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Criminalization of Spousal Rape in India: An Interference into the Marital Sphere of Spouse, Culture and Social Structure of the Indian Society

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Abstract: This paper will examine the position of martial rape in legal sphere and argue that how far criminalization of Spousal Rape is required for Indian society by referring legislative measures and judicial decisions and justify that existed remedies in laws for such kind of action are not enough and more stringent laws should be made to safeguard the self-esteem of women. Making the Spousal Rape offence is required to be recognized for various reasons like Spousal Rape is against the Indian Constitutional mandates as well as other national and international conventions. While on the other hands, sanctity attached to the institution of marriage in India, importance of right to privacy of married couples, and the legal and cultural sanctity bestowed with marital relations are the justifications for non-criminalization of Spousal Rape. The researcher conclude that criminalization of Spousal Rape is need of an hour for Indian society and social, cultural, and legal hurdles should not be given more weightage over the dignity and privacy of the women in India.

Keywords: Spousal Rape, Society, Social Welfare, Marriage, Public Interest. Indian Constitution.

1. Introduction

Marriage is the union between the spouses which has been socially and legally recognized and determines the rights, obligations, and liabilities towards each other, with children and their-in laws. As per Hindu religious scriptures any religious ceremony rights performed by a man shall not be deemed to be a perfect one unless woman has participated with men because she is taken as *Ardhangani* which means a part of body of man. Hence it could be said that woman has equal importance in the society with men[1)].

The competence of women to make selections at home was operationalized as the ability to make important household purchases, own health care, visit family or relatives, and control how respondents' wages are spent. The research describes these characteristics as elements that affect women's autonomy[2)].

It is noticed that condition of women has been deteriorating day by day due to many reasons which includes domestic violence, cruelty and forced sexual relation in the veil of marriage. Such kind of forced sexual relation between the spouse is categorized as Spousal Rape. It has been defined various ways i.e., Spousal Rape is also recognized as inmates' partners rape or spousal rape done by husband against his wife or spouse. Spousal Rape could be defined as undesired sexual relation by male spouse with his wife through means of threat and force, physical violence, emotional blackmailing, or in a situation when wife is unable to communicate consent[3)]. Therefore, it is non-consensual act of forceful nature by partner over his wife which could be termed as physical and sexual abuse[4)].

Traditionally, rape can be demarcated in many countries as intimate relation with a female without her consent who is not wife. It means sexual relation without consent by the stranger shall be termed as rape. Nonetheless, because marriage provides a license to have sexual relation with his wife, a husband cannot be alleged to commit rape to his wife even if it is non-consensual. The basis of this exemption can be traced from the statement of Justice Matthew who wrote that spouse cannot be guilty of committing rape of wife whether with or without consent because wife has given herself to her marital partner which she cannot retract in future[5)].

Justice Matthew further stated that in marriage, the wife submits herself to the husband and for all sexual acts

under the motion of irrevocable implied consent at the time of marriage and continued till marriage subsists[6]. This lay down a principle that once entered in marriage, a woman shall not have liberty to decline for sex except in extraordinary situations which will endanger the life of wife and aggravate any life-threatening disease[7]. But it does not entitle any husband to be cruel and brutal while having sex with wife. And if so, women can resort to available civil and criminal remedies[8].

2. Spousal Rape and Legislative Measures in India and World

Sexual behaviors performed by the partner with his bride while he is exceeding 15 years of age are not considered rape. Nevertheless, following the Apex Court decision in Independent Thought v. UOI, 2017[9], It was established that intimacy between a husband and his wife, with or without consent, constituted rape if the wife had not reached the eighteenth year of age. In other words, it can be inferred from the Supreme Court judgement that Spousal Rape is recognized in India but in limited sense if wife is not Adult. If wife is adult Spousal Rape is not an offence. However, the Karnataka High Court has ruled that a merciless sexually explicit violence on the woman, without or against her assent, even if committed by the spouse, is a rape punishable under the Indian Penal Code, Section 376.

The Amendment Act 2013[10][11], which disallowed the incorporation of Spousal Rape into the IPC, maintains a lighter punishment for rape of a separated wife by a husband. The modified Act includes an exception for male raping his wife exceeding the fifteen years of age. When rape is perpetrated while the spouses are living apart, the punishment is less severe. According to the law, any 'non-consensual' sexual conduct is not rape[12]. Even if the woman is separated from her husband, she is still her husband's wife until the marriage is dissolved through divorce or other means, and the law will be 'understanding' and 'lenient' towards him if he has sexual relations with her consent. In this regard, the government should interact with women's groups as part of the process of amending laws and processes relating to her husband's forceful intercourse and sexual assault.

