

CRIMINALISATION OF MARITAL RAPE IN INDIA: UNDERSTANDING ITS CONSTITUTIONAL, CULTURAL AND LEGAL IMPACT

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The law in India does not criminalise marital rape, i.e. the Indian Penal Code, 1860 does not recognise that it is a crime for a husband to rape his wife. The reasons for this are manifold and can be found in various reports of the Law Commission, Parliamentary debates and judicial decisions. The reasons range from protecting the sanctity of the institution of marriage to the already existing alternative remedies in law. In this paper, we depict how these arguments advanced to not criminalise marital rape are erroneous. Through an analysis of Article 14 of the Constitution of India, we argue that the marital rape exception clause found in the Indian Penal Code, 1860 is wholly unconstitutional. Further, we note the lack of existing alternative remedies for a woman to seek redress under if she is raped by her husband. We conclude on the note that criminalisation of marital rape is wholly necessary. We propose a model for the same by suggesting amendments to criminal law as well as noting the changes required in civil law, particularly the law relating to divorce.

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I. INTRODUCTION

Marital rape refers to rape committed when the perpetrator is the victim’s spouse.¹ The definition of rape remains the same, i.e. sexual intercourse or sexual penetration when there is lack of consent.² Therefore, an essential ingredient to prove the crime of rape is to prove the lack of consent. This burden to prove the lack of consent often rests on the victim. In some instances, as in the case of minors, it is presumed that consent does not exist as they are presumed by law to be incapable of consenting to such sexual acts.³ On the other hand, there are also instances when consent is presumed to exist. Often, this presumption exists when the victim and the perpetrator are married.⁴ In such instances, the idea of marital rape becomes antithetical.

At present, only fifty two countries have laws recognising that marital rape is a crime.⁵ In many jurisdictions across the world, including India, marital rape is not recognised as a crime by law and society. Even when countries recognise rape as a crime and prescribe penalties for the same, they exempt the application of that law when a marital relationship exists between victim and perpetrator. This is often called the ‘marital rape exception clause’. Across these jurisdictions, there are four major justifications advanced for not criminalising marital rape. The initial two justifications are not used in present day context due to advancements made with respect to gender equality. The first justification stemmed from the understanding of the wife as subservient to her husband.⁶ Women were chattel to their husbands, and this meant that women did not have any rights in the marriage.⁷ In such a scenario, it would not be possible to fathom a husband raping his wife since the husband was the master to the wife, and enjoyed privileges over her body.⁸ Along with this justification, the unities theory also existed.⁹ This theory rested on the idea that after marriage, the identity of the woman merged with that of her husband.¹⁰ Therefore, law did not give the married woman a personality independent of her husband. This is linked to the previous justification in terms of looking at women as chattel of the husband.

¹ In this paper, since the discussion is couched in the Indian context, we will assume that the perpetrator is the husband, and correspondingly, the victim is the wife.

² The Indian Penal Code, 1860, §375.

³ See The Protection of Children from Sexual Offences Act, 2012, §3. Consent is immaterial when the assault is against a child.

⁴ The Indian Penal Code, 1860, §375, Exception 2.

⁵ UN Women, *2011-2012 Progress of the World’s Women*, 17, (2011) available at <http://www2.unwomen.org/-/media/field%20office%20eseasia/docs/publications/2011/progressoftheworldswomen-2011-en.pdf?v=1&d=20160810T092106> (last visited on December 15, 2017).

⁶ Rebecca M. Ryan, *The Sex Right: A Legal History of Marital Rape Exemption*, 20 LAW AND SOCIAL ENQUIRY, 944 (1995).

⁷ *To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99(6) HARVARD LAW REVIEW, 1256 (1986).

⁸ *Id.*, 1261.

⁹ *Id.*, 1256.

¹⁰ *Id.*

However, post 1970s and the feminist revolution,¹¹ these justifications were no longer at the forefront of the advocacy to not criminalise marital rape. This was because women were recognised as equal citizens as men. Instead, more nuanced theories have become the justifications. The ‘implied consent’ theory is one such justification.¹² Here, an irrefutable presumption of consent is thought to exist when a man and woman enter the institution of marriage. Marriage is considered to be a civil contract and consent to sexual activities is thought to be the defining element of this contract.¹³ The fourth justification, which is the most recent, is that criminal law must not interfere in the marital relationships between the husband and wife.¹⁴ It is a private sphere which the law must not penetrate into. Through the course of this paper, we will establish why these justifications are not well-founded and subsequently propose a model for the criminalisation of marital rape in India.

In Part II of this paper, we trace the law and debates in the Parliament of India (‘Parliament’) pertaining to the criminalisation of marital rape. Similar to the four major justifications we discussed, the Government of India (‘Government’) has advanced arguments for not criminalising marital rape. These arguments are culled out in Part II. In Part III, Part IV and Part V we will establish why criminalisation of marital rape is required by countering the arguments.¹⁵ Further, in Part VI, after having built a case for criminalisation of marital rape, we will suggest amendments required in the criminal law to facilitate the same.

II. A HISTORY OF THE MARITAL RAPE EXCEPTION IN THE INDIAN CONTEXT

The Indian Penal Code (‘IPC’) in §375 criminalises the offence of rape. It is an expansive definition which includes both sexual intercourse and other sexual penetration such as oral sex within the definition of ‘rape’.¹⁶ However, in Exception 2, it excludes the application of this section on sexual intercourse or sexual acts between a husband and wife. Thus, a wife under Indian law does not have recourse under criminal law if a husband rapes her. The wording of §375 of the IPC on account of the Criminal Law (Amendment) Act, 2013 are:

“375. A man is said to commit "rape" if he—

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

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

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

¹¹ Ryan, *supra* note 6, 964.

¹² *Id.*

¹³ *Id.*, 944.

¹⁴ *Id.*, 941.

¹⁵ A more detailed breakdown of the respective parts is provided in Part II after having established what the common justifications advanced against criminalization of marital rape are.

¹⁶ The Indian Penal Code, 1860, §375 as amended by the Criminal Law Amendment Act, 2013.

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 fifteen years of age, is not rape".¹⁷

Exception 2 of §375 of the IPC ('exception clause') does not state any reason for the exclusion of sexual intercourse or sexual acts between a man and his wife from the purview of rape.¹⁸ Since the crux of the focus of the section is on consent, it is possible that an irrefutable presumption of consent operates when the relationship between the victim and

¹⁷ The Indian Penal Code, 1860. §375.

¹⁸ The exemption excludes rape committed in a marriage, if the age of the wife is more than fifteen years. Recently, the Supreme Court struck down this part of the exception clause in *Independent Thought v. Union of India*, AIR 2017 SC 4904.

the perpetrator is that of marriage. However, at the same time, it is also possible that this was a legislative decision to exclude the operation of this section from married relationships given the sanctity that this institution has assumed in our society. This is probable since there are sections in the IPC where spouses are exempt from its application.¹⁹

While the law does not criminalise marital rape, a specific form of marital rape is criminalised, i.e. non-consensual sexual intercourse when the wife and husband are living separately on account of judicial separation or otherwise. §376B of the IPC states:

“§376B: Sexual intercourse by husband upon his wife during separation:

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

*Explanation - In this section, "sexual intercourse" shall mean any of the acts mentioned in clauses (a) to (d) of §375”.*²⁰

This section indicates that in §375 of the IPC consent is presumed, which is not so here since the husband and wife are not living together. Living together raises a presumption that the wife has consented to sexual intercourse by the husband.

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

The first report to deal with this issue was the 42nd Law Commission Report.²¹ Since the law has been amended at various intervals subsequent to this report, the importance of this report is restricted to understanding the prism through which the Law Commission views marital rape. This report made two important suggestions. First, it noted that in instances where the husband and wife were judicially separated, the exception clause must not apply.²² Although this was a laudable suggestion, the reasoning given for this was unclear. It stated that “in such a case, the marriage technically subsists, and if the husband has sexual intercourse with her against her will or her consent, he cannot be charged with the offence of rape. This does not appear to be right”.²³ It does not discuss the reason why this is not right. It implies that consent is presumed in situations where the husband and wife live together and cannot be implied when they do not live together. The second suggestion made in this report was regarding non-consensual sexual intercourse between women aged between twelve and fifteen.²⁴ It stated that the punishment for such offences must be put into a separate section and preferably not be termed rape.²⁵ This was because prior to the recent amendments in the IPC, there was a different punishment for rape committed by the husband when the wife was between twelve and fifteen. The defining feature of the second suggestion is the reluctance to classify marital rape as rape, but at best as a lower form of sexual

¹⁹ See e.g., The Indian Penal Code, 1860, §§136, 212 & 216.

²⁰ The Indian Penal Code, 1860, §376B.

