

ISSN: 2582-6433



INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed 6th Edition

VOLUME 2 ISSUE 7

www.ijlra.com

DISCLAIMER

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Managing Editor of IJLRA. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Team of IJLRA.

Though every effort has been made to ensure that the information in Volume 2 Issue 7 is accurate and appropriately cited/referenced, neither the Editorial Board nor IJLRA shall be held liable or responsible in any manner whatsoever for any consequences for any action taken by anyone on the basis of information in the Journal.

Copyright © International Journal for Legal Research & Analysis

IJLRA

EDITORIAL TEAM

EDITORS

Megha Middha



Megha Middha, Assistant Professor of Law in Mody University of Science and Technology, Lakshmanagarh, Sikar

Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshmanagarh, Sikar (Rajasthan). She has an experience in the teaching of almost 3 years. She has completed her graduation in BBA LL.B (H) from Amity University, Rajasthan (Gold Medalist) and did her post-graduation (LL.M in Business Laws) from NLSIU, Bengaluru. Currently, she is enrolled in a Ph.D. course in the Department of Law at Mohanlal Sukhadia University, Udaipur (Rajasthan). She wishes to excel in academics and research and contribute as much as she can to society. Through her interactions with the students, she tries to inculcate a sense of deep thinking power in her students and enlighten and guide them to the fact how they can

bring a change to the society

Dr. Samrat Datta

Dr. Samrat Datta Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Samrat Datta is currently associated with Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Datta has completed his graduation i.e., B.A.LL.B. from Law College Dehradun, Hemvati Nandan Bahuguna Garhwal University, Srinagar, Uttarakhand. He is an alumnus of KIIT University, Bhubaneswar where he pursued his post-graduation (LL.M.) in Criminal Law and subsequently completed his Ph.D. in Police Law and Information Technology from the Pacific Academy of Higher Education and Research University, Udaipur in 2020. His area of interest and research is Criminal and Police Law. Dr. Datta has a teaching experience of 7 years in various law schools across North India and has held administrative positions like Academic Coordinator, Centre Superintendent for Examinations, Deputy Controller of Examinations, Member of the Proctorial Board



Dr. Namita Jain



14th, 2019

Head & Associate Professor

School of Law, JECRC University, Jaipur Ph.D. (Commercial Law) LL.M., UGC - NET Post Graduation Diploma in Taxation law and Practice, Bachelor of Commerce.

Teaching Experience: 12 years, AWARDS AND RECOGNITION of Dr. Namita Jain are - ICF Global Excellence Award 2020 in the category of educationalist by I Can Foundation, India. India Women Empowerment Award in the category of "Emerging Excellence in Academics by Prime Time & Utkrisht Bharat Foundation, New Delhi.(2020). Conferred in FL Book of Top 21 Record Holders in the category of education by Fashion Lifestyle Magazine, New Delhi. (2020). Certificate of Appreciation for organizing and managing the Professional Development Training Program on IPR in Collaboration with Trade Innovations Services, Jaipur on March

Mrs.S.Kalpana

Assistant professor of Law

Mrs.S.Kalpana, presently Assistant professor of Law, VelTech Rangarajan Dr. Sagunthala R & D Institute of Science and Technology, Avadi. Formerly Assistant professor of Law, Vels University in the year 2019 to 2020, Worked as Guest Faculty, Chennai Dr.Ambedkar Law College, Pudupakkam. Published one book. Published 8 Articles in various reputed Law Journals. Conducted 1 Moot court competition and participated in nearly 80 National and International seminars and webinars conducted on various subjects of Law. Did ML in Criminal Law and Criminal Justice Administration. 10 paper presentations in various National and International seminars. Attended more than 10 FDP programs. Ph.D. in Law pursuing.



Avinash Kumar



methodology and teaching and learning.

Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC - NET examination and has been awarded ICSSR - Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research

ABOUT US

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS
ISSN

2582-6433 is an Online Journal is Monthly, Peer Review, Academic Journal, Published online, that seeks to provide an interactive platform for the publication of Short Articles, Long Articles, Book Review, Case Comments, Research Papers, Essay in the field of Law & Multidisciplinary issue. Our aim is to upgrade the level of interaction and discourse about contemporary issues of law. We are eager to become a highly cited academic publication, through quality contributions from students, academics, professionals from the industry, the bar and the bench. INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN 2582-6433 welcomes contributions from all legal branches, as long as the work is original, unpublished and is in consonance with the submission guidelines.

AN ANALYSIS OF LAW RELATING TO MARITAL RAPES IN INDIA

Authored By - Bhupender Singh Antil
& Deepak Bedi

INTRODUCTION

Before Raja Ram Mohan Roy's campaign, women were seen as the property of men, and harmful practises like Sati and child marriage were commonplace. It was the first time in the Indian Independence Struggle that women engaged on an equal footing with men, and Mahatma Gandhi took enormous strides to better their socioeconomic conditions as a result. It was as a result of these activities that a Constitution was drafted that guaranteed women the right to vote and the opportunity to run for office on equal footing with men. Following independence, practically every sector saw development and progress, allowing for a greater emphasis on bettering women's lives. Discrimination against them because of their gender was rather common. Due in large part to persistent activism on the part of Indian women, the Constitution guarantees equal rights for men and women. Following the country's independence, various legislative reforms were enacted to empower women and elevate their status in society, ensuring that they would be free from discrimination. Women now have the same legal protections and political rights as men thanks to the Constitution.

The constitution guarantees women equal rights and protections so that they can participate equally in national decision-making. In light of the recent success of Mangalyaan, wherein the entire team consisted primarily of female scientists, this is a noteworthy example to cite. There are still numerous areas where the United States falls behind other countries, despite the fact that women have made enormous strides in practically every industry, including academia, law enforcement, and the scientific and technological communities.

MARITAL RAPE

To put it simply, marital rape occurs when one spouse has sexual contact with the other without their permission.

The Indian Penal Code defines rape as "any other sexual penetration of the vagina, anus, or mouth of another person, with or without force, by a sex organ, other bodily part, or foreign object, and it is a crime to engage in sexual activity with another person without their consent." (Section 375).¹

Non-consensual sexual activity between a married couple, however, is not considered rape under the law.² Domestic violence refers to "the violent or aggressive behaviour within the home which involves the violent abuse of a spouse or partner³ which takes place with a woman because the husband in all the circumstances is powerful and most males comprehend that marriage gives them the right to have sexual intercourse with the wife at any point of time whether she is willing or not." This is the face of a patriarchal society; this act is detrimental to the institution of marriage. IPC, 1860 provides for rape and punishment for rape under section 375 and 376, respectively.

Justice Ahmad stated in the case of *Bodhisattwa Gautam v. Subhra Chakraborty*, that this "cruel act, in turn, destroys the entire psychology of a woman and pushes her into deep emotional crises" because marriage is a form of social bonding between the spouses and everything in this institution needs to have the consent of both.⁴

Almost everywhere in the globe, either the current legislation has been updated or a new law has been enacted to make marital rape a crime. There are now over 150 nations whose laws specifically prohibit or severely punish marital rape. While rape inside a marriage is illegal in all 50 states in the United States, the maximum sentence in the United Kingdom is life in prison. In countries like the United Kingdom⁵, Fiji it was criminalised due to decision delivered by courts, in some countries like Brunei⁶ the offence is explicitly criminalised. In some countries like Bangladesh, India⁷ "the law for marital rape does not exist because women are

¹ The Indian Penal Code, 1860 (45 of 1860), s. 375

² The Indian Penal Code, 1860 (45 of 1860), Exception to s. 375

³ The Protection of Women from Domestic Violence Act, 2005. (No 43 of 2005), s.3

⁴ *Bodhisattwa Gautam v. Subhra Chakraborty* (1996) 1SCC 490

⁵ *R. v. R*, [1992] 1 AC 599 (UK)

⁶ Brunei's Penal Code, s.375

⁷ *Supra* note 3

considered the property of the husband and the state does not interfere in the institution of marriage.”