The Domestic Violence Act[13] (Protection of Women) 2005 classifies Spousal Rape as a type of domestic violence and mandates a lighter sentence in prison than non-Spousal Rape[14]. This is the only means to punish Spousal Rape in India, and it is a civil remedy, not a criminal one. This Act allows a woman who has been subjected to Spousal Rape, may file a petition the court for judicial separation or divorce from her spouse on the pretext of domestic violence (cruelty). Sexual assault by her own spouse creates in the woman a sense of insecurity and anxiety. Nevertheless, the enactment of specific statute for curbing domestic violence has given a way out for punishing husband committing sexual violence with wife in form cruelty without causing much intervention in family life.

The Evidence Act of 1872 prohibits the married partner from disclosing any communication made between husband and wife during the subsistence of marriage, which is a privileged communication. Hence, the parties are precluded from revealing any matters between them in court and cannot be made to make any disclosure, unless one of them is prosecuting the other for any offence, and evidence is inadmissible if there is no prosecution. The object of such restriction for the purpose of protecting the well-being of the married couple and society because on daily basis there is conflict of one or other nature, if they will be permitted to disclose or can be compelled to disclose, the existence of marriage and society will be in danger.

It will not be right to say that evidence act does not allow the married couple to give evidence or make evidence inadmissible even in case of Spousal Rape because when Spousal Rape is deemed to be a form of domestic violence comes in the category of cruelty which is an offence under IPC 1860 for which evidence are admissible and can be proved. It has been noticed that proving the offence of Spousal Rape is nearly impossible due to the constraints imposed by the Evidence Act is a misunderstanding.

Spousal Rape is not a problem of India but problem of whole of the world. Spousal Rape has been overlooked for long time and very little attention has been given to it by legal practitioners, social scientist, criminal justice system and society, but since need for reform in legal system has been felt in relation to women. In recent years, many offences have been recognised in relation to women Spousal Rape is one of them. It is prohibited in eighteen states of USA, three states of Australia, Israel, France, Denmark, the Soviet Union, Canada, and Norway.

Until 1975, there was a marital exception but, in 1993, some American states including the Columbia had established a law barring Spousal Rape in the United States. The marital exemption still existing in many States of America as statutory rape and provided punishment that will be equal to rape[15]. In UK in 1991 through (R versus R, 1991) in exercise of appellate jurisdiction by committee of House of Lords, Spousal Rape exemption was abolished. The exemption was never a state norm, as Hale stated: the husband cannot be charged for rape against his legitimate wife for the simple reason that the wife has handed up herself to her husband, which she cannot reverse. The European Court of Human Rights upheld this decision.

Notwithstanding this, several Asian nations, including Pakistan, Bangladesh, Iran, Yemen and especially India, did not recognise Spousal Rape as an offence; however, sufferers of such a crime have an acceptable remedy accessible under various laws in existence in India. The Countries that have designated spousal rape and crime, but where the burden of proving it still rests on a woman,

make it hard for women to establish that sexual relations were not with permission.

3. Spousal Rape and Indian Judiciary

If we look into the judicial decisions passed by the various Apex Courts in the world. We can find that concept of intimate partner rape has not been recognised as crime by the judiciary. One of the landmark cases, in which court held that rape law does not apply in case of married women, when it is done by the husband and wife is above the age of 15 years. In light of the argument that Spousal Rape should be criminalised on the basis of the Constitution rather than culture when we contrast the free speech discussion with India's obscenity regulations. One of the arguments mentioned in Article 19(2) to curtail free expression is morality. According to the Apex Court of India, "morality" is defined as "public morality"[16]. This would indicate that the Court would regard speech as immoral in cases where the public morality comes in conflict with. This popular concept of morality may conflict with what the Constitution considers moral[17].

It does not mean that husband can danger the life of women in doing sexual relation with his wife, if such intercourse may result into the danger of life of women. In the current instance, the male spouse was made liable under the IPC (Section 338) for rupturing his eleven years old bride's vagina, resulting in death due to brain hommarage. In another case, the Supreme Court declared the spouse guilty of causing the murder of his wife by rash or careless act under section 304A IPC 1860 because of rash and negligent sexual relations that led in the death of the wife.

Another historic judgement decided by the High Court of Kerala declared that when a bride is not living independently from her partner under a degree of Judicial separation or under any other tradition patterns and her husband indulge in sexual relations against her will or consent, such sex cannot be regarded as an offense under Section 376A IPC 1860. In above mentioned case, petition for divorce between the spouse was pending but compromise took place between disputed parties, and they started living together in the house. She lived with her husband for two days, during her stay with the husband sexual relation took place against her consent. Therefore, the court held, husband not guilty for raping his wife.

Another Landmark decision of High Court of Delhi while dealing with the petition in which restitution of conjugal right's constitutional validity was challenged. The Court departed from T. Sareetha Case judgement and upheld the restitution of conjugal right as constitutionally valid under the HMA 1955 (section 9). The Court guarded his verdict on the ground that restitution of conjugal right was made constitutional and valid not to compel spouse to live and to have sexual relation with the partner without will but rather "to safeguard the institution of marriage" by applying the theory of marital privacy. By referring the above decision, we can find that concept of Spousal Rape has not been recognised by the judiciary as an offence, but court has given justice to victim by giving punishment to the husband accused under the penal provision of India Laws.