²¹ Law Commission of India, *Indian Penal Code*, Report No. 42 (June 1971), available at <http://lawcommissionofindia.nic.in/1-50/report42.pdf> (last visited on December 15, 2017).

²² *Id.*, ¶16.115.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

misdeemeanour.²⁶ In summary, this report highlighted the presumption of consent that operates when a husband and wife live together and the differentiation between marital rape and other rape, where the former is viewed as less serious. It did not however comment on the exception clause itself, i.e. whether the exception clause must be retained or deleted.

The Law Commission was directly faced with the validity of the exception clause in the 172nd Law Commission Report.²⁷ Here, during the consultation rounds, arguments were advanced regarding the validity of the exception clause itself.²⁸ It was argued that when other instances of violence by a husband toward wife was criminalised, there was no reason for rape alone to be shielded from the operation of law.²⁹ The Law Commission rejected this argument since it feared that criminalisation of marital rape would lead to “excessive interference with the institution of marriage”.³⁰ This report sheds light on the interplay between marital rape and the sanctity of the institution of marriage.

In 2012, marking a departure from the tone of previous discussions, a committee constituted under Justice J.S. Verma (Retd.) advocated for the criminalisation of marital rape. This committee was formed in light of the nation-wide agitation seeking to make criminal law more efficient to deal with cases of heinous sexual assault against women.³¹ The committee published the ‘Report of the Committee on Amendments to Criminal Law’ (‘J.S. Verma Report’) in 2012.³² One of the suggestions given in this report was that marital rape ought to be criminalised.³³ A two-fold recommendation to this effect was made. The preliminary recommendation was simply that the exception clause must be deleted.³⁴ The second suggestion was that the law must specifically state that a marital relationship or any other similar relationship is not a valid defence for the accused, or relevant while determining whether consent existed or not and that it was not be considered a mitigating factor for the purpose of sentencing.³⁵ This report discussed how the immunity granted in case the perpetrator is the husband of the victim stemmed from the outdated notion of women being the property of men and irrevocably consenting to the sexual needs of their husband.³⁶ It remarked how this immunity has been withdrawn in a number of jurisdictions and in the modern concept of marriages between equals, such an exception clause cannot stand.³⁷

In light of this, the Criminal Law Amendment Bill, 2012 (‘Amendment Bill, 2012’) was drafted.³⁸ In this Bill, the word ‘rape’ was replaced with ‘sexual assault’ in an attempt to widen its scope but the Bill did not contain any provision to criminalise marital rape.³⁹ The Amendment Bill, 2012 did not take into account the suggestions laid down in the J.S. Verma Report. The Parliament Standing Committee on Home Affairs in its 167th Report (‘Standing Committee Report’) reviewed this Amendment Bill, 2012 and also organised

²⁶ *Id.*

²⁷ 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 February 6, 2016).

²⁸ *Id.*, ¶3.3.

²⁹ *Id.*

³⁰ *Id.*, ¶3.1.2.1.

³¹ As per GOI Notification No. SO (3003), December 12, 2012, this committee was constituted to give out a report in merely thirty days.

³² JUSTICE J.S. VERMA COMMITTEE, *Report of Committee on Amendments to Criminal Law* (January 23, 2013).

³³ *Id.*, 113-117.

³⁴ *Id.* ¶79 (i).

³⁵ *Id.*, ¶79 (ii).

³⁶ *Id.*, ¶72.

³⁷ *Id.*, 73-77.

³⁸ The Criminal Law Amendment Bill, 130 of 2012.

³⁹ *Id.*

public consultations.⁴⁰ Here, it was suggested that §375 must be suitably amended to delete the exception clause.⁴¹ However, the Standing Committee refused to accept this recommendation. The Standing Committee Report argued that, first, if they did so, the “entire family system will be under greater stress and the committee may perhaps be doing more injustice”.⁴² Second, the Committee reasoned that sufficient remedies already existed since the family could itself deal with such issues and that there existed a remedy in criminal law, through the concept of cruelty as under §498A of the IPC.⁴³

Recently, in 2015, this argument was reiterated by the Ministry of Home Affairs in reply to a bill proposed by a Member of Parliament which aimed to criminalise marital rape.⁴⁴ The press release stated that it “was considered that the concept of marital rape, as understood internationally, cannot be suitably applied in the Indian context”.⁴⁵ One of the reasons given for this was the “mind-set of the society to treat the marriage as sacrament”.⁴⁶ Further, notably, a private bill was introduced on this topic in December, 2015.⁴⁷ During the ensuing discussion, the Home Minister stated that this was being considered by the Law Commission, and any decision would only be taken after the report came out.⁴⁸ A striking aspect of his speech was his reference to the existing remedy of ‘cruelty’ that already existed in the IPC.⁴⁹ In 2016, the Home Minister was again questioned about the existence of the marital rape exception and if the government was planning on criminalising marital rape. Again, the Home Minister replied that the matter was being studied by the Law Commission and no decision had been taken to criminalise it since the Parliamentary Standing Committee had decided against it.⁵⁰

This attitude towards criminalisation of marital rape is not restricted to the legislature alone, it extends to the judiciary. Although there are no cases in which the constitutionality of the exception clause in §375 has been explicitly upheld, there have been instances when courts have simply avoided this question,⁵¹ dismissed petitions to strike down this exception clause or have otherwise used the exception clause to avoid answering questions as to whether a husband raped his wife.⁵²

⁴⁰ STANDING COMMITTEE ON HOME AFFAIRS, Fifteenth Lok Sabha, *Report on The Criminal Law (Amendment) Bill, 2012*, One Hundred and Sixty Seventh Report, 45, (December 2015).

⁴¹ *Id.*, 47

⁴² *Id.*

⁴³ See The Indian Penal Code 1860, §498A.

⁴⁴ The Criminal Laws (Amendment) Bill, 2014, 28 of 2014. (This Bill was a Private Member Bill proposed by Ms. Kanimozhi on the 28th of November, 2014. The status of the Bill is currently pending as of 1st December, 2017).

⁴⁵ Press Release, PRESS INFORMATION BUREAU, April 29, 2015, available at <http://pib.nic.in/newsite/PrintRelease.aspx?relid=119938> (Last visited on December 17, 2017).

⁴⁶ *Id.*

⁴⁷ *Supra* note 44.

⁴⁸ RAJYA SABHA DEBATES, *Discussion on the Indian Penal Code (Amendment) Bill, 2015*, 53, Session Number 237, December 4, 2015, available at <http://164.100.47.5/newdebate/237/04122015/Fullday.pdf> (Last visited on December 15, 2017).

⁴⁹ *Id.*

⁵⁰ LOK SABHA DEBATES, *Question on Marital Rape, 2016*, Question No. 2872, March 15, 2016, available at <http://164.100.47.190/loksabhaquestions/annex/7/AU2872.pdf> (Last visited on December 16, 2017).

⁵¹ See Nimeshbhai Bharatbhai Desai v. State of Gujarat, 2017 SCC OnLine Guj 1386. The Gujarat High Court notes that marital rape is a disgraceful offence. However, it does not strike down the exception clause nor does it urge the government to do the same. See also Deya Bhattacharya, *'Marital Rape a Disgraceful Offence': Gujarat HC's Ruling Progressive, But Mere Condemnation of Practice Rings Hollow*, Child Marriage, FIRSTPOST (India) November 9, 2017.

⁵² In a judgment delivered by Justice Virender Bhat, an Additional Sessions Judge of the Special Fast Track Court, he noted that forced sex cannot be considered rape in a marriage and hence, an analysis of the fact situation was not required. See Apoorva Mandhani, *Marital Sex Even if Forcible is Not Rape; Delhi Court*,

Looking at the reasons advanced by the Government and the analysis undertaken by various Law Commission reports, there are three broad themes in the arguments against criminalisation of marital rape. The first is with regard to the goal of protecting the institution of marriage and as an extension, not interfering with it to ensure that the institution remains sacred. This is seen in the IPC as well as the Law Commission reports. The second deals with the alternative remedies that already exist for a woman to seek recourse through, within the family and in the law itself such as §498A of the IPC, the Protection of Women from Domestic Violence Act, 2005 ('PWDVA, 2005') and various other personal laws dealing with marriage and divorce. This is used to enforce the idea that criminalisation is not important because women have existing recourses thereby reducing the urgency of the advocacy to criminalise marital rape. The third is focussed upon the cultural values in India, emphasising how these values should hamper us from criminalising marital rape.

In this paper, we will engage with these themes and depict the inconsistencies in these arguments. Our analysis will be grounded in the spheres of constitutional law, criminal law and family law while being critical of the role that culture plays in shaping law. The larger aim of this paper is to make a case for criminalisation of marital rape and to also provide a model for criminalisation by analysing both criminal procedural law as well as the law of evidence.

