'continuance of MRE on the statute triggered discrimination against women based on their marital status' and 'violated the guarantee given by the Constitution concerning freedom of expression, amongst others, to married women who are citizens of this country.'<sup>37</sup>

Striking down § 198B of the Code of Criminal Procedure, 1973,<sup>38</sup> as violative of Articles 14, 15, 19(1)(a) and 21 of the Constitution, Justice Rajiv Shakti reasoned that § 198B, Cr.P.C.

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<sup>33</sup> *Id.*, at ¶ 119.

<sup>34</sup> *Id.*, at ¶ 127.

<sup>35</sup> *Id.*, at ¶ 135.2.

<sup>36</sup> *Id.*, at ¶ 162.

<sup>37</sup> *Id.*, at ¶ 166.1.

<sup>38</sup> Code of Criminal Procedure, § 198B, No. 2, Acts of Parliament, 1974 (India).

along with § 376B, IPC<sup>39</sup> provided separate procedures triggering the offence and mandated a lower minimum sentence without being able to demonstrate how a rapist who falls in this category is different from a husband who is not separated or even a person who is a stranger to the victim.<sup>40</sup> The emphasis was that a rapist remains a rapist regardless of his relationship with the victim.

Thus, this judgment recognised the need for the criminalisation of marital rape and removal of the MRE. However, one must keep in mind that while this verdict is a welcome move to strengthen the institution of marital ties, the practical fallacies also need to be scrutinized to make the legal position on this major issue more in sync with the present ground reality and the challenges that would arise in light of the implementation of the same.

## **Criminalisation & Penalisation - Issues & Challenges**

Hon'ble Justice C. Hari Shankar held a dissenting opinion and put forth arguments justifying his stand against the criminalisation of marital rape. Highlighting issues such as the practical difficulty of gathering evidence without piercing the veil of privacy between the society and a married couple, the possibility of misuse of the provision, the creation of new offence by the judiciary which is beyond its scope and power, conjugal rights and expectations and the existence of other remedies, Justice Hari Shankar gave the following rationale.

He opines that the distinction that MRE makes between married and unmarried women is constitutionally viable.<sup>41</sup> The IPC itself contains provisions which are relationship centric.<sup>42</sup> The legislature has provided various avenues to enable a victim to seek redressal against spousal violence, such as, §§ 376B and 498A of the IPC, as also, to the provisions of the D.V. Act.<sup>43</sup> The husband has a conjugal expectation to have sex with his wife.<sup>44</sup> While the legislature does not condone spousal sexual violence, it chooses not to label the act as rape as it seeks to protect families including progeny. In other words, the State has a legitimate interest in protecting the institution of marriage.<sup>45</sup> There is a palpable and real apprehension that striking

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<sup>39</sup> Indian Penal Code, § 376B, No. 45, Acts of Parliament, 1860 (India).

<sup>40</sup> *Supra* note 30, at ¶ 167.

<sup>41</sup> *Id.*, at ¶ 136 (i).

<sup>42</sup> *Id.*, at ¶ 136 (ii).

<sup>43</sup> *Id.*, at ¶ 136 (iii).

<sup>44</sup> *Id.*, at ¶ 136 (iv).

<sup>45</sup> *Id.*, at ¶ 136 (v).

down MRE could result in the lodging of false cases.<sup>46</sup> If the husband is prosecuted for marital rape, it would result in the State invading a married couple's private space. Being a closed space, it would be well-nigh impossible for the State to collect evidence concerning the allegation of rape.<sup>47</sup> The striking down of MRE would create a new offence by criminalizing an act which up until now was not construed as an offence.<sup>48</sup> The Court is not vested with such power, this power is reserved well and truly for the legislature.

With reference to § 198B of the Code of Criminal Procedure, 1973, Justice Hari Shankar opined that there was no reason to strike down the said provision as it merely set the procedure to deal with complaints filed under § 376B, IPC. Upholding the validity of § 376B, IPC, Justice Hari Shankar observed that § 376B, IPC was a middle ground created to deal with the offence of forceful sexual intercourse by the husband upon the wife during separation and distinguished the same from sexual intercourse between strangers and sexual intercourse between a healthy married couple.<sup>49</sup>

An aspect which went unconsidered is that marriage in India is governed by personal laws, which although have been codified into separate enactments, but in nature and practice are highly community-centric. Due to this, discrepancies arise with respect to the definition of marital rape and the remedies available to a victim of the same. For instance, as per § 2 (vii) of the Dissolution of Muslim Marriages Act, 1939,<sup>50</sup> the wife can repudiate the marriage after she is fifteen years old but before she is eighteen years of age provided that the marriage has not been consummated. This has to be considered in light of the fact that the marriage would still be deemed consummated even in the case of marital rape. Thus, removing Exception 2 to § 375, IPC, or at the very least, increasing the age limit from fifteen to eighteen for the wife, would offer a reliable remedy to the victims in such cases. However, at the same time, this would mean that the State would be entering into and modifying the personal laws governing social institutions, such as marriage. This contention is strengthened by relying on the case of *Rahul @ Nayaz Pasha v. State of Karnataka*,<sup>51</sup> wherein it was held by Justice K. Natarajan that 'the personal law cannot override the special law of POCSO, Child Marriage Restraint Act and the General Penal Code of this Country'.