The petition was filed in 2017 by a registered independent thought organisation working in the field of child rights for making spousal rape as crime by deleting section 375 (exception-2) because it makes an unfair discrepancy between a married and not married woman between the age group of fifteen to eighteen, violative of equality rights and inconsistent to several international norms, including the child rights' Convention[18),15)].

In 2018, While determining the Nimesh bhai Bharatbhai Desai vs State of Gujarat;[19)] case, wherein the main point was Spousal Rape and unnatural carnal relation, the bench of Gujrat High Court, held that a wife is not a chattel and hence cannot use wife as property while having sexual relation, he has to understand that he is fulfilling martial duty with human being, must be performed in dignified manner. It also contradicted the POCSO Act, which categorised sexual acts with a girl below the age of eighteen as rape irrespective of her consent.

A male cannot be permitted to damage a wife's dignity by pushing her to perform a private advance without her absolute and voluntary consent. In the present case, the question before the court was whether a wife might file a complaint against her spouse for carnal intercourse under Section 377 and under section 376 IPC for the offence of Spousal Rape. The Court determined that a wife may file a claim against her husband under Section 377 for carnal intercourse and no prosecution under section 376.

In 2021, the Chhattisgarh High Court in Dilip Pandey versus State of Chhattisgarh;[20)], it was noted and declared that "sexual intimacy or sex encounter by a spouse with his bride, does not amount to rape, if the bride is below the age of eighteen." Justice Shankar holds a view that "the husband's expectation of sex with his female partner is a realistic hope for a strong and fruitful carnal relation being integral to the marital tie," the High Court (Delhi) made an observation, in RIT Foundation versus UOI;[21)].

He further stated that marriage relationship is of unique in character and complexity, where allegation of rape cannot find any place because sex between spouse is very sacred. In subsisting healthy married life, sex is not a mere physical act to gratify lust but also involves emotional element, when performed spouse, is unquestionable keeping in mind the sacredness of marital bedroom.

In 2022, the Karnataka High Court, addressing with gender parity, decided that male and female are equal under the Indian Constitution and cannot be treated unequal by Section 375 Exception-2 of the criminal law 1860. It is the responsibility of legislators to evaluate the existence of such discrepancies in the law. For generations, man wore the garments of a husband and treated his wife like a property. Hence A merciless sexual act of husband with his wife should be punished under IPC (section 376)

1860. In Suchita Srivastava case, the Highest Court of India recognized the right of women to decline from participation in sexual relation, or use of contraceptive measures.

4. Advocacy For Criminalization of Spousal Rape in India-

4.1 Spousal Rape and The Constitution of India

There are two basic arguments to challenge the constitutional validity of Spousal Rape exemption is contravention of right to dignified life and privacy of women under Indian Constitution 1949 (Article 21). It seems very difficult to accept that all of this is happening due to subordination of women in the society. If we analyse the reason behind such exemption, legislative and judicial intent are major issue[14]. A nation's law of land is a mirror that reflects the nation's heart and soul and respect for intrinsic rights of human beings, strikes a balance between competing societal and private interests, regulates the nation's culture and values, and serves as an impetus for national growth and cohesion[22].

During British rule, women were taken as property of husband, possess no civil right and separate legal identity[23]. But now situation changed, where women are considered to possess legal character apart from her husband and also gets protection against violence by husband, under various Indian statutes. But in context to Spousal Rape no change took place till date which again create a dilemma of separate legal identity of women in India.

Spousal Rape causes the victim severe physical and mental trauma and violates basic human rights. Spousal Rape which is an exception of rape violates fundamental rights provided in India. Article 14 provides provision of equality and treating married and unmarried differently is violation of article 14. The protection of laws available to married women is very less, if compared to a protection available to a unmarried woman. Rape of unmarried woman by man is a heinous offence and results in infliction of severe punishment, while rape of married women by her husband is not a serious offence and punished with lesser punishment. Such kind of classification is not permitted under article 14.

The protection of laws to women changes as per their marital status is not warranted by the Indian constitution because it does not fall within the reasonable classification guaranteed or permitted under Article 14 Indian constitution[24),25]. The Classification shall be deemed to be a reasonable under article 14 only when it has some nexuses with object to be achieved or it is based on the intelligible differentia[26]. The object of rape provision is to protect women from sexual violence but, exemption clause authorises sexual violence if done by husband, contradict the purpose to be achieved.

Moreover, exemption of Spousal Rape is also violative of Article 21. The Highest Court of India through judgement reiterated many times that person has right to intimate a person with choice, to participate willingly in sexual play without any force and use your force amounted to sexual violence which violates person's right to privacy, health and dignified life are fundamental rights secured by article 21 of Indian constitution. The judgement was gender neutral irrespectively fact of marital status, it had not differentiated between married and unmarried woman. I never said that it meant not unmarried women only[27]. Making disparities amongst rape victims depending on their marital status implies that married women lack the right to live in a marriage with inherent dignity. Clearly, this is not what our Constitution requires[28].