We will begin by focussing upon the relationship of the State and the woman through the realm of constitutional law. By doing so in Part III of this paper, we will trace the trajectory of the courts' reluctance to engage with fundamental rights within the 'private' sphere of the family. We will depict the misplaced 'public/private dichotomy'⁵³ that still persists in interpretation of constitutional law. Moreover, we will assert that not criminalising marital rape would fail the equality test and at the same time we will disagree with the notion of the nature of marriage. This is important as it will contextualise the debate as not one on societal norms but a case of denying constitutional rights to women.

Having laid down the base for the subsequent analysis, we will then analyse the existing civil and criminal remedies, if any, that a woman can avail of to seek redress. This will be done in Part IV. In addition to this, in Part V, we will critique the importance being given to culture and values as an argument for not criminalising marital rape. In Part VI, we look at the suggestions given in existing government reports with regard to the reforms required in law and critically analyse them. Finally, we will provide our version of the reforms required to criminalise marital rape, in addition to merely deleting the exemption clause. We will discuss the implications this would have with regard to complex questions in matters of evidence, specifically with regard to matters of burden of proof to prove lack of consent.

III. LACK OF CRIMINALISATION OF MARITAL RAPE AS A FUNDAMENTAL RIGHTS' VIOLATION

In the previous Part, we had illustrated one of the justifications for not criminalising marital rape which was that it would amount to excessive interference with the institution of marriage. Marriage is considered to be a sacred institution that forms the bedrock of our society. It is viewed as deeply personal and the State is hesitant to disturb this delicate space. This is to maintain the privacy of citizens and the intrusion of the State in this

LIVELAW (Delhi) May 14, 2014, available at <http://www.livelaw.in/marital-sex-even-forcible-rape-delhi-court-read-judgment-close-look-law-relating-marital-rape-india/> (Last visited on January 1, 2018).

⁵³ This public/private dichotomy has been explained further in Part III. This dichotomy is central to feminist theory-praxis and refers to the creation of a 'private sphere' that is shielded from law. This ultimately results in a situation wherein women who are victims of forms of domestic violence have no redress, since the law refuses to enter these spheres, or selectively enters such spheres.

sphere would disrupt this privacy. Thus, the State does not compel any two individuals to marry or divorce. However, the refusal of the State to enter this private space even in certain specific instances can be problematic. For example, if a wife is subject to cruelty in a marriage, then the State will have to enter this private sphere to criminalise this cruelty that the wife is subject to.⁵⁴ If the State does not do so, then the woman will have no redress legally. Thus, it is important for the State to penetrate this private sphere on certain occasions.

Marital rape is also a violation of the fundamental right of a woman specifically under Articles 14 and 21 of the Constitution of India ('Constitution'). In this Part, we argue that the lack of criminalisation of marital rape infringes on the fundamental rights of a woman. Even though this crime of marital rape occurs within the private sphere of a marriage, it is the responsibility of the State to penetrate through this private sphere. If the State does not penetrate this private sphere, then a woman is left without remedy when raped by her husband.

However, an analysis of judicial decisions with respect to matters traditionally conceived to be within the private sphere of marriage and family highlights the hesitation of the judiciary to bring in fundamental rights in this private sphere. The judiciary has created this fictitious private sphere where it refuses to implement and read in fundamental rights. The effect of this has been to negate the question of whether marital rape is an infringement of fundamental rights. This is because in the perceived marital sphere, there is no role for fundamental rights.

Thus, in this Part, we will first, rebut this creation of a private sphere where constitutional rights cannot be engaged with. In Part A, we will first trace the creation of the private sphere where fundamental rights cannot be enforced. In Part B, we will analyse why this conceptualisation of the private sphere is flawed. Further, in Part C, we will depict how the exemption clause of §375 of the IPC is in violation of Article 14 of the Constitution.

A. *THE CREATION OF A PRIVATE SPHERE WHERE FUNDAMENTAL RIGHTS CANNOT BE ENFORCED*

It is necessary to analyse the reluctance of the judiciary to engage with fundamental rights in the private sphere by tracing the trajectory of the decisions with regard to 'restitution of conjugal rights' ('RCR'). This is because the constitutional law issues that arise with regard to RCR are analogous to the debate on marital rape. The RCR is a remedy that originated in English law, although it no longer exists there.⁵⁵ It is a mechanism through which a court may pass an order compelling a married couple to live together, a restitution of a spouse's conjugal right against the other. In India, this is found in §9 of the Hindu Marriage Act, 1956 ('Hindu Marriage Act').⁵⁶ The gist of the section is that if a husband or wife does not live with the other spouse 'without reasonable excuse', the court can grant a decree of RCR.⁵⁷ RCR has been known to work to the disadvantage of women. Women are often forced to resume conjugal relations with their husbands. Here, similar to the debate on marital rape, the central question is whether the State can compel a woman to have sexual relationships with her husband.⁵⁸ This question has confronted High Courts and the Supreme Court and they have had to continually deal with challenges to its constitutionality.

⁵⁴ In this instance, the State has entered into the supposed private sphere by criminalizing activities that happen in the private spaces of husband and wife.

⁵⁵ The remedy for restitution of conjugal rights was primarily granted by Ecclesiastical Courts. However, in 1969, Justice Scarman recommended the abolition of this remedy. Accepting this recommendation, an amendment was made to the relevant law which prevented the courts from granting this remedy.

⁵⁶ See The Hindu Marriage Act, 1956, §9.

⁵⁷ *Id.*

⁵⁸ In the case of marital rape, by not criminalizing it, the State is essentially presuming that a woman has provided an irrevocable consent to her husband for sexual activity. By not providing her the option to refuse

The Andhra Pradesh High Court in the case of *T. Sareetha v. T. Venkata Subbaiah* ('Sareetha')⁵⁹ was the first case to strike down the constitutionality of the RCR as given in the Hindu Marriage Act. The argument before the Court was that the §9 of the Hindu Marriage Act violated Articles 14, 19 and 21 of the Constitution. The Court agreed with this argument. The Court held that the RCR remedy was unconstitutional since it transferred the right of choice to indulge in sexual intercourse from the woman to the State. This would violate Article 21 of the Constitution since it infringes upon the personal autonomy of an individual.⁶⁰ Moreover, the Court accepted that women would be hurt by this provision and notes the importance of sexual autonomy for a woman.⁶¹ It is also here that the Court agrees that "no positive act of sex can be forced upon the unwilling persons, because nothing can conceivably be more degrading to human dignity and monstrous to human spirit than to subject a person by the long arm of the law to a positive sex Act".⁶² Interestingly and it is very rare for the Court to do so – it notes that even within the realm of marriage, the concept of forced sex can exist. However, the Court held that the concept of RCR is not in tandem with the concept of the 'marital sphere'.⁶³

In *Harvinder Kaur v. Harmander Singh* ('Harvinder Kaur'),⁶⁴ the Delhi High Court was also confronted with a petition challenging the constitutionality of the RCR. Departing from Sareetha, the Court upheld the constitutionality of §9 of the Hindu Marriage Act. In this case, the Court stated that the purpose of RCR was not to coerce someone to stay with their partner but rather to "protect the institution of marriage".⁶⁵ It also refuses to accept that a decree of RCR would result in women being forced to resume conjugal relationships with their husband. At one part of the judgment, the Court takes a progressive stance by mentioning that sexual relationships are not the only kind of relationship that encompasses a marriage. However, again, the Court uses this 'progressive' understanding of marriage to ignore the fact that when a woman is forced to live with her husband, there is a very high probability that these women would be forced into sexual relationships as well. The Court turned a blind eye to this form of abuse women would face by subscribing to the theory of 'marital privacy'. The Court asserted that:

"The introduction of constitutional law into the ordinary domestic relationship of husband and wife will strike at the very root of that relationship and will be a fruitful source of dissension and quarrelling. It will open the door to unlimited litigation in relationships which should be obviously as far as possible protected from possibilities of that kind. The domestic community does not rest on contracts sealed with seals and sealing wax. Nor on constitutional law. It rests on that kind of moral cement which unites and produces 'two-in-one-ship' ".⁶⁶

such activity (say no), the State is offering her no choice but to participate in that sexual activity. Therefore, the State is compelling her to have conjugal relations with her husband.

⁵⁹ *T. Sareetha v. Venkata Subbaiah*, AIR 1983 AP 356.

⁶⁰ *Id.*, ¶31-32.

⁶¹ *Id.*

⁶² *Id.*, ¶18.

⁶³ *Id.*, ¶38.

⁶⁴ *Harvinder Kaur v. Harmander Singh*, AIR 1984 Del 66.