There are a number of laws in place to prevent discrimination against women, such as dowry, domestic abuse, and cruelty; nevertheless, marital rape is not yet criminalised. Victims of marital rape suffer psychological and physiological harm since they are forced to spend the rest of their lives with the guy who abused them. Since there are no laws against marital rape, and reporting such a crime might result in social stigma, it is highly underreported in the nation.

As people in the 21st century become increasingly conscious of their own rights and wants, so too must the laws that protect them. According to the Indian Penal Code of 1860, it is illegal to have sexual relations with a wife who is younger than 15 years old. The catch here, though, is that there is a way out. An Indian child marriage is simply voidable, not void, according to the country's Prohibition of Child Marriage Act (2006).⁸ Any marriage in which a minor marries an adult must be recognised by law unless the minor files for divorce within one year of reaching the age of majority. This allows husbands to have sexual relations with their wives until they reach the age of majority despite the fact that there is no mechanism in place for males to seek agreement from their wives between the ages of 15 and 18. Non-consenting intercourse between a male over the age of 50 and a woman under the age of 16 can be lawful, whereas consensual intercourse between a boy and a girl under the age of 17 is prohibited.

Domestic violence is defined as "harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to so and includes causing physical abuse, sexual abuse, verbal and emotional abuse, and economic abuse" in Section 3(a) of the Protection of Women from Domestic Violence Act, 2005.⁹ Sexual abuse mentioned under this definition “includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman¹⁰”, which in turn gives a chance to wives to initiate legal proceedings.” The negative aspect of this action is that it is not always unlawful in nature. There is no provision for a jail sentence. Instead, it allows for monetary restitution, restraining orders, and other forms of protection.

⁸ The Prohibition of Child Marriage Act, 2006, s. 3(a)

⁹ The Protection of Women from Domestic Violence Act, 2005. (No 43 of 2005)., s3(a)

¹⁰ The Protection of Women from Domestic Violence Act, 2005. (No 43 of 2005)., s3(d)

EFFECTS OF MARITAL RAPE

There are lasting effects from experiencing rape in a marriage, and they can be detrimental to a woman's physical and emotional health. In this section, we break down the many mental and physical health problems a raped woman may face into their respective subheadings.

a. PSYCHOLOGICAL EFFECTS

Depression, post-traumatic stress disorder, fear, low self-esteem, rape trauma syndrome, and a lack of sexual desire or satisfaction have all been reported by women who have experienced marriage rape.¹¹ When a couple ties the knot, the lady automatically becomes the object of her husband's libidinal desires. Without question, any woman who experiences this for the first time will be taken aback by the possibility that she may be forced to submit to it. After that, everything happens must feel terrible yet numbing, but she understands that resisting or disputing her partner's authority would lead nowhere. The woman worries that her prestigious last name will be ruined. Consequently, she is under pressure to uphold the honour of her ancestors.

The medical community has coined the phrase "Rape Trauma Syndrome" to describe how survivors of rape react, and it describes the typical reaction of a mentally healthy individual to the trauma of rape.¹² This might happen right away or it could take months or even years. There's a chance the victims may feel degraded or embarrassed. Victims can wonder what they might have done differently or why they were helpless. Some victims may also place the blame on themselves, thinking that they were weak or unwilling to stand up to their spouses' sexual advances.¹³ Rape's classic psychological fallout is self-blame, which can lead to PTSD since it heightens the victim's sense of powerlessness (they did nothing to deserve being raped, thus they must have done something wrong).

People who experience this may feel uncomfortable coming out because they might not want to draw attention to themselves or their situation. They believe that discussing this with other individuals may attract unwanted attention. In the case of *Bodhisattwa Gautam v. Subhra Chakraborty*¹⁴, a criminal complaint was filed based on a consensual affair and a questionable

¹¹ Campbell, R., Dworkin, E. and Cabral, G., *An ecological model of the impact of sexual assault on women's mental health. Trauma, Violence, & Abuse*, 2009

¹² *Surjibhai Badaji Kalasva v. State of Gujarat*, (2018) 59 (3) GLR 2498

¹³ Ann Burgess and Lynda Holmstrom, *Rape Trauma Syndrome*, *American Journal of Psychiatry* 981-986 (1974).