In K. S. Puttaswamy (Retd) versus UOI and Ors, 2017, the Apex Court of India proclaimed the right to privacy is basic right and the restitution of conjugal rights violates the same[29]. It has been argued that the implementation of the order on the RCR offers a method for male partners to vehemently establish carnal relations with wives, is incompatible with the right to privacy. In T. Sareetha case high court of Andhra Pradesh affirmed the statement and declared section 9 unconstitutional**.** Nevertheless, the Supreme Court reversed its ruling in T Sareetha Case in Smt. Saroj Rani Case 1985. The primary query was whether the right to privacy may be invoked in the matrimonial or personal domain? Such question answered by the Apex court in Govind vs State of MP & Anr; 1975 and held that right to privacy cannot be demanded in marital or private sphere. But Govind case judgement was overruled by the K S Puttaswamy case and again set fire in existing debate on exemption of rape and provision of Section 9 of The HMA 1955[30].

The Apex Court in famous Ratlam Municipality verdict, observed that state is under primary duty under 47 of Indian constitution to ensure healthy condition for life of people and such duty can be enforced against any government body and excuse of insufficiency of fund will be useless. The Right to health is severely affected by the sexual violence in form of the rape or Spousal Rape. Rape causes not only the physical damage but also affects psychologically to the women and causes anxiety, Depression, sexual transmitted diseases like AIDS, Pregnancy Complications, and mental repercussions[31]. In the comparative study on effect on women raped by husband or raped by the strangers, they found no difference as to impact on mental and physical injuries on women. Hence, they concluded by saying that relationship does not make any difference in rape cases[32]. The Sati system was a prevalent cultural practise that was criminalised in the past. The assertion that a crime is socially or ethnically appropriate does not justify making it a criminal. Because it symbolises a culture that tolerates crime, it should serve as a catalyst for its criminalization. Because of society's culture, and especially in cases of spousal rape, this argument is relevant when discussing rape[33].

4.2 In Contravention of Other National Laws

Exemption of Spousal Rape as an exemption to rape does not seem sensible because, in the wider context of national laws in India, it can be observed that the husband may be answerable for several other offences under Indian Criminal Code such as voluntary causing hurt, voluntary causing grievous hurt, voluntary causing hurt or grievous hurt by dangerous weapon or means, sexual harassment, offense of disrobe, stalking, voyeurism, outraging the modesty of women are crime regardless of marital status. Furthermore, Spousal Rape violates fundamental human rights protected by the Indian Human Rights Act 1993. In a landmark decision, the Apex Court asserted that husband's involuntary intimate relationship with a girl child violates basic human rights. The Indian Domestic Violence Act of 2005 defines Spousal Rape as domestic violence. Domestic abuse, according to the Domestic Violence Act of 2005, injures women not just physically but also emotionally.

4.3 In Infringement of International Law Commitments-

India has shown its attitude towards protection of women from all kinds of discrimination and to eliminate all kind of practises which are derogatory in nature against women. As a result, India has signed the many international conventions foster the protection to women i.e., (UDHR in 1948, ICCPR & ICESCR in 1966and CEDAW in 1979). The Convention for protection for children provides the right against discrimination, the right to dignified life, freedom, security & health[34]. It also emphasises the abolition of unfair treatment against women by any individual or organisation. The States are under commitment to avert violence against women and for this purpose state will have power to investigate, to prosecute and provide compensation to the victim women.

The above conventions guarantee, right to life and recognised violence against women by intimate partner must be restricted around the world. Spousal Rape also infringes right to life and results into various consequences including miss carries, unsafe abortion practises sexual transmitted diseases complications in pregnancies are these fatal results. states are under obligation under international laws to criminalise Spousal Rape in their state[35]. Finally, convention on economic social end culture rights specifies that states are under obligation to diminish the health risk by protecting women from domestic violence. sexual violence by the partner causes number of health issues. If Spousal Rape is not criminalised by the state, it is clear case of infringement of state's commitment to guard health and well-being of women[36].

4.4 Justice Verma Committee Report (2013)

The committee was formed under the head of Justice J.S. Verma to advise changes in criminal law to enable a speedy disposal of cases and higher penalty for those accused of carnal assault against women on gang rape occurred in 2012. The Justice Verma Commission released its report and stated that the Indian Criminal Code 1860 makes distinction between rape in and outside marriage[37].

The commission proposed that the exclusion of Spousal Rape be deleted because wedding should not be interpreted as agreement for sexual relations between victim and accused. The Justice Verma Committee relied on the Human Rights Court of European Commission's decision, which concluded that, irrespective of his relationship the victim, a rapist will be a rapist.