⁶⁵ *Id.*

⁶⁶ *Id.*, ¶36.

By doing so, the Court refuses to even engage with the question of sexual and personal autonomy simply because it distances the debate of RCR from the constitution. This boils down the debate on RCR to merely a legislative policy, one without implications on constitutional law. Here, the Court has created a private sphere where the Constitution and the fundamental rights enshrined in it have no significance.

B. *CRITIQUING THE CREATION OF A PRIVATE SPHERE*

These cases indicate two views that are relevant to distancing marital rape as an infringement of fundamental rights. First, there is a creation of an impenetrable sphere known as the ‘marital sphere’ where constitutional law has no application. The impact of this is that while rape is seen as a violation of the fundamental right of a woman, this argument ceases to hold in the ‘marital sphere’. This is because fundamental rights are inapplicable in the marital sphere. Feminist theory has critiqued the notion of public and private spaces in law. Traditionally, it was believed that law could not regulate certain private affairs of the family. Thus, the law was thought to regulate mainly public affairs and the private world was immune to law. However, this is now understood to be a misplaced notion of the role of law.⁶⁷ Frances Olsen in the ‘Feminist Critique’ argues that the notion of certain private spaces creates an area wherein those who are harmed do not have recourse under law, and as a consequence, no legal action can be taken against those who harm.⁶⁸ There is no basis for the argument that constitutional law does not have place in the realm of the family. The Constitution of India was brought in to assure equality and abolish practices such as untouchability even in private spaces, indicating the intention to break down these public-private barriers.⁶⁹ With the coming in of legislations that deal with the violence of women in their marital sphere, this distinction has slowly but surely eroded.⁷⁰ The PWDVA, 2005 and §498A of the IPC already provide a range of civil and criminal remedies for women who are victims of forms of abuse in the marital sphere.⁷¹ This was to protect the rights of such women. Thus, the argument that there exists a sphere without any constitutional rights has lost its relevance in the present scenario. It is merely employed as a tool to continue to mask certain forms of violence in the marital sphere that both the judiciary and the legislature are uncomfortable to acknowledge and address. Therefore, we argue that the exception clause in §375 of the IPC can be adjudged on the basis of constitutional law, and as we shall depict further, it fails the test of the Constitution.

1. The State’s Selective Penetration into the Private Sphere

In *Sareetha*, the Andhra Pradesh High Court held that the concept of forced sex was not in sync with the concept of ‘marital privacy’. They read ‘marital privacy’ to indicate that the State cannot force two people to resume conjugal relations because this

⁶⁷ Margaret Thornton, *The Public/Private Dichotomy: Gendered and Discriminatory*, 18 JOURNAL OF LAW AND SOCIETY 448 (1991).

⁶⁸ Frances Olsen, *Constitutional Law: Feminist Critiques of the Public/Private Distinction*, 10 CONSTITUTIONAL COMMENTARY 319. (1990); Catherine McKinnon, *Feminism, Marxism, Method & the State: Toward Feminist Jurisprudence*, 8 JOURNAL OF WOMEN IN CULTURE AND SOCIETY 635 (1983); See Nancy Fraser, *Rethinking the Public Sphere, A Contribution to the Critique of Actually Existing Democracy*, 25/26 SOCIAL TEXT 56. (1990).

⁶⁹ REENA PATEL, HINDU WOMEN’S PROPERTY RIGHTS IN RURAL INDIA 16, 19 (2007). The Constitution of India followed western models envisaging one space as opposed to two spheres. See The Constitution of India, 1950, Art. 14, 17.

⁷⁰ MANISHA PRIYAM, KRISHNA MENON & MADHULIKA BANERJEE, HUMAN RIGHTS, GENDER AND THE ENVIRONMENT 157 (2009).

⁷¹ See The Protection of Women from Domestic Violence Act, 2005; The Indian Penal Code, 1860, §498A.

invades their privacy. In *Harvinder*, the Delhi High Court reads ‘marital privacy’ to mean that the Constitution cannot be applied in that sphere. The Court in *Harvinder* used the term ‘marital privacy’ to denote a private sphere which the Court cannot enter into. This shows the difference in the understanding of ‘marital privacy’ and the ambiguity that could possibly arise from usage of this term. This is evinced in the conflicting engagement of the State with this sphere.

For example, as mentioned above, in *Harvinder Kaur* the Court refuses to discuss the violation of Article 21 rights of a woman subject to an RCR decree due to the ‘marital sphere’ argument. However, despite advocacy to decriminalise §377 of the IPC, the State continues to interfere in the private sexual activities between two consenting adults. Sexual activities between consenting adults are often subject to policing by State authorities. Here, the State is not hesitant to enter this fictitious private sphere. This can be found in laws regulating abortions as well, where the private sphere of a woman is violated and women are routinely harassed in this regard.

This implies that there is selective penetration of the State in this arena. This conceptualisation of the ‘private sphere’ is not definite and changes depending on the decision of the State. The State decides the privacy of the sphere keeping in mind and its impenetrability depending on its ideologies. The State can deem criminalising acts such as adultery or intercourse between consenting adults of the same gender as appropriate and at the same time, refuse to criminalise marital rape due to its place in the private sphere.⁷²

2. The Need to Move Away from ‘Privacy’ to ‘Individual Autonomy’

Thus, we propose that we must shift away from relying on the privacy argument, even if it is in support of a woman’s right to sexual autonomy and personal autonomy. The conceptualisation of the private sphere can be done in a progressive manner highlighting women’s rights as was done in *Justice KS Puttaswamy v. Union of India*.⁷³ Even in *Sareetha*, the Court held that RCR was unconstitutional since it was not sync with ‘marital privacy’. However, the crux of the judgment actually focuses on how the individual autonomy of a woman is violated when she is compelled to stay with her husband. Therefore, ideally, in *Sareetha*, the Court should have struck down the unconstitutionality of §9 of the Hindu Marriage Act merely by relying upon the understanding of individual autonomy and liberty instead of delving into the ‘marital sphere’ angle. But because the term ‘marital privacy’ was used, it opened up the possibility for *Harvinder Kaur* to use this same term in a completely different light where it stated that the concept of individual autonomy would not be relevant in this sphere. This shows the contradictions in the perceptions of this term ‘privacy’ and thereby indicates the dangers of relying on the privacy sphere.⁷⁴ Martha Nussbaum, a noted feminist scholar argues that instead of focusing on the privacy line of argumentation, we must focus on arguing for women’s rights on the basis of equality for self and choice.⁷⁵ In this paper, we also advocate for couching advocacy for criminalisation of

⁷² VIDHU VERMA, NON DISCRIMINATION AND EQUALITY IN INDIA: CONSTESTING BOUNDARIES OF SOCIAL JUSTICE (2012); Saptarishi Mandal, ‘Right to Privacy’ in *Naz Foundation: A Counter-Heteronormative Critique*, 2 NUJS L. REV. 525 (2009).

⁷³ See *Justice KS Puttaswamy v. Union of India*, 2017 10 SCC 1.

⁷⁴ Martha C. Nussbaum, *Is Privacy Bad for Women?*, BOSTON REVIEW, April 1, 2000, available at <http://bostonreview.net/world/martha-c-nussbaum-privacy-bad-women> (Last visited on January 1, 2018).

⁷⁵ *Id.*

marital rape in terms of choice, autonomy (both individual and sexual) for the woman and not in terms of privacy.

Thus, in this Part, we have explained how the conceptualisation of a private sphere immune from constitutional law is flawed. Further, we have depicted how the debate should ideally move away from the privacy angle and use the language of autonomy. Having established the constitutional law is valid even in a marriage, in the next Part, we will focus on Article 14 and its violation by virtue of the exception clause.

C. ANALYSING THE EXCEPTION CLAUSE IN LIGHT OF CONSTITUTIONAL LAW

Having established that the conceptualisation of a private sphere is flawed and that constitutional rights have a role to play in a marriage, in this part, our aim is to show that the exception clause is unconstitutional. Before we embark on our attempt to do the same, we must go back to the conflict that came about after Sareetha and Harvinder Kaur. In light of these contrasting decisions, the Supreme Court in *Saroja Rani v. Sudarshan Kumar Chada*⁷⁶, attempted to settle the issue and ultimately upheld the constitutionality of the RCR. The Court agreed with the outcome in Harvinder Kaur. However, on a closer reading, it is slightly different from the Delhi High Court decision. Here, the Court holds that the purpose of RCR is to preserve a marriage, and hence, when analysed from this perspective, it does not violate either Article 14. The Court argues that the purpose of the law justifies a separate law for married women and this does not violate Article 14 since there is a reasonable classification.

