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MARITAL RAPE: AN INJUSTICE TO MARRIED WOMEN

Ratna Priya¹

I. ABSTRACT

Spousal or marital rape is the term for non-consensual sex in which the victim's spouse is the one who commits the crime. A woman's permission is viewed as meaningless when marital rape occurs because it diminishes her dignity and turns her into property that is only utilized for a man's comfort and pleasure. In India, marital rape is legal even though it occurs frequently. This study examines the historical, social, and cultural causes of marital rape in addition to defining the issue.

History of legal development related to marital rape in India and its status globally. Along with analyzing important cases, publications, and statutes, this study also discusses the legal, social, and cultural challenges, the legislative and judicial perspectives on this matter, and the numerous amendments that have been made. In addition to providing ways to address the problem and defend victims' rights, this paper examines the body of existing literature, research studies, publications, and the judicial system. Any forced sexual contact without consent must be considered rape, and marital rape must be criminalized.

II. KEYWORDS

Marital rape, Legislative views, Judicial views, Amendments, Criminalise, Section 63 Exception II.

III. INTRODUCTION

The horrible act of forced sexual contact against a person without that person's consent is called rape. Force, threats, manipulation, or taking advantage of someone unable to provide consent because of intoxication or unconsciousness are common examples. Rape is a serious blow to a woman's dignity and honor, and it offends her self-esteem.

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It degrades and humiliates the victim, causing not only physical and mental injuries but also leaving an indelible scar on her.

IV. DEFINITION

Marital rape also defined as spousal rape,² is non-consensual intercourse in which the victim's spouse is the perpetrator. It is a form of partner rape, domestic violence, and sexual abuse. From time immemorial, women have been considered the property of men, with men having greater authority and control over women's bodies. It is generally considered that if you give consent for marriage, it also implies consent for sexual relations.

Men are seen as masters, and women are denied the right to refuse any sexual activity as their consent is immaterial. A woman is presumed to have an obligation to appease and meet her husband's needs. According to this, a woman's main responsibility is to please her husband, depriving her of her independence and choice. As society progresses, women are becoming more educated and aware of their rights. They are striving for equality with men and fighting for their rights, emphasizing that rape is rape, regardless of whether it occurs within a marriage. Marital rape is no different from any other form of rape, as the defining factor is the lack of consent in sexual activity.

A. MRE's status in India:

In India, there is no law criminalizing marital rape, which creates a legal gap and leaves victims unprotected within marriage. As a result, their rights remain unprotected, putting their lives in jeopardy. Marital rape remains a largely unrecognized and underreported crime in India.

Nearly one in three Indian women between the ages of 18 and 49 have experienced some kind of marital abuse, and about 6% have experienced sexual violence, according to the most recent National Family Health Survey (NFHS-5).³ 32% of women

²Sandra Silva & Robyn Russell, *What Is Marital Rape?*, PSYCH CENTRAL (June 23, 2021), <https://psychcentral.com/lib/marital-rape>.

³"Nearly 1 in 3 Women Have Suffered Spousal Sexual, Physical Violence: Family Health Survey," *Times of India* (May 11, 2022, 8:22 PM), <https://timesofindia.indiatimes.com/india/nearly-1-in-3->

who have ever been married reported experiencing sexual, physical, or emotional abuse at home, and 27% reported experiencing at least one type of violence in the 12 months before the study. ⁴Fifteen percent of women who have ever been married have been victims of emotional abuse, and twenty-nine percent have been victims of physical abuse.⁵

Table 1: sexual violence against married woman by their intimate partners

(Intimate partner violence (IPV)) , NFHS-5 (2019-21)⁶:-

Violence experienced by women who have been married	Number of married women with a history of intimate partner violence (out of 46488)	percentage of women with a history of marriage who have been victims of IPV (out of 46488)	percentage of various forms of violence experienced by women who are victims of IPV (out of 13922)
Sexual Violence	2396	5.15	17.21
Compelled to engage in unwanted sexual activity	1787	3.84	12.83

women-have-suffered-spousal-sexual-physical-violence-family-health-survey/articleshow/91491367.cms.