5. Advocacy Against Criminalization of Spousal Rape in India

The Indian legislative and judiciary are not in the mood to criminalise Spousal Rape. There has yet to be a single case in which a court has confirmed the unconstitutionality of the exemption clause of Section 375 IPC, even avoided or ignored the matter of criminalising spousal rape[38].

5.1 Adequate Remedy in Criminal and Civil Law in Spousal Rape case

The existing law in India provides adequate remedy under criminal and civil laws. Remedy under Criminal Laws-The exponents of exception of Spousal Rape due to availability of adequate remedy in criminal as well as civil law. If sexual abuse takes place in marital sphere, it shall be termed as cruelty, punishable under section 498A of IPC 1860 with imprisonment upto three years and fine. Sexual violence against the nature is punishable under section 377 of IPC 1860 with imprisonment upto life imprisonment and fine. Besides above provisions of laws which punishes Spousal Rape, section 376 provides a mechanism to punish rape of wife if wife's age is under 18 years, was held in [Independent Thought v. Union of India (2017)10 SCC 800)] case and also punishable under section 4 of POCSO Act 2015 as penetrative sexual assault on child. Section 376A of IPC provides confinement of either description for period not exceeding two years and liable for fine if husband has sexual relation with wife during judicial separation.

Remedy under civil Laws- If sexual violence takes place in marital sphere, it shall be deemed to be domestic violence and husband has to face the consequence under the Domestic Violence Act, 2005, which includes protection order, maintenance, residence order etc. Section 3 explanation 1 sub explanation (ii) defines sexual abuse is an any conduct of a sexual nature that abuses, humiliates, degrades, or otherwise violates the dignity of woman. Therefore, marital rape comes under the periphery of sexual abuse as per section 3 and hence amount to domestic violence. In [RIT Foundation v. Union of India (W.P.(C) 284/2015)] case, Delhi high Court held that marital rape is amount to domestic violence and victim shall be entitled to claim protection under the

Domestic Violence Act 2005.

Sexual relation without consent shall be termed as cruelty under section 13 of the Hindu Marriage Act (HMA) 1955[39] and cruelty is a criterion for divorce or judicial separation. It means wife can take divorce from his husband and can live separately and claim maintenance also[40]. The Kerala High Court's Division Bench comprising of A. Muhamed Mustaque and Kauser Edappagath, JJ., remarked that merely for the reason that the law does not recognise marital rape under penal law, it does not inhibit the court from recognizing the same as a form of cruelty to grant divorce. High Court remarked that "A spouse has a choice not to suffer and law cannot compel a spouse to suffer against his or her wish by denial of divorce by the court. [X v. X, Mat. Appeal No. 151 of 2015]." In Above mentioned case Kerla High Court recognised the Marital Rape as cruelty and can be a ground for divorce. The Supreme Court in [Samar Ghosh v. Jaya Ghosh, (2007) 4 SCC 511] case, held that the appellant's licentious and profligate conduct could not be considered as part of normal conjugal life. Hence the Bench held that "insatiable urge for wealth and sex of a spouse would also amount to cruelty."

5.2. Judicial Attitude towards Non-Criminalizing Spousal Rape

Another very strong argument against criminalizing the Spousal Rape is the judicial attitude. The Apex court concluded that Spousal Rape is a crime in case of child between the age group of 15-18 even married but not for adult married couples. The non-governmental organisation Independent Thought filed the Independent Thought versus UOI to defend child brides from Spousal Rape[41]. In India Judiciary is a symbol of Justice and protector and guardian of Fundamental rights provided under the Indian Constitution. If Judiciary is not willing to criminalize Spousal Rape it means Spousal Rape is not violative of fundamental rights including right to equality and right to dignity under article 14 and 21. The judicial approach is very apparent from the various decisions like, Spousal Rape has been regarded as domestic violence and ground for judicial separation, divorce but not an offence under PWDV Act 2005.

The Chhattisgarh High Court ruled in 2021 that a partner's sexual relationship or sexual act with bride is rape if the wife is below 18 years of age. In 2022, "Justice Shankar has a position that the husband's expectation of sex with wife is a fair desire for a healthy sexual connection being important to the marital tie, according to a recent split decision of the High Court (Delhi)." He went on to say that marriage relationships are unique in their character and intricacy, and that rape allegations have no place because intercourse between a wife and a husband is highly sacred. In a healthy married existence, sex is more than just a physical act to satisfy passion; it also incorporates an emotional element, which is undeniable when conducted between wife and husband. The marriage bedroom is sacred ground. Any 'rape' charge is fully immune to interference in the marriage connection.