Transporting this to the marital rape debate, the argument would be that even though the law treats a married woman and an unmarried woman different with respect to their rights, it would not be in violation of Article 14 since marriage serves as a reasonable classification. It is important to note that the argument is not that rape per se is not unconstitutional, but rather that marriage satisfies the criteria laid down for reasonable *differentia* under Article 14 of the Constitution. Therefore, despite rape being a violation of Article 21,⁷⁷ it is justified when it is ‘marital’ rape since it amounts to a reasonable classification. To rebut this, we will depict how the concept of marriage has changed legally making women equal partners in a marriage. Using this, we will explain how this evolved understanding of marriage does not allow for the marital rape exception to satisfy the requirements of Article 14.

The concept of marriage in Indian law has evolved significantly over the past few decades. At present, specific laws for various religions govern the domain of marriage or if the parties to the marriage, so choose, a religion neutral law will be applicable.⁷⁸ This codification of laws for marriage has changed the dynamics of the spousal relationship. At the very outset, the archaic understanding of the role of women in a marriage was to view women as property belonging to the husband.⁷⁹ If not property, it was to view the woman as not equal to the husband, keeping in mind gender roles. However, with the codification, there

⁷⁶ *Saroja Rani v. Sudarshan Kumar Chada*, AIR 1984 SC 1562.

⁷⁷ *Bodhisattwa Gautam v. Subhra Chakraborty*, (1996) 1 SCC 490, ¶8-10.

⁷⁸ See The Hindu Marriage Act, 1955 (which governs Hindu Marriages); Dissolution of Muslim Marriage Act, 1939 (which partially governs divorce in Muslim Marriages); Parsi Marriage and Divorce Act, 1936 (which governs Parsi Marriages); Indian Divorce Act, 1869 (which governs divorce in Christian marriages); The Special Marriage Act 1954 (governs inter-religious marriages and the marriages registered under it).

⁷⁹ Lisa R. Eskow, *The Ultimate Weapon: Demythologizing Spousal Rape ad Reconceptualising its Prosecution*, 48 STANFORD L. REV. 680 (1996).

is no difference in the status of either husband or wife in the marriage. In codified legislations such as the Hindu, Christian, Parsi, Special Marriage Act, there is no difference mentioned in the laws regarding the status of the wife and the husband. It is not possible to infer that women are the property of their husband in light of clear constitutional rights mandating equality between the sexes. Even when parties marry under Islamic personal law, both religious scholars as well as case law affirms that the status of husband and wife under Islamic law is equal, dispelling the notion of women being property.⁸⁰ Further, there has been significant advancement in a woman's right to divorce and right to property as well within the marriage only reaffirming her position as an equal partner.⁸¹ Thus, the understanding of women as *chattel* to their husbands cannot hold in law. An argument of inequality of women before men in marriage will never satisfy the requirements of Article 14 in view of extensive case law and constitutional jurisprudence in favour of the equality between the genders, with the Supreme Court now moving beyond the binary of man and woman to recognise the third gender as well.⁸²

By bringing to light the equality among both the husband and wife, we also negate the argument that marriage entails consent of the wife to sexual intercourse. The problem with debates surrounding consent to sexual activity in a marriage is that it is often viewed in two clearly demarcated categories. First, that marriage is irrevocably linked to sexual relationship. The second is that marriage does not indicate any engagement in a sexual relationship. Legally, the assertion that marriage is completely disassociated from sexual relationships cannot hold much weight which is only evidenced by how so many of the claims for divorce rest on sexual relationships. However, marriage cannot presuppose consent to every sexual activity. Even if we are to visualise sexual relationships as a term in the contract of marriage, consent to sexual intercourse at all points in the marriage cannot hold good in view of general rules to contract law. A contract which is ambiguous, contrary to public policy and is uncertain is not a valid contract.⁸³ By this logic, in a contract of marriage wherein woman consents to sexual intercourse at all points of time without consideration to her bodily requirements will not hold against the test of contract.

However, another argument is the fact that the state would want to protect the institution of marriage for the larger stability of the society.⁸⁴ A glaring fallacy in this approach would be that the harms caused to women will far outweigh the harms apparently caused to society because of a broken marriage. Moreover, with the State creating laws criminalising cruelty and with the PWDVA, 2005 it is implicit that the State has understood that the protection of the institution of marriage cannot be an overarching goal. Further, such an approach only reinforces the public and private dichotomy, and thus, should be avoided.

Through these layers of arguments, we have attempted to establish that there is no basis for treating married and unmarried women differently with respect to rape. The requirements for Article 14 as laid down in present law require not just a nexus between the purpose to be achieved and the law, but also that the law is not arbitrary.⁸⁵ Recently, in

⁸⁰ *Mohammad Naseem Bhat v. Bilquees Akhtar & Anr.*, 2016 (1) J.K.J. 312.

⁸¹ *See* the Hindu Succession Amendment Act 2005 §6. The amendment gives equal property rights to women in a joint Hindu Family.

⁸² *See* National Legal Services Authority v. Union of India, (2014) 5 SCC 438. In this case, the Supreme Court expressly created a third gender status for transgenders.

⁸³ *See* The Indian Contract Act, 1872, §§23 and 29.

⁸⁴ *See* The Family Courts Act, 1984 (The object of this Act is to promote conciliation and speedy settlement of disputes relating to marriage and family affairs).

⁸⁵ *E.P. Royappa v. State of Tamil Nadu*, (1974) 4 SCC 3.

Independent Thought v. Union of India ('Independent Thought'),⁸⁶ the Court partly struck down a part of the exception clause in §375 of IPC. Under the Protection of Children from Sexual Offences Act, 2012 ('POCSO'), it is illegal to have sexual intercourse with a child under the age of eighteen. However, the exception clause allows for this in the event a girl is married and is between the ages of fifteen to eighteen. The Court noted that this differential treatment to the girl on the basis of marriage was wholly unconstitutional. This was because marriage did not serve as reasonable classification. Although the Court was keen on noting that the judgment was not for adult marital rape,⁸⁷ it is encouraging that the Court has recognised that women's rights cannot be subsumed on the basis of marriage.

By this standard, we have established that there exists no pre-supposition of consent to sexual activities in a marriage. Moreover, to not criminalise marital rape simply to protect the institution of marriage when there is a constitutional right at stake and when other forms of violence have been criminalised, would be arbitrary. Thus, this fails the test of Article 14 and the exception clause is hence, unconstitutional.

IV. THE REMEDIES THAT EXIST IN LAW TO PROVIDE REDRESS TO VICTIMS OF MARITAL RAPE

As explained in Part II, a common response to advocacy for criminalisation is that adequate remedies already exist in law. In the following analysis, we will explain how this assumption is misplaced by separately examining the law in the spheres of civil and criminal law. While analysing the lack of remedies in criminal law, we focus squarely on our emphasis on the need for criminalisation of rape as opposed to criminalising violence against women in a marriage. At the same time, we also address the inadequacies of these alternate remedies to encapsulate a crime such as rape. On the other hand, our argument for civil law rests primarily on the uncertainty of the law and the underlying ideologies that work in family law that conflict with our advocacy for criminalisation of marital rape.

A. CRIMINAL LAW

The most relevant provision that is often cited as a viable alternative to actual criminalisation is §498A of the IPC. §498A was inserted into the IPC to specifically deal with cases of cruelty against women. However, we argue that this is inadequate for two reasons. Our first reason is because there is a marked difference being cruelty and rape. The nature and act of rape distinguishes it from an offence of cruelty. The second reason is that this section is not adequate to deal with cases of rape.

Feminist literature has long understood the importance of recognition of rape as a separate crime.⁸⁸ Beyond that, the crime of rape is distinct because of the very nature of the crime itself. It definitely is a form of cruelty; however, this cruelty is distinct from physical violence and mental violence. It has complex patriarchal and power structures attached to it. This is also indicative through the treatment of rape as a distinct offence in the

⁸⁶ *Independent Thought v. Union of India*, AIR 2017 SC 4904.

⁸⁷ *Id.*, ¶2. In fact, while hearing the petition, the Bench remarked on how the Parliament debated marital rape and decided that it was not a crime and hence the Bench opined that it was not a crime. See Deya Bhattacharya, *SC Says Marital Rape Can't be Considered Criminal: Tradition Doesn't Justify Assault, Child Marriage*, FIRSTPOST (India) October 11, 2017.