¹⁴ *Bodhisattwa Gautam v. Subhra Chakraborty*, (1996) 1 SCC 490.

finding of rape due to failure to marry. Also, in a hearing for criminalizing marital rape, Hon'ble Delhi High Court in 2018 said that: "*Force is not a pre-condition for rape. If a man puts his wife under financial constraint and says he will not give her money for household and kids expenses unless she indulges in sex with him and she has to do it under threat.*"¹⁵ All of these things place mental strain on the victim and, if they have children, on them as well. The kids may have a nervous breakdown or develop clinical depression as a result of this. Therefore, it is clear that such actions not only ruin a woman and her life, but also have devastating consequences for the wellbeing of her children, setting off a vicious cycle.

b. HEALTH ISSUES

Although there is a provision provided in the Protection of Women from Domestic Violence Act, 2005¹⁶, but that accounts for only civil liability for sexual abuse. Motivations for using physical force might include establishing one's superiority and creating an atmosphere of intimidation in the hopes of achieving one's goals peacefully.

As a result of repeated rapes, most women have chronic pain. Because of this, they end up with fractured ribs, knife wounds, markings all over their body from the attack, and black eyes. These are but a handful of the possible issues that women face. Most patients have complained of vaginal pain and bleeding. Experiencing severe vaginal rupture causes severe bleeding.¹⁷ People who are coerced into having anal intercourse may experience bleeding, discomfort, and irritation. If they are reminded of the abuse, they may experience nausea. In addition, the sufferer may experience emotional and psychological strain from an unplanned pregnancy.¹⁸ More so if the victim is a young adult (between the ages of 15 and 18). This might lead to the need for an early delivery, which can have devastating effects on the baby. Vaginal rupture is another potential cause of infertility that might leave the sufferer childless for the rest of her life. This can have devastating long-term effects on the victim, especially if they ever wish to have children. Lifelong scarring is a real possibility. Suicide is another option for those affected by this. Suicide may seem like the only choice to someone who has experienced marital rape because of the stigma associated with it and the difficulty in disclosing the abuse to others.

¹⁵ <https://www.financialexpress.com/india-news/delhi-hc-on-marital-rape-marriage-doesnt-mean-wife-always-ready-for-physical-relations-with-her-husband/1248987/>

¹⁶ *Supra* note 4

¹⁷ *Supra* note 12

¹⁸ Sarkar J. Mental health assessment of rape offenders, 55(3) Indian J Psychiatry 235-243 (2013).

MARITAL RAPE LAWS IN INDIA

While there have been numerous changes and new laws passed in our nation, domestic rape is still not regarded to be a crime here. In the absence of such legislation, the court is left to decide whether or not a woman should be protected within the context of marriage.

Under Section 375 of the Indian Penal code, has mentioned exception that – “*Sexual intercourse by a man on his own wife, the wife not being under 15 years of age, is not rape*”¹⁹

Under the Indian Penal Code, the instances where punishment is awarded to husband under marital rape is as follows:

- i. When the age of wife is between 12-15 years, there can be imprisonment up to 2 years or fine or both;²⁰
- ii. When the age of wife is below 12 years, there must be imprisonment for term which shall not be less than 7 years but can also extend to life and shall also be liable to fine.²¹
- iii. When the wife is judicially separated, there can be imprisonment up to 2 years and fine²²
- iv. ***When the age of wife is above 15 years, the rape is not punishable.***²³

Since a woman's human rights are directly violated whenever her husband engages in sexual harassment, it follows that after a woman reaches the age of 15, she is no longer protected by the law if she experiences sexual harassment. Shockingly, while the Constitution sets the minimum age for marriage at 18, there is no legal recourse for victims of sexual assault after they reach age 15.