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<sup>46</sup> *Id.*, at ¶ 136 (vi).

<sup>47</sup> *Id.*, at ¶ 136 (vii).

<sup>48</sup> *Id.*, at ¶ 136 (viii).

<sup>49</sup> *Id.*, at ¶ 222-223.

<sup>50</sup> Dissolution of Muslim Marriages Act, 1939, § 2(vii), No. 8, Acts of Parliament, 1939 (India).

<sup>51</sup> *Rahul @ Nayaz Pasha v. State of Karnataka*, CrI.P. No. 1173 of 2021 (India).

With most of the considerable points of discussion being amply deliberated upon, it is time to structure possible inputs that may better facilitate the socio-legal mechanism of the country to deal with the grave issue of marital rape in a legally sound and socially coherent manner.

## **Paving the Path – Addressing the Social Aspect**

It needs to be understood that law is only as developed and relevant as the society which chooses to uphold and implement it. As society progresses, the law modifies and develops itself. Law cannot progress at a greater pace than the society it is applicable to, for that would just make the idea of justice and its implementation too idealistic and utopian. Marital rape is one of the myriad aberrations that lie on the middle ground between law and society. Marital rape has its roots in the society but its manifestations are reflected in the law.

What we as members of the society forget is that for every problem which exists in society, the law is not be the one-stop solution to end all. The most effective remedies are the ones which cut off the source of the predicament at the very root of it. Thus, to remedy an issue and to rectify the same, the approaches will highly incongruent. On the social front, such sensitive dilemmas and their reality and implications need to be acknowledged, accepted and then altered.

On the legal front, the following proposals and recommendations are put forth by the authors:

- That the Supreme Court of India, the Ministry of Law and Justice, Ministry of Women and Child Development, in collaboration, issue guidelines to the National Legal Services Authority (NALSA), various State Legal Service Authorities (SLSA) and various other such organisations to conduct socio-legal literacy programs aimed at target audience consisting of women from sixteen years of age onwards to propagate information and awareness about marital rape and the legal remedies available to a victim of such incident.
- That the various enactments governing marriages in India be amended to declare as void marriages solemnised between parties, one or both of whom are under the age of eighteen years, with no regard to whether the marriage was solemnised with the consent of the parties.

- That the Prohibition of Child Marriage Act, 2006 (Act 6 of 2007) be more effectively and stringently implemented and a uniform minimum legal age for marriage be incorporated.
- That Exception 2 to § 375, IPC be amended as follows:

*375. Rape.—A man is said to commit “rape” if he— (a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or*

*(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or*

*(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or*

*(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven 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 eighteen years of age.*

*Seventhly.—When she is unable to communicate consent.*

*Explanation 1.—For the purposes of this section, “vagina” shall also include labia majora.*

*Explanation 2.—Consent means an unequivocal voluntary agreement when*

*the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:*

*Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.*

*Exception 1.—A medical procedure or intervention shall not constitute rape.*

*Exception 2.—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under **eighteen** years of age, is not rape.*

- That the minimum sentence for an offence under § 376B, IPC be amended to be made at par with the minimum punishment for rape as given under § 376, IPC.
- That the enactments on marriage be amended to include marital rape as an additional ground for divorce, to prevent excessive misuse of § 377, IPC.<sup>52</sup>

These proposals have been suggested keeping in mind the welfare and upliftment of married girls who fall between the ages fifteen to eighteen who are prevented from approaching the courts of law whereas their unmarried counterparts can, even though the nature of the offence that they have been subjected to is the same in its dire essence. As for married women over the age of eighteen, adding marital rape as a ground for divorce provides them with a civil remedy at the very least. This is further aimed to prevent the misuse of § 377, IPC, as marital rape may not always fall under unnatural sex. Offering a civil remedy by including marital rape as a ground for divorce prevents the problems related to its criminalisation. However, these initiatives would not be exhaustive and will only be the first step towards curing the societal malady of marital rape. There remains a lot of steps to be taken by all the stakeholders and the recommendations above are only meant to be a serve as an indicator towards the possible steps that could be taken instead of maintaining the status quo over the subject.

## Conclusion

There is no denying that marital rape is a hard-hitting reality plaguing marriages in India. What makes it worse is that marriage and rape are viewed as separate spheres, as a result of which neither the perpetrator's family, nor the victim's family, view it as something to be concerned about. The judiciary points out a variety of reasons for maintaining the status quo while

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<sup>52</sup> Indian Penal Code, § 377, No. 45, Acts of Parliament, 1860 (India).

acknowledging the lacuna in the existing law. All this is undoubtedly bound to set the wrong precedent for the upcoming generation. The massive shroud of uncertainty surrounding this heinous act needs a beacon of clarity to pierce through. The onus rests on both the judiciary and the legislature to revise and re-evaluate the position on marital and bring about a balancing of interests for securing and stabilising the institution of marriage, which is already bearing the strain and showing signs of needing a goal-oriented, society-led reform. The suggestions put forth in this paper are a starting point towards plugging the loopholes present in the existing law. The entire moot point is not to create the creating of a new offence, but to remove the special treatment given to the perpetrators thereof.