⁸⁸ Stanford Encyclopedia of Philosophy, *Feminist Perspectives on Rape*, June 21, 2017 available at <https://plato.stanford.edu/entries/feminism-rape/> (Last visited on December 20, 2017).

criminal statutes distinct from grievous hurt or assault.⁸⁹ A reform in rape law is a positive indication of betterment of women in the society as well.⁹⁰ Additionally, rape involves different requirements in evidence law as well.⁹¹ The nature of the crime changes the amount of evidence and the nature of evidence that can be provided. The purpose of criminalising marital rape is not only that the perpetrator be ‘put in jail’, but that the perpetrator be prosecuted in law for the crime committed. It is unnecessary to boil down the debate of women’s rights to finding alternatives to seek justice when the actual mechanism is constitutionally mandated. In terms of practical application, it might be true that a victim of marital rape might have alternate mechanisms, but this does not have any bearing on the requirement for criminalisation of marital rape.

We recognise that some feminists argue that distinguishing rape from cruelty buys into the patriarchal understanding of the chastity of a woman.⁹² We differ from this line of argumentation for three reasons. First, we note the distinction between the criminalisation of rape and the treatment of a victim of rape as impure. The former does not lead to the latter but rather a host of factors, including societal perceptions and gender inequality which do. Second, criminalisation of rape as a specific offence notes that the rapist or the perpetrator has violated the law and not the victim. The victim has not contributed to the crime in any way, and the fault lies wholly with the perpetrator, even if that is her husband. This is in line with our third reason which is that rape as a crime is distinct from cruelty given the difference in the nature of the crime, evidentiary requirements which we have discussed below. In a situation where a woman has been raped and battered physically, this distinction between rape and cruelty might not be of much consequence, it is of immense consequence otherwise for the following reasons.

To begin with, there is no straightjacket definition of cruelty. The explanation to §498 defines ‘cruelty’. However, what would amount to cruelty is purely a question of fact and would vary from case to case.⁹³ There are certain factors such as the matrimonial relationship between husband and wife, their cultural and temperament status in life, state of health, and their interaction in their daily life that would be relevant for determining cruelty.⁹⁴ Further, mental cruelty varies from person to person depending on the intensity of sensitivity and the degree of courage or endurance to withstand such mental cruelty. In other words, each case has to be decided on its own facts to decide whether mental cruelty was established. Even though there is no specific definition of cruelty given by the courts to keep it broad, it is still very difficult and tricky to bring in cases of rape within this section. We assert so on the basis of our three-fold argument.

The first reason is because the threshold for conviction under cruelty is very high. It is not enough that the conduct of the accused is wilful and offensively unjust to a woman, but is further necessary that the degree of intensity of such unjust conduct on the part of the accused is such which is likely to drive the woman to commit suicide or to cause grave

⁸⁹ See The Indian Penal Code, 1860. While hurt is covered from §319-338 in a separate part, the offence of rape is covered from §375-376E.

⁹⁰ Ronald J. Berger, Patricia Searles & W. Lawrence Neuman, *The Dimensions of Rape Reform Legislation*, 22 LAW & SOCIETY REVIEW 329 (1988).

⁹¹ See The Indian Evidence Act, 1872, § 114A.

⁹² See Business Standard, *Proving Marital Rape is Not Easy; It would be a Challenge for the Woman*, April 23, 2016 available at http://www.business-standard.com/article/current-affairs/proving-marital-rape-is-not-easy-it-would-be-a-challenge-for-the-woman-flavia-agnes-116042300710_1.html (Last visited on December 20, 2017).

⁹³ Mohd Hoshan v. State of Andhra Pradesh, 2002 CrLJ 4124 (SC).

⁹⁴ Sarojakshan Shankarah Nayar and Ors v. State of Maharashtra 1995 CrLJ 340 (Bom).

injury or danger to life, limb or health.⁹⁵ This was said in a case where the husband used to have forced sexual intercourse with his wife and inserted a stick and his fingers in her vagina causing severe pains and bleeding which made the victim unconscious.⁹⁶ Even in this case the court did not charge the accused under §498. This is in continuation of our earlier point regarding the peculiar evidentiary requirements of rape and this is more important in cases of marital rape. §498A does not have these specific nuances in the law relating to evidence as §375 does.

Second, to be convicted under §498A the conduct has to be done repeatedly or over a long period of time.⁹⁷ Therefore it is not possible to convict when the act of forced sexual intercourse is done one or two times. It must be carried on for a long period of time which is clearly harmful. This also ties in with a practical problem, which is the fear of the misuse of §498A. The belief that §498A has been used to harass men has found its way to the Supreme Court as well. Recently, in *Rajesh Sharma v. State of Uttar Pradesh*,⁹⁸ the Court issued directions to prevent the misuse of §498A. This rhetoric coming from the apex Court is an indication of the mentality that plagues the various organs of the State and will also make prosecution of incidences of marital rape, all the more difficult.⁹⁹ Third, the maximum punishment under §498A is only three years with/without fine. The maximum punishment for rape is life imprisonment.¹⁰⁰ This major difference in the punishment again tells us that the concept of cruelty cannot in any manner deal with an offence of marital rape.

Interestingly, §377 of the IPC has been used to criminalise acts of violent sexual intercourse.¹⁰¹ Whilst we must appreciate the attempt of the judiciary to punish the perpetrator as opposed to refusing to consider the matter since it is not criminalised according to the act,¹⁰² using §377 is not a feasible alternative considering the struggle to repeal the section in light of the violation of rights of sexual minorities. The problems caused by the public-private dichotomy, lack of engagement with fundamental rights as explained in Part II of this paper, are common to the LGBTIQ movement as well.¹⁰³ The usage of §377 will only reinforce these notions. Therefore, usage of §377 will be detrimental to our advocacy as well.

B. CIVIL LAW

The remedies that exist in civil law hold an uneasy place in discussions centred on gender based violence. One of the most prominent reasons for this is perhaps the belief that focusing on civil remedies will only serve to aid the public and private dichotomy since it makes gendered violence a matter between the perpetrator and victim as opposed to

⁹⁵ *Bomma Ilaiah v. State of Andhra Pradesh*, 2003 CrLJ 2439.

⁹⁶ *Id.*

⁹⁷ *Samar Ghosh v. Jaya Ghosh*, (2007) 4 SCC 511.

⁹⁸ *Rajesh Sharma v. State of Uttar Pradesh*, 2017 SCC OnLine SC 821.

⁹⁹ *The Wire*, *Supreme Court Order on Domestic Abuse Cases Is a Step Back for Women's Rights Law*, July 31, 2017, available at <https://thewire.in/163011/supreme-court-domestic-abuse-dowry/> (Last visited on December 23, 2017).

¹⁰⁰ See The Indian Penal Code, 1860, §§375 and 376.

¹⁰¹ *The Times of India*, *Treat Marital Sexual Abuse as Rape: Court*, March 5, 2014, available at <https://timesofindia.indiatimes.com/india/Treat-marital-sexual-abuse-as-rape-Court/articleshow/31434943.cms> (Last visited on December 23, 2017); *LiveLaw*, *Marital Rape is a Disgraceful Offence that has Scarred the Trust & Confidence in the Institution of Marriage: Gujarat HC*, November 7, 2017 available at <http://www.livelaw.in/marital-rape-disgraceful-offence-scarred-trust-confidence-institution-marriage-gujarat-hc/> (Last visited on December 23, 2017).

¹⁰² *Mandhani*, *supra* note 50.

¹⁰³ *Supra* note 73.

an act of violence against the State itself.¹⁰⁴ At the same time, it is not unreasonable to discard the importance of civil remedies since it allows for women to ‘do something’ as opposed to relying on the criminal justice system to act appropriately and swiftly, i.e. it gives women the agency to choose the recourse, and this should help women move outside the private structures.¹⁰⁵ However, this discussion tends to be clearer when we align it in context of violence within marriage. This is because marriage entails a relationship between two persons and is governed by family law. In such cases, it is of immense importance to have a corresponding civil remedy while criminalising a certain act and further, that the criminal and civil remedies exist harmoniously with each other. Thus, while we continually argue for criminalisation, we question the efficiency of this criminalisation if family law does not reflect this. In the subsequent analysis, we majorly thrust our focus area on how family law, as it stands today, is not adequately prepared to deal with the concept of marital rape.

The overarching concern that we share with regard to family law as it is structured is the importance given to sexual relations throughout. For example, as discussed in Part II, the RCR continues to exist in India despite being abolished in the United Kingdom.¹⁰⁶ This is primarily used by men to force their wives into resuming conjugal relationships.¹⁰⁷ Notably, all personal religious laws recognise ‘cruelty’ as a ground for divorce.¹⁰⁸ However, there is no specific mention of ‘sexual violence’ as a ground for divorce. This leads to a rather complex position in law. As mentioned before, the general tenor of family law is the constant glorification of sexual relationships in a marriage. Thus, as a corollary, ‘refusal to engage in sexual intercourse’ falls within cruelty, specifically under ‘mental cruelty’.¹⁰⁹ At the same time, ‘forced sexual intercourse’, i.e. a form of sexual violence, should also amount to cruelty. Cruelty, thus, encapsulates two distinct positions. *Prima facie*, it would seem simple to be able to draw a line between a wife’s refusal to ever indulge in sexual intercourse and forcing the wife to have sex. However, while analysing case law, it is difficult to conceptualise this line, since cases have relied upon the wife’s obligation to engage in sexual intercourse with her husband. The problem arises because advocacy for marital rape largely relies on the changing notion of marriage, and thereby, the woman’s right to say ‘no’ to her husband’s sexual advances. But, if courts have held that the husband can file for divorce because a wife is not engaging in sexual intercourse; our advocacy of the right to say ‘no’ is diluted.