Since the old law held that marriage itself granted authorization to have intercourse at any time after the marriage and the agreement of the female was not needed, it is clear that the law, which is intended to protect victims, is unable to do so in the case of marital rape. A woman is subjected to violence, which forces her into sexual behaviour in which she sustains both bodily and mental harm. Our courts and legislature continue to remain mute on the question, "Is

¹⁹ *Supra* Note 1

²⁰ The Indian Penal Code (45 of 1860), s. 376(1).

²¹ *Ibid*

²² The Indian Penal Code (45 of 1860), s. 376A.

²³ *Supra* Note 3

marriage a licence to rape?"

The Report of 42nd Law Commission²⁴ talks about “the removal of exception of Section 375 from the IPC because it is discriminatory towards women and is not in accordance to the law.” Even the Report of 172nd Law Commission²⁵ was in favour of removing the exception to Section 375 thereby making marital rape a criminal offence but more than 10 years have passed and no action has been taken on the same issue.

CONSTITUTION OF INDIA ON MARITAL RAPE

Several arguments might be made against this law's seeming tolerance of spousal rape. In accordance with the Indian Constitution, all legislation enacted by the legislature must adhere to the Constitution's basic structural theory. Any law that goes against this can be ruled unlawful by the courts. If a statute or other provision were to be passed condoning marital rape, it would have to be consistent with the Constitution's essential premise.

Article 14

Article 14 of the Indian Constitution²⁶ guarantees the “Fundamental right of equality before the law and equal protection of the laws within the territory of India.” However, there is still a lack of recognition in criminal law for the prejudice that victims of marital rape experience. Because it creates a new strata of women who would not gain protection from the law if they encounter sexual harassment from their spouses, the Exception to Section 375 of IPC is discriminatory law for married women and fails to meet intelligible differentia.

Abuse committed by a spouse against his wife is not covered under Section 375. Article 14 of the Indian Constitution prohibits discrimination, therefore exempting someone from the application of Section 375 of the IPC because of their marital status is discriminatory. Everything else about a rape also applies to a marital rape; the only difference is that the victim is married in the latter circumstance. In turn, it's challenging for married women since they have to spend their entire lives with their abuser and rely on him financially. The reality is that this loophole encourages husbands to engage in forced sexual intercourse since they know that

²⁴ Law Commission of India, “42nd Report on Indian Penal Code, 1860” (June, 1971).

²⁵ Law Commission of India, “172nd Report on Review of Rape Laws” (January, 1998).

²⁶ The Constitution of India, art. 14.

doing so will not result in legal repercussions. Since the female victims of marital rape do not have access to equal protection under the law, and since the crime fails the twin criteria of intelligible differentia and reasonable linkage established by Article 14 of the Indian Constitution, it must be considered a violation of the constitution.

Article 21

Article 21 of the Indian Constitution says that:

“[N]o person shall be deprived of his life or personal liberty except according to a procedure established by law.”²⁷

In the case of *Kharak Singh v. State of Uttar Pradesh*²⁸, the Hon’ble Supreme Court held that “[b]y the term “life” as here used something more is meant than mere animal existence” The Supreme Court has repeatedly reshaped this article via its interpretations in various judgments. The right to health, dignity, a secure environment, sexual privacy, and human dignity are only a few of the many rights guaranteed to people under Article 21. In the case of *State of Karnataka v. Krishnappa*²⁹, the Hon’ble Supreme Court held that “[s]exual violence apart from being a dehumanizing act is an unlawful intrusion of the right to privacy and sanctity of a female.”, it further held that “rape in itself is a serious blow to the self-esteem and dignity of the victim and it degrades her, leaving behind a traumatic experience.”

i. Right to Healthy and Dignified Life

In the case of *C.E.S.C. Ltd. v. Subhash Chandra*³⁰, the Hon’ble Supreme Court held that “Right to Life also includes the Right to live a healthy and dignified life which is one of the most important things to maintain the individuality of a citizen in the country.”³¹ Because marital rape causes emotional, psychological, and physical problems for a woman and puts her into depression, and because there is always a chance of transmission of STDs in the case of forceful sexual intercourse, the exemption to Section 375 is a violation of the right to good health of a married woman. It has been established in several cases heard by the Hon’ble

²⁷ The Constitution of India, art. 21.