5.2 Non-Criminalization of Spousal Rape is consistent with constitutional Mandate.

Another compelling reason against criminalising spousal rape is that it does not violate fundamental rights guaranteed in 14 and 21. With regard to article 14, Dr Jennings remarked that "Like should be treated similarly, and unlike should be treated similarly; the right to sue or be sued, and the right to prosecute and be prosecuted, should be the same for adults for the same type of offence." Article 14 also permits reasonable classification in which one group can be treated differently from the other group of the society, like married couples shall be treated differently in comparison with unmarried couple in respects of rights and not violative of article 14 because marriage provides a ground of classification. It has been noted in relation to punishment of rape, whether victim-offender relationship plays any role, it was answered in positive. Rape is violative of Article 21, but Spousal Rape comes under reasonable classification under Article 14.

Martial Rape is also not violative of Article 21 because it restricts the married couples to enjoy their marital life and taking sexual pleasure which is the backbone of marital relation and happy life in the society. It shall also violate right to privacy of married couples to have sexual life as per their want. The Right to privacy support marital relations which must remain in the marital sphere and interference by the state in the marital sphere of the spouse, would amount to violation of fundamental right of right to privacy enshrined under Art. 21.

5.4. Apprehension of misuse of Spousal Rape by Wives like other laws

Another compelling reason against criminalising spousal rape is the misuse by wives of the Spousal Rape as weapon like other offences made in order to protect women[42]. The Apex court of India held that cruelty provision under 498A is used as a missile rather than a shield for the protection form cruelty[43]. The argument that wives shall misuse the Spousal Rape like other laws can be proved by the statistics that only 15% dowry cases and 14% Cruelty cases are converted into the convictions[44]. In very recent case in 2017, the Apex court of India seeing the misuse directed the District Legal Service Authority to constitute at least one Family Welfare Committee to look into the matter before making arrest of the accused under 498A[45]. In 2022, in very landmark case SC has held that husband's relatives cannot be compelled to face trial for the offence of cruelty under section 498A based on omnibus allegations of demand of dowry harassment by the wife, unless there is specific role played by the relatives or in-laws of women is an example of concern of Apex Court of India on misuse of section 498A of IPC 1860.

5.5. Implied Consent in Marriage

The presence of implicit understanding in marriage is the most prevalent and apparent argument advanced against criminalising Spousal Rape. She cannot abandon the spousal permission she granted at the time of marriage until the couples are formally divorced, parted by custom, or a court has handed down a decree prohibiting the husband from interfering with his wife.[46]. If we take into the consideration the definition of marriage which provides that marriage is that relationship which legalizes the sexual relation between two heterosexual adults and authorizes the procreation of children and confers legitimacy to children. Sir Mathew Hale of England in 1736, stated that partner of marriage cannot be made liable for the offense of rape of her wedded wife because of mutual matrimonial authorization, which she cannot be retracted during the bond of marriage. 172nd report of India's Law commission, justifies the Spousal Rape on the ground of implied consent in marriage for sexual relation[47][48]. Justice Mthiyane stated in his reasoning that the violence of men is understandable when they born and brought up in the world of tradition, customs which are above the life of men and that women who born and brought up with and marry traditional male are accustomed to male dominance because they have witnessed such kind of dominance in her family[49].

The existence of a Spousal Rape exception in India is closely attributed to its history of extended colonial control, as well as the survival of the Spousal Rape exception in British Jurisprudence[50]. The idea of Spousal Rape was first articulated in 1736[51]. The Hale mentioned that a wife offers herself to her husband by providing her marital assent, which she cannot revoke, and contracting to marriage, and so her partner could not be made responsible for doing rape on his wife[52][53]. This idea became renowned as the Baron Hale principle and became the foundation stone for the exception of rape[54].

5.6. Sanctity of the Marriage Institution in India

Another compelling reason against criminalising rape is that the law and the nation desire to maintain the marriage institution for the sake of the humanity's survival. Society is a unit that is required to preserve the human race from being exploited in various ways by diverse sections of society. The Criminalization of Spousal Rape would drastically affect the marriage institution and people in order to avoid marriage, will go to prostitutes or start live-in-relationship for sexual pleasure in lieu of monetary consideration to the other partner without any kind of social bondage. If such bond breaks, it will not affect society only but also procreation of children which will affect men-women ratio. Hence social equilibrium will be disbalanced.

We have experienced that social bond is being broken on daily basis due to cruelty law and domestic violence laws in India, therefore it shall not be advisable to give some more ground like Spousal Rape as weapon to disbalance social equilibrium. The study demonstrated that Spousal Rape as less often committed and less violent, less infringement of victim's rights and having less psychological effect on women in comparison with rape[55]. The study reveals that basic reason behind Spousal Rape is lack of education, Illiteracy, poverty, custom and values and society's mind set and taking marriage as sacrosanct[56]

Aside from the above assertion regarding the protection of the marriage, the Apex Judiciary in (Smt. Saroj Rani Case, 1985), affirmed the constitutionality of RCR by overturning the judgement in the Sareetha case, which asserted RCR (Restitution of Conjugal Rights) under of the HMA 1955, Section 9, unconstitutional under Article 14. The Supreme Court believes that RCR is essential to safeguarding and strengthening the institution of marriage. As a result of the Apex Court of India's judgement, it is clear that the institution of marriage is critical to the survival of society.