At no point do we argue that it is impossible for both of them to exist in tandem, but it is dicey and uncertain. How do the courts decide what amount of sexual intercourse is ‘required’ and at which point the husband loses his ‘right’ to sexual intercourse?¹¹⁰ There is no clear rule, and the threshold is not a blanket denial of sexual intercourse or inability to perform sexual intercourse, rather it is based on the judiciary

¹⁰⁴ Lauren M. Gambier, *Entrenching Privacy: A Critique of Civil Remedies for Gender-Motivated Violence*, 87 NYU L. REV. 1934-1937 (2012).

¹⁰⁵ *Id.*

¹⁰⁶ In 1970, the Matrimonial Proceedings and Property Act abolished Restitution of Conjugal Rights in United Kingdom.

¹⁰⁷ Flavia Agnes, *Hindu Conjugality: Transition from Sacrament to Contractual Obligations* in REDEFINING FAMILY LAW IN INDIA, 236 (2008).

¹⁰⁸ See, The Hindu Marriage Act, 1955, §13; Dissolution of Muslim Marriage Act, 1939, §2; Parsi Marriage and Divorce Act, 1936, §32; Indian Divorce Act, 1869, §52; Special Marriage Act, 1954, §27.

¹⁰⁹ *Shakuntala Kumari v. Om Prakash Ghai*, AIR 1983 Del 53; *Samar Ghosh v. Jaya Ghosh*, (2007) 4 SCC 511.

¹¹⁰ The Times of India, *Denying Sex a Ground For Divorce: Karnataka HC*, April 20, 2012, available at <https://timesofindia.indiatimes.com/india/Denying-sex-a-ground-for-divorce-Karnataka-HC/articleshow/12739949.cms?referral=PM> (Last visited on December 24, 2017).

envisaging some basic amount of sexual intercourse required for a marriage. This obviously allows the judges to use their discretion in this matter. Moreover, on a jurisprudential understanding, the conflict of ideologies that underlie refusal to engage in sexual intercourse as a form of mental cruelty and the right to refuse as indicated through recognising forced sexual intercourse in a marriage is visible.

Since the recognition of the ‘right to sexual intercourse’ is a development of case law, an appropriate solution to this would be that the further trajectory of cases will be sensitive to this conflict that exists and deliver judgments which will be pro-choice of the woman. However, this also seems rather simplistic. Another suggestion could possibly be to refer to ‘sexual violence’ explicitly in cruelty. For example, §13(1)(i)(ia) of the Hindu Marriage Act could be amended to state that cruelty includes sexual violence. Again, the necessity of this can be challenged on two grounds. First, since the PWDVA, 2005 brings in sexual violence in its definition of domestic violence. If this definition could be used as a guideline for understanding cruelty, it could also work in tandem. Second, because of the gender neutrality of the term ‘cruelty’ in family law as opposed to how the law on offence of sexual violence only accepts women as the victim, it will not be appropriate to include sexual violence within cruelty. A more detailed analysis for this is not within the scope of this paper which is focused on the criminalisation of marital rape. However, when the criminalisation of marital rape happens, a wife can file for divorce as the husband’s conviction of rape is recognised as a ground for divorce.¹¹¹ The larger questions raised in this section are more pertinent for recognising the ideological shifts required in family law as well as when the victim of sexual violence might not wish to file charges for rape or if it would not meet the criteria for rape but was a sexual assault. Notably, the PWDVA, 2005 recognises sexual assault and is an extremely important tool to ensure that the wife gets protection orders, maintenance and so on.

Thus, we have discussed the nuances of the existing law, both criminal and civil to deal with cases of marital rape. Through this, we aim to have established the importance of criminalisation of marital rape as opposed to looking at alternative remedies. Notwithstanding this, we highlighted the lack of viable alternatives. With regard to family law, we have examined the role that sexual intercourse plays, and critiqued this vis-à-vis our advocacy for criminalising marital rape.

V. THE ROLE OF CULTURE IN DETERMINING WHETHER MARITAL RAPE MUST BE CRIMINALISED

Throughout history, the relationship between culture and law has been scrutinised. Law and culture share a symbiotic relationship with each influencing and being influenced by the other. This relationship has been studied extensively on a jurisprudential level. However, within the scope of this paper, we argue that this debate is irrelevant. First, because we have established that the matter of criminalisation of marital rape is a matter relating to fundamental rights enshrined in the Constitution. Second, because having a law that moves against established cultural ideas is not unknown in our legislative history. This is because most gender specific laws or laws for marginalised communities are not in consonance with our understood ideas of society and its structure.

¹¹¹ The Hindu Marriage Act, §13(2)(ii).

With regard to the demand for criminalisation of marital rape being one based on the Constitution and not on culture, we draw an analogy with the debate between the freedom of speech and the laws on obscenity in India. Article 19(2) mentions ‘morality’ as one of the grounds for restricting freedom of speech. The Supreme Court has interpreted ‘morality’ to mean ‘public morality’.¹¹² This would imply that cases wherein the public at large viewed certain speech as immoral, the Court would deem this speech to be immoral. This perception of what the public might consider moral might be in conflict with that the Constitution envisages being moral.¹¹³ The morality of the Constitution is called ‘constitutional morality’.¹¹⁴ The morality of the Constitution espouses concepts of equality between sexes and the right to bodily autonomy.¹¹⁵ These might exist in direct contrast to public morality.¹¹⁶ The argument that public morality will be relevant for adjudging constitutional morality is a dangerous one to take. For example, the public morality might largely agree with the caste system, which statistics depict it does. In such a situation, to adjudge a law prohibiting the lower castes from the benefit of any law might be in accordance with public morality and thereby constitutional is dangerous. Public morality is adjudged on the morals of the public, which is a part of their culture and their cultural beliefs.

In our case of marital rape, it is true that this term is an oxymoron when adjudged in light of the societal background. However, this does not undermine the unconstitutionality of the marital rape exception. This is more so in countries such as India in which the societal structure is starkly different from the constitutional moralities envisaged. For example, the Dowry Prohibition Act, 1961 was brought in because of the cultural practice of *dowry* that was prevalent in India.¹¹⁷ Historically, *sati* was an accepted cultural practice and even that was criminalised. The argument that a crime is culturally acceptable is not a reason to not criminalise it. If anything, it should act as a catalyst to the criminalisation since it indicates a culture which is accepting toward a crime. This argument is especially relevant while discussing matters of rape simply because of the ‘rape culture’ that exists in society, more so, in cases of spousal rape.¹¹⁸ For these reasons, we argue that because our ‘culture might not permit rape’, does not undermine the unconstitutionality of not doing so. If anything, this should only motivate both the judiciary and the legislature to take prompt action.

VI. THE MODEL FOR CRIMINALISATION OF MARITAL RAPE

We have focussed on the requirement for criminalisation of marital rape and established the necessity of doing so. In this part, we propose a model for criminalisation. We scrutinise it in light of the existing section for rape, i.e. §375 of the IPC. Our main aim in this

¹¹² Ranjit D. Udeshi v. State of Maharashtra, (1965) 1 SCR 65.

¹¹³ Gobind v. State of Madhya Pradesh, (1975) 2 SCC 148.

¹¹⁴ Oxford Scholarships Online, *Democracy and Its Institutions*, available at <http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198080961.001.0001/acprof-9780198080961-chapter-4> (Last visited on December 25, 2017).

¹¹⁵ See the Constitution of India, 1950, Art. 21.

¹¹⁶ Rohit Sharma, *The Public and Constitutional Morality Conundrum: A Case-Note on the Naz Foundation Judgement*, 2 NUJS L. REV. 445 (2009).

¹¹⁷ See Dowry Prohibition Act, 1961. The object of the Act is to prohibit the giving or taking of dowry.