²⁸ *Kharak Singh v. State of Uttar Pradesh*, AIR 1963 SC 1295.

²⁹ *State of Karnataka v. Krishnappa*, (2000) 4 SCC 75 (India).

³⁰ *C.E.S.C. Ltd. v. Subhash Chandra*, (1992) 1 SCC 441 (India).

³¹ See also *Bandhua Mukti Morcha v. Union of India* (1997) 10 SCC 549, *Francis Coralie v. Union Territory of Delhi* 1981 AIR 746, 1981 SCR (2) 516

Supreme Court that rape is a crime against society and a violation of Article 21 of the Indian Constitution.³² Therefore, the essential structure of Article 21 is violated and is unconstitutional, since the exception to Section 375 of the IPC is in plain violation of the woman's right to live a healthy and dignified life because sexual intercourse without the woman's permission undermines her dignity and health.

ii. Right to Sexual Privacy

There are numerous cases in the Apex Court where it has been held that Right to Privacy is to be protected constitutionally under Article 21.³³ Therefore, any type of forceful sexual act to a woman is a violation of her privacy as it is her body and she has full right to consent to it and protect it. If we talk about sexual privacy the same has been discussed by the Hon'ble Supreme Court in the case of *State of Maharashtra v. Madhkar Narayan*³⁴ where it was held that "[e]very woman is entitled to her sexual privacy and the same is not open to for any and every person to violate her privacy". But a married woman's right to sexual privacy has been violated by the IPC's exception of marital rape, as no one should coerce her into sexual activity. This exception consequently violates the Right to Privacy and should be struck down as illegal.

iii. Right to Bodily Integrity

A woman has the right to decide for herself whether or not she wants to engage in sexual activity, and no one has the authority to force her to do so against her will. Under Indian law, if a woman refuses sexual activity and is coerced into it, the perpetrator is guilty of rape, but if a married woman is coerced into sexual activity, the perpetrator is guilty of adultery. Since marriage does not eliminate the requirement for permission before engaging in sexual intercourse, the exception to Section 375 is a violation of a married woman's right to control her own body.

Because of this, Articles 14 and 21 of the Indian Constitution prohibit any kind of immunity for Marital Rape under the Indian Penal Code, making Section 375 of the Indian Penal Code clearly unconstitutional. Since this is not a fair legislation and establishes a distinction favouring a married woman, it fails the "just, fair, and reasonable law" and the "reasonable categorization" standards. This provision is no longer necessary and should be removed from

³² *The Chairman, Railway Board v. Chandrima Das*, AIR 2000 SC 988.

³³ *Govind v. State of Madhya Pradesh*, AIR 1975 SC 1378.

³⁴ *State of Maharashtra v. Madhkar Narayan*, AIR 1991 SC 207.

the IPC; instead, India should implement stringent measures to protect the rights of married women, as many of them have been the victims of rape within their own marriages without any effective legal protections other than Section 498A of the Indian Penal Code and the Domestic Violence Act. The Supreme Court in the case of *State of Maharashtra v. Madhukar Narayan Mandikar*³⁵ 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.” It's a huge issue, and the Indian judicial system has criminalised practically all rapes but provided an exception for marital rape, which leaves a disproportionate number of women vulnerable to assault.

HUMAN RIGHTS PERSPECTIVE

The vast majority of individuals believe that rape within a marriage should not be treated as a criminal offence. That's the way public perception is shaped, and it paints a dire picture of the country. Since the majority of Indians are culturally engaged and hold that the rules that characterised India a thousand years ago are widespread even now, these arguments have acquired traction. Furthermore, given the discriminatory nature of this exemption, these arguments are irrelevant in the modern context. The counterarguments have been laid out below.