⁴"Nearly 1 in 3 Women Have Suffered Spousal Sexual, Physical Violence: Family Health Survey," *Times of India* (May 11, 2022, 8:22 PM), <https://timesofindia.indiatimes.com/india/nearly-1-in-3-women-have-suffered-spousal-sexual-physical-violence-family-health-survey/articleshow/91491367.cms>.

⁵"Nearly 1 in 3 Women Have Suffered Spousal Sexual, Physical Violence: Family Health Survey," *Times of India* (May 11, 2022, 8:22 PM), <https://timesofindia.indiatimes.com/india/nearly-1-in-3-women-have-suffered-spousal-sexual-physical-violence-family-health-survey/articleshow/91491367.cms>.

⁶Rakesh Chandra et al., *Locating Perpetrators of Violence Against Women in India: An Analysis of Married Men's Characteristics Associated with Intimate Partner Violence*, PLOS ONE, Aug. 1, 2023, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10403108/>.

compelled to engage in additional unwanted sexual activities	981	2.11	7.05
Respondent refused to engage in sexual acts after being physically coerced into doing so.	1372	2.95	9.85

The United Nations Population Fund and the International Center for Research on Women recently released a report on 9,500 respondents in seven Indian states, which The DailyO covered in 2017.⁷ One in three males admitted to submitting sexual brutality against their wives, while 17 percent of wives reported sexual violence from their spouses, according to the research.⁸

V. STATUS OF MARITAL RAPE GLOBALLY

Globally, more than 150 governments have made marital rape illegal by 2019, although India still struggles to do the same. In the US, the criminalization of marital rape started in the mid-1970s. Marital rape immunity is known to several post-colonial common law countries.⁹ However, Australia (1981), and South Africa (1993) have enacted laws .and legislation in the UK in 2003 outlawed marital rape.¹⁰

⁷Bhagyashikha Saptarshi, *Marital Rape and Law*, MANUPATRA (Apr. 9, 2024), <https://articles.manupatra.com/article-details/Marital-Rape-and-Law>.

⁸Bhagyashikha Saptarshi, *Marital Rape and Law*, MANUPATRA (Apr. 9, 2024), <https://articles.manupatra.com/article-details/Marital-Rape-and-Law>.

⁹Kunal Khureja, *The Issue of Marital Rape – Explained, Pointwise*, FORUMIAS BLOG (May 13, 2022), <https://forumias.com/blog/the-issue-of-marital-rape/>.

¹⁰Kunal Khureja, *The Issue of Marital Rape – Explained, Pointwise*, FORUMIAS BLOG (May 13, 2022), <https://forumias.com/blog/the-issue-of-marital-rape/>.

R vs. Clarke ¹¹; a husband was found guilty of raping his estranged wife, as it was held that a court order for non-cohabitation had revoked the consent.

Article 27 of Geneva Convention 4 states that women shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault. Article 1 of the Universal Declaration of Human Rights says, "All human beings are born free and equal in dignity and rights," so here this article talks about the equality of men and women.¹² Also, article 16 of the Universal Declaration of Human Rights says, "Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage, and at its dissolution."¹³ It means men and women should have the same legal status, decision-making power, and rights in their relationships and family life.

The United Nations Declaration on the Elimination of Violence against Women defines violence against women as "any act of gender-based violence that results in, or is likely to result in, physical, sexual, or mental harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life."¹⁴

VI. STATUS OF MARITAL RAPE IN INDIA

Section 63¹⁵ Of THE BHARATIYA NYAYA SANHITA (BNS), 2023 (earlier section 375 of INDIAN PENAL CODE) defines the act which constitutes Rape by a man.

A. Punishment

Punishment for rape is given under section 64¹⁶ of BNS, where punishment is rigorous imprisonment of a term which shall not be less than 10 years (as given earlier in

¹¹R. v. Clarke, [1949] 2 All E.R. 448 (K.B.); 33 Crim. App. R. 216 (C.C.A.).

¹²Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/RES/217 A (III) (Dec. 10, 1948).

¹³Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/RES/217 A (III) (Dec. 10, 1948).

¹⁴Marital Rape in India, DRISHTI IAS (Dec. 29, 2022), <https://www.drishtiias.com/daily-updates/daily-news-analysis/marital-rape-in-india-2>.