¹¹⁸ Lisa R. Eskow, *The Ultimate Weapon?: Demythologizing Spousal Rape and Reconceptualizing its Prosecution*, 48 STANFORD L. REV. 677 (1996).

section is to give a draft legislation that will ensure that the complexities of consent, burden of proof and evidence are taken into consideration.¹¹⁹

The J.S. Verma Report, as discussed in Part II, is the landmark report that reignited the debate on marital rape in recent times. The committee gave a four-prong suggestion to effectively criminalise marital rape.¹²⁰ It asked for the removal of the exemption clause, it asked to specifically mention that it is not a defence, that there would not be a presumption of consent and lastly, that the quantum of punishment is the same. In contrast to this, the 42nd Law Commission Report suggested that marital rape be put into a separate section, and not be called ‘marital rape’ and also have a different punishment. In this part, we will analyse the model we believe works best. However, we will also add our analysis with regard to the law of evidence, since a major hurdle for conviction in marital rape is the difficulty to prove it.

A. *THE LAW MUST SPECIFY THAT THE RELATIONSHIP OF MARRIAGE IS NOT A DEFENCE*

First, we agree with the J.S. Verma Report’s suggestion that mere removal of the exception clause in §375 is not sufficient to ensure that the peculiar circumstances in cases of marital rape is covered. This is because it will lead to excess of judicial discretion. For example, in Ghana, marital rape is legally criminalised, i.e. they do not have an exception clause, but because it was not explicitly mentioned that the relationship of marriage is not a defence, it opened up for the judiciary to frame its own framework for dealing with such cases. It is possible for the judiciary to treat cases of marital rape differently, by imposing a higher evidentiary requirement or presuming consent. This will lead to arbitrary consequences. Secondly, it is important that the exception be clearly laid down in law. This is more so when there is significant cultural opposition to this legislation since the reader might not be aware that the act is a crime.

B. *SHOULD WE PRESUME CONSENT IN CASES OF MARITAL RAPE?*

Secondly, we also agree with the J.S. Verma Report that the existence of a marriage does not lead to a presumption of consent. However, in practicality, the judiciary will undeniably look at some threshold of force to answer questions of consent. There are three ways to treat consent while criminalising marital rape. The first would be to presume consent, and put the burden on the victim to rebut that consent. The second is to presume absence of consent, and the accused will have to establish consent. The third would be to draw out a system especially for cases of marital rape, and this will require a review of existing principles of evidence law.

The most ideal of these would be to treat consent in the similar manner as we would in other cases. It is extremely difficult to presume the existence of consent in a marriage since rebutting it would close to impossible considering the nature of spousal rape and abuse which happens within the private confines. The other extreme of presuming consent is that once the wife testifies in court that she was raped there will be a presumption of lack of consent that will act against the accused.¹²¹ Both of these will not operate well

¹¹⁹ Additionally, as we discussed in Part IV, adequate reforms are required in the personal laws relating to divorce as well. Unless reforms are made there as well, the reforms in criminal law will not have much teeth to them.

¹²⁰ J.S. VERMA REPORT, *supra* note 32, 117.

¹²¹ The Indian Evidence Act 1872, §114A.

practically while determining the existence of ‘consent’ in cases of marital rape. According to law at present, there need not be force used to indicate lack of consent.¹²² Consent is understood on the basis of circumstantial evidence.¹²³ Considering the nature of the act of marital rape, producing evidence is extremely difficult. This is even more so due to societal imagery of women’s filing for charges of rape as using it to harass or hurt or seek revenge. In light of this, we submit that a few factors that the court must take into consideration while understanding cases of marital rape.

The first problem we would face is that proof of the existence of sexual intercourse will not amount for much in cases of marital rape. This is because of the implicit underlying assumption that it is expected that married couples will engage in sexual intercourse with each other. Thus, the proof of lack of consent is not as simple as in stranger rape cases. In the United States of America, thirty-three states have some qualifications regarding the amount of force required to prove marital rape.¹²⁴ Thus, the general rule that force is not a qualification might not practically work in these cases. However, this situation is not grim since statistically, most cases of marital rape also exist in tandem with signs of physical injury or other forms of cruelty, including mental cruelty. Thus, the general rule of lack of force not being a consideration will face a shift in cases of marital rape.

Due to the private nature of the crime, very often, the only proof will be that of the wife’s testimony. In such instances, it is extremely important to look for other forms of evidence to corroborate charges of rape. This means that if the husband has had patterns of cruelty, domestic violence, it will be relevant while determining whether the husband has committed rape. It need not be a mandatory factor but must work as a contributing factor. This will be in conflict with §§53 and 54 of the Indian Evidence Act, 1872 as past bad character is not relevant. However, in cases of marital rape, this might sometimes be the only significant source of corroborative evidence to prove a history of assault. For example, if a wife applies for protection under the PWDVA, 2005 on the basis of being a victim of ‘sexual assault’, this must be treated as admissible evidence.

In addition to this, there is established case law recognising that past sexual activities of the woman are not required for establishing the existence of consent.¹²⁵ However, this is couched in terms of the woman’s sexual history with another man. However, this ratio can still be applied in these cases, i.e. to not take into consideration whether the woman has had past sexual history with that man. This is extremely crucial in case of marital rape, since the woman could have had consensual sexual relationship with her husband before the instance or instances of non-consensual intercourse, i.e. rape. Expert testimony, specifically testimonies of doctors, will also be relevant since the mental trauma and the psychological trauma that the victim faces can be established through such evidence. This will increase the importance of such evidence from the side of the prosecution. Testimony from family members attesting to such instances will also be hugely beneficial.

C. *SENTENCING POLICY*

¹²² State of H.P. v. Mango Ram, (2000) 7 SCC 224.

¹²³ Uday v. State of Karnataka, (2003) 4 SCC 46; Pradeep Kumar alias Pradeep Kumar Verma v. State of Bihar, (2007) 7 SCC 413; Dilip v. State of Madhya Pradesh, (2013) 14 SCC 331.

¹²⁴ ENCYCLOPEDIA OF RAPE, 169 (Merril D. Smith, 1st Ed., 2004).

¹²⁵ Narender Kumar v. State (NCT of Delhi), (2012) 7 SCC 1.

Third, we agree that there must be no difference in the sentencing policy. §376 of the IPC lay down the sentencing policy. The punishment for rape is between seven years to life imprisonment. However, §376B deals specifically with husband and wife living separately has a different sentencing policy with the punishment between two years and seven years. This clearly shows that the intention was to bring about a lesser standard for punishing rape when the husband was the convict. However, on grounds of equality as given in Article 14, we argue that this is unconstitutional. There is no justification for having a lesser punishment policy because of the relationship of existence of marriage. In light of this, we propose that §376B be repealed and the sentencing policy work as it does.

D. CONSOLIDATED REFORMS REQUIRED IN THE IPC AND EVIDENCE ACT

We have spent previous sections arguing for the criminalisation of marital rape. In light of all of the arguments advanced, we propose the following amendments in the criminal law.

First, removing the exception clause in §375 and adding another explanation clause mentioning that marriage is not a defence.

§375. Rape.—A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:—

(First) — Against her will.

(Secondly) — Without her consent.

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

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

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

(Sixthly) — With or without her consent, when she is under sixteen years of age. Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Explanation — The relationship of marriage does not constitute a valid defence.

Second, repeal of §376B of the IPC.

Indian Evidence Act, 1872 to amend §54 and to insert §114B.

§54: In criminal proceedings the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant.

Explanation 1—This section does not apply to cases in which the bad character of any person is itself a fact in issue.

Explanation 2- A previous conviction is relevant as evidence of bad character.

Exception: In cases under §375 of the IPC, the previous bad conduct will be relevant if the accused is the husband of the woman.

§114B: No presumption of consent in prosecutions of rape: There shall be no presumption of consent in prosecutions of rape, even if the accused is the husband of the woman.

VII. CONCLUSION

The debate of marital rape is crucial in establishing substantive equality for married women who are otherwise relegated in public and legal discourse to the confines of their home. It is crucial to recognise that this is a major lacuna in criminal law at present defeating the constitutional provisions that grant women equality and autonomy. As we have continually illustrated, there have been stiff political, legal and cultural arguments against criminalisation.

We have carefully analysed the validity of these arguments which are coated with notions of the family, marriage and the role of women in society. We have established how all the arguments against criminalisation do not have any legal standing. We have argued that the exemption clause in §375 of the IPC as it stands today, is unconstitutional. This is because it fails the equality test as given in Article 14. In addition to this, we have depicted how there are not any effective alternatives in law, and further that our focus should not be on alternatives but rather on criminalising it. We also brought out how our culture not being accepting towards marital rape is not a reason to not criminalise it.

In light of all of this, we propose a model to criminalise marital rape. First, we propose that the exception clause be deleted. Second, we propose that it be specifically highlighted that the relationship of husband and wife between the accused and the woman will not be a defence. Third, we propose that the sentencing policy be the same. Fourth, we propose for certain amendments in the Evidence Act to ensure that it takes into account the complexities of prosecution in cases of marital rape.