Arguments against Criminalising Marital Rape

i. The Sanctity of Matrimonial Institution

One argument against making marital rape a crime is because doing so would undermine marriage's sacredness and, by extension, the stability of families. If husbands and wives couldn't trust each other, marriage would lose its holy purpose. Any attempt to criminalise marital rape would force the state to cross the barrier between the private sphere of the home and the public sphere of the courtroom, presenting a formidable obstacle to the judicial system. If the state were to pass a law mandating the practise, it would be beyond its legal authority. Any move that blurs the boundary between what happens in a marriage and what happens with other people is likely to be met with hostility and criticism.

³⁵ *Supra* note 29

ii. Marriage is Consent

Marriage is the legal union of two people in their individual capacities. Some have also stated that the lady has given her agreement to the marriage as both parties have freely engaged into this arrangement. It is the parents' duty to arrange a suitable marriage for their daughter if she is not the one initiating the union. Many cultures still do not include the woman's permission in their decision-making process. The wives are presumed to have granted their husbands their sexual permission when they agreed to get married or had their marriages arranged. It's important to distinguish between an arranged marriage and a forced marriage. In an arranged marriage, the prospective spouses express interest in getting married soon after meeting, but in a forced marriage, at least one of them expresses reservations about the idea.

iii. Cultural Boundaries

Traditions, conventions, and values have been ingrained in people from a young age. Everyone has these standards ingrained in their minds, and anything that deviates from them or is out of sync is considered forbidden. In accordance with these cultural traditions, it is expected that a man's wife will provide for his sexual gratification. A nation's culture is its defining characteristic.

iv. Pseudo Cases

It has also been suggested by a significant majority of individuals that wives would use the fear of legal action against marital rape as a strategy to leave their husbands or to coerce them into doing something they don't want to do. The Supreme Court found that "[s]ection 498A is being utilised as a weapon by dissatisfied wives" in the case of *Arnesh Kumar v. State of Bihar*.³⁶ The guys would be subject to constant judicial observation. A flurry of frivolous lawsuits might be filed, delaying justice for genuine cases and causing chaos in the court system. It has taken India years to amass enough funds to pay for all the cases that have been postponed because of this.

v. Pre-existing Legislation

Marital rape, it is argued, may be remedied by enforcing the Protection of Women from Domestic Violence Act of 2005. Some people argue that the state shouldn't pass its own version of this law if a federal law with similar provisions is already in effect. As defined in Section

³⁶ *Arnesh Kumar v. State of Bihar*, (2014) 8 SCC 273 (India)

3(a), marital rape "includes inflicting physical abuse, sexual abuse, verbal and emotional abuse, and economic abuse" and "harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical" of the injured person.³⁷ Existing protections account for the husband's history of sexual and verbal abuse.

Arguments in Favour of Criminalisation

i. Sanctity is Distorted

The purity of marriage is violated when a husband has sexual relations with his wife without her permission. Since marital rape is outside the purview of marital disputes, there can be no going back on this position. Similarly in the High Court of Gujarat, in the case of Nimeshbhai Bharatbhai Desai v. State of Gujarat³⁸, it was held that the "[n]on-consensual act of marital rape violates the trust and confidence within a marriage and the prevalence of marital rape in India is what has damaged the institution of marriage". This argument loses any moral compass when the sanctity of human life is called into question.

ii. Consent is Important

According to the Prohibition of Child Marriage Act of 2006, a marriage between a minor and an adult is nullifiable.³⁹ Parents have the right to marry off their underage children to anybody they want, and the children have no legal right to divorce or cancel the marriage until they reach the age of majority (18 in most countries). However, sexual activity between a man and a wife younger than or equal to 15 years of age is illegal according to Section 375 of the Indian Penal Code, 1860.⁴⁰ For individuals, however, who are between the ages of 15 and 18, this opens up a grey area. In order to afford housing, they must share a home with someone who may or may not try to coerce them into sexual acts. This is a long-held custom whereby wedding vows are considered consent. Now that we live in the 21st century, these antiquated statutes may be updated to reflect modern culture.