The aforementioned argument is supported by 42nd report of LCI (Law Commission of India) on the protection of the institution of marriage. Spousal rape was addressed in the 42nd Law Commission report which was the first ever report in relation to spousal rape. The LCI confronted the viewpoint that "When other aggressive behaviours performed by partner against own bride were penalized in India, why rape to be immune from the application of the law." Meanwhile LCI had a concern that criminalisation of Spousal Rape would transform into "unnecessary invasion with the marriage relationship." This report made the substantial suggestion that the exception of rape is applicable where the husband and wife have been judicially separated because marriage explicitly remains[57].

In reaction to the measure criminalising Spousal Rape, the Home Ministry repeated the above reasoning in 2015. One of the most important factors was the "societal mindset to see marriage as a sacrament"[58]. Through various Supreme Court decision, it was clarified that restitution of conjugal rights has been recognised and declared to be constitutionally valid in order to save marriage. It is necessary to investigate the Judicial tribunal's inability to connect with core private-sector rights.

Even in a Divorce by mutual consent, first Counselling is done when people breaking their tie of marriage and, waiting period is granted to couple to rethink on their decision to break marital bond till 6 months. If parties are still interested in divorce and when divorce petition is filed first time, the court shall grant decree of judicial separation with intent to preserve the dissolution of Marriage. Secondly in order to save institution of Marriage, Irritable-break down of marriage has not been recognised as a ground of divorce because parties are feeling that incompatibility is existing between couple[59].

Additionally, in the mid-18th century, the Spousal Rape exemption received support on the basis of Blackstone's 'unities' argument, which stated that after marriage, the couple become one single identity. According to this

belief, after marriage, women lose their personal identity and thus become an "estate" of their husband[60]. Furthermore, Blackstone not only recognized the married couple to be a single juristic identity upon marriage, but also during subsistence of marriage, wife's juristic identity disappears and is united with her husband's; hence, if she is damaged, she can seek redress through her partner's consensus rather than her own.

Furthermore, because the term "rape" was originated from the Latin expression "rapio," which means "to take," it was asserted that a man could not injure or confiscate his own property, i.e. (wife)[61]. The Spousal Rape Exemption was extended further due to legislators' widespread concern that wives would deliberately blame their husbands of rape. All of the aforementioned arguments and concepts resulted in Spousal Rape becoming a practical as well as legal barrier in the majority of colonial countries including in India, in terms of the Spousal Rape exemption and bride does not own capacity to file suit against husband. Such exemption clause gives males licence for forceful sexual act with female partner of marriage[62].

The preceding considerations grant the Spousal Rape Exemption in India not only legal but also cultural validity and law and culture inextricably linked to each-other, it is important that the law transform the social sacredness of Spousal Rape, as it has done with Sati system practise. Although cultural beliefs evolve more slowly than laws, legislation must act as a catalyst in changing society's prevailing ideas. In India, the women consider herself religiously obliged to satisfy husband physically for the remainder of their lives; there are several illustrations where victim of rape pushed to marry accused, as it would relieve the victim's agony, and the administration upheld that criminalising Spousal Rape will impair the cornerstone of marriage[63]. Besides the executive, the former CJI shares this viewpoint[64], demonstrating the cultural legitimacy, this practise has earned throughout the year.

5.7. Significance of Cultural, Social Customs and Values in India

Another justification against criminalising Spousal Rape is the cultural difference between India and the Western world. The Customs, religious beliefs, and weddings as sacraments, produced in heaven and executed on earth, as well as the privacy of the sacrament of marriage, makes an environment that is not favourable for criminalising Spousal Rape[65]. Most crucially, the cultural, societal, and religious significance put on marriage's purity which negate the thought if Spousal Rape is criminalised, the institution of marriage will be ruined. Lastly the criminalization of Spousal Rape is going to affect the cultural values attached with marital relations.

Spousal rape has also been culturally condemned due to traditional religious obligations. The desire to sexually satisfy the spouse, which has been used to characterise forced sex in a marriage, has been suggested to be part of marital responsibility. Furthermore, a guy has been asserted in religion sacred scripture to have moral superiority over his wife based on physical power. Second, the male of the family has been conferred with duty to safeguard the family's integrity and reputation. In doing the same male has been empowered to use physical power to save the morality of the family and family's dignity.

Furthermore, social assumptions have resulted in Spousal Rape being culturally invalidated. The concept that males have higher sex urges than women, which compel spouse to regulate sexual activity by using force sometimes to satisfy sexual need[66]. The premise is that India's social cultural standards and religious convictions, and a sacrament conception of marriage, together with disturbingly high rates of poverty and illiteracy, all contribute to a climate unsuitable to criminalising Spousal Rape[67]. The majority of Indian women, according to Indian culture, are not economically secure or educated, making them unable to survive outside of marriage[68].