iii. Changing of Culture

According to the Mahabharata tale, Yudhishtira wagered his bride against Duryodhana in a

³⁷ *Supra* note 10

³⁸ Nimeshbhai Bharatbhai Desai v. State of Gujarat, (2017) No. 26957

³⁹ *Supra* note 9

⁴⁰ *Supra* note 21

game of chauras. Throughout history, women have been seen and treated as simply property. The bride's father traditionally performs the kanyadaan, or "giving away," of his daughter to her future spouse. A girl's family views her as an outsider who belongs to her husband. The rights of women in our modern period mean that such archaic customs must be challenged rationally, and objectification of women is no longer acceptable. Support for the cultural paradigm is warranted. In this way, outmoded customs might be updated or abandoned altogether.

iv.A Criminal Liability

Both the Hindu Marriage Act and the Domestic Violence Act give victims of domestic violence legal recourse to escape abusive relationships. Some have questioned the necessity for new legislation protecting women in India as there is already a law against domestic violence that covers "sexual abuse." Offenders face solely civil penalties under the Protection of Women from Domestic Violence Act of 2005. Furthermore, in civil responsibility, the offender can avoid criminal prosecution by only compensating the victim. The person responsible for this must be locked up in prison. Showing that the state will not tolerate such behaviour by not punishing those who engage in this crime sends a strong message to the rest of society.

CONCLUSION

Justice Krishna Aiyar in the case *Rafiq v. State of Uttar Pradesh* said that "***A Murderer kills the body but a Rapist kills the soul***"⁴¹. However, the State argues that marriage is not sacred and that it is the private affair of the husband and wife, and it has passed a number of laws regulating various aspects of marriage (including dowry, adultery, cruelty, and dissolution of marriage). If India were to add marital rape to the list, it would be a big win for the country's mental health. The state also said that criminalising marital rape would "destabilize the institution of marriage"⁴² and it can be easily used to "harass husbands". When the fundamental sanctity of a marriage has been violated, how might seeking redress for that violation threaten the stability of the marriage? When one partner attempts or engages in sexual abuse of the other, the marriage is already in a precarious position. Regarding the second issue, "harassing husbands," fast-track courts and their rapid trials are a viable solution. The proliferation of fast-

⁴¹ *Rafiq v. State of Uttar Pradesh*, 1980 Cr. L.J. 1344 SC

⁴² *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*

track courts around the country would be a good first step toward resolving the problem of frivolous lawsuits. Unfortunately, it might take years to have marital rape criminalised when the state is adamant about not taking any action to help the cause. To ensure that married women have access to the legal system to resolve disputes, it is vital to criminalise the same. Only until the difference between rape and marital rape is recognised can it be made a crime.

Racial stigmatisation of spouse-on-spouse homicide has to be addressed immediately. As a people, we value our cultural heritage and historical customs highly. As a result, there will be no more taboo conversations. Ignoring these taboos will not eliminate the problem; it will just postpone its resolution. No country can legalise marital rape until its own people are aware of the concept. Even if rape in a marriage were to be made illegal, there would still need to be a detailed explanation of the law. In order to reach the pinnacle of justice, it is necessary to raise consciousness about marital rape. Many groups have made commitments in this direction, but the judiciary won't pay much heed until the public does. According to the statistics, 70% of women will suffer some kind of intimate relationship abuse in their lives.⁴³ It's a violation of the basic liberties our ancestors fought for. Liberty and equality are guaranteed under the Indian Constitution, namely Articles 14 and 21. If India is serious about stopping domestic violence, it must make a choice. No longer can India, a country where goddesses are worshipped, remain mute on this matter. It would be a serious injustice if it happened.

⁴³ World Health Organization, Department of Reproductive Health and Research, London School of Hygiene and Tropical Medicine, South African Medical Research Council (2013). <http://www.who.int/reproductivehealth/publications/violence/9789241564625/en/>