5.8. Marital Sphere Protected from Invasion

Laws in India basically regulates the affairs of public spaces and regulation of affairs of private spaces are merely an accidental thing. Law which regulates the private spaces are called personal laws, based on custom and usages. The Marriage, Divorce, Maintenance, Guardianship and Procreation of Children are dealt by the personal laws. Even Apex Court in India refrained itself to interfere with them except in exceptional situation where any custom or usages in violation of fundamental rights. In line of above arguments, regulation of sexual relation in the name of Spousal Rape between married couples is unwanted intrusion into the marital sphere. The HMA 1955 (Section 9) brings married couples together to enjoy their marital life by the restoration of conjugal relation in spouse. According to Frances Olsen's argument in "Feminist Critique,"[69] the concept of some private areas is meant for the purpose of debarring those who are hurt, can't take legal recourse[70][71]. The State may opt to criminalise certain activities, such as adultery[72] or sexual intercourse between homosexual adults[73], but not criminalising Spousal Rape due to its intimate character[74].

5.9 Difficulties in Proving the guilt of husband.

To Prove the Spousal Rape two things are required to be proved, first there must be a sexual relation and second without consent or against will. First Challenge, as to Sexual relation which will be presumed in marriage because marriage is a licence of sexual relation, and the relationship of marriage shall not be a defence has not been expressly mentioned by any law or any judicial precedent till date. It is considered to be process of legalising the sexual relationship between two adults which would be immoral and against the tannates of Indian society if done without marriage. It also legalising

the sexual relation as well as legitimizing the children born out of it and gives inheritance right in the property of the parents and ancestral property.

Second Challenge as to presumption of the presence or absence of consent in the marital or sexual relations that how consent will be proved. for this, two possible ways are, the court presume the consent and victim rebut the consent or the Court resume absence of consent and establishment of Consent on the accused. In first situation it would be next to impossible for a victim to prove the consent because it has happened in the private sphere no witness can be produced and in letter case court presume absence of consent on the testimony of the wife, it will amount to injustice with the husband. The procedures given above will not be useful in determining he assent in Spousal Rape scenarios[75]. Strong proof is required to prove. Bad character of husband can't be basis of conviction because it is against the Evidence Act 1872 (section 53 and 54) and when past forceful sexual relation by husband cannot be the basis of conviction because it is not relevant to prove consent against women then how it could be relevant against the husband and violative of Art 14

6. Conclusion and Suggestions

Traditionally rape can be defined in most of the countries as sexual relation with a female without her consent who is not wife, it means sexual relation without consent by the stranger shall be termed as rape. Spousal rape, on the other hand, could be characterised as undesired intimacy by a husband with his own wife using force, physical violence, or in a scenario where she is incompetent to express consent. Therefore, even if the rape is non-consensual in marriage, the husband cannot be prosecuted with rape because marriage provides legal backing to have sexual relations with his wife. The term Spousal Rape does not appear to be appropriate, when questioning the sexual activity between married couples, sometime done without consent but it shall be forceful cannot be assumed.

India is one of the countries among those countries, where spousal rape is not given any sanction. The Proponents of criminalising spousal rape in India make numerous grounds that non-criminalization violates not only Indian constitutional demands but also international norms. The Justice Verma Committee of 2013 also proposed the deletion of the exception of Spousal Rape on the arguments that marriage should not be interpreted as consent for intimate intercourse and that the victim-accused connection should not be taken into account.

But India that is a country which is respected throughout the world for its culture, civilization and social structure which provides social stability. The supporters who don't want criminalization of Spousal Rape state that India is not ready for criminalization of Spousal Rape for various reason firstly, institution of marriage has always given prime importance and marriage is the base of creation of the society in India. Secondly criminalization of Spousal Rape would be intrusion into the marital sphere of the married couple. Even laws are not meant to regulates private acts take places in private places in order to provide better environment for discharge of marital obligation in four walls of the house. Thirdly it will be against the legal and cultural sanctity bestowed in this marital relation.

Even above given reasons may seem to be very convincing but these social, cultural, and legal hurdles should not be given more weightage over the dignity and privacy of the women in India. Spousal rape is clearly a serious kind of violence against women that must be confronted by the public as well as the government. According to recent research, victims raped by their spouses undergoes several incidents and frequently struggle from long-term emotional as well as physical difficulties. Spousal rape is comparatively dangerous than stranger's rape because woman has to live with attacker and afraid of repeated assault whether she is awake or asleep. It is an acknowledged fact that 1 in every 5 Indian males had compelled sex, as per the International Center for Research on Women[76]. Hence, it may be inferred that criminalising Spousal Rape is both necessary and beneficial for reducing the threat of Spousal Rape.

"Where women are not respected that society and country cannot grow nor become great in future". India is a country where women are respected as Devi and consider to be the creator of society"- (Swami Vivekananda).

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