¹⁵Bhartiya Nyaya Sanhita, No. 45 of 2023, § 63 (India).

¹⁶Bhartiya Nyaya Sanhita, No. 45 of 2023, § 64 (India).

Section 376 of Indian Penal Code), and which may extend to life imprisonment and also fine.¹⁷ And if the woman's age is less than 16 years, then the punishment shall not be less than twenty years as given in section 65¹⁸ of BNS (Section 376 (3) of Indian Penal Code).

If we see the above punishment rape punishment in India is very stringent. But because of Exception 2 of section 63¹⁹ Of BNS (earlier Section 375 Exception 2), which states that "sexual intercourse or sexual acts by a man with his wife, the wife not being under eighteen years of age, is not rape."²⁰ Married women are excluded and this Marital Rape Exception (hereinafter called' MRE') decriminalizes rape committed within the context of a married couple's relationship.

The purpose of section 63 of BNS is to protect the woman's dignity and bodily integrity and punish those who engage in such inhumane and unacceptable activity of rape, however exempting the husband is not serving the purpose for which this provision is made. Married woman is more prone to rape as they find it more difficult to escape, they have to live with the same person in fear of getting raped again and again because of societal pressure, and dependency on husbands for basic needs, no laws are present to address their issue, and society also doesn't treat marital rape as rape.

It is so normalized in India that some women don't even understand that they are raped. As it is assumed that once a woman is married, she gives perpetual consent, which she cannot withdraw. This idea, rooted in colonial-era law, views a woman as the property of her husband. It implies that a woman is obligated to fulfill sexual duties within marriage, as the primary purpose of marriage is seen as procreation, which makes sexual intercourse in any form expected. At the time when the Indian Penal Code was drafted in the 1860s, married women were not seen as independent legal individuals. The marital exception to the IPC's definition of rape was based on Victorian patriarchal norms, which did not recognize men and women as equals.

¹⁷Bhartiya Nyaya Sanhita, No. 45 of 2023, § 64 (India).

¹⁸ Bhartiya Nyaya Sanhita, No. 45 of 2023, § 65 (India).

¹⁹Bhartiya Nyaya Sanhita, No. 45 of 2023, § 63 (India).

²⁰Bhartiya Nyaya Sanhita, No. 45 of 2023, § 63 (India).

These norms also prevented married women from owning property and merged the identities of husband and wife under the "Doctrine of Coverture".²¹

The 42nd Law Commission Report, 1971 recommended that for Husband and Wife who were judicially separated the exception clause must not apply but it also stated that marriage is technically subsisting so if there is sexual intercourse by a husband with his wife forcibly then also he cannot be charged under section 63 of BNS (then sec 375 IPC).

Then comes the 172 Law Commission Report, which was against the criminalization of marriage; the reason given was that it would lead to excessive interference with the institution of marriage.

After the gruesome act of the Nirbhaya incident, the entire country was shaken, leading to the formation of the J.S. Verma Committee and the passing of the Criminal Law (Amendment) Bill of 2013. The amendment was passed to remove ambiguity in the earlier section of 375 IPC and to provide for strict punishment in the rarest cases of sexual violence. The J.S. Verma Committee recommended that marital rape should be criminalized, stating that the marital relationship or any similar relationship should not be a valid defense when determining whether consent existed.²² The 167th report of the Parliamentary Standing Committee 2012 didn't accept the Justice Verma committee report related to marital rape. They were of the view that if marital rape is brought under the law, the entire family system will be under great stress.²³

Criminal Amendment, Bill, 2013 did not take into account the suggestion as they were of the view that marital rape should not be criminalized as it could destabilize the institution of marriage and potentially be used by the wife to harass husbands and marriage implies a woman's consent for sexual acts with her husband and also they

²¹Anirudh Pratap Singh, *The Impunity of Marital Rape*, INDIAN EXPRESS (Dec. 20, 2020), <https://indianexpress.com/article/opinion/columns/the-impunity-of-marital-rape/>.

²²*Marital Rape in India*, DRISHTI IAS (Dec. 29, 2022), <https://www.drishtias.com/daily-updates/daily-news-analysis/marital-rape-in-india-2>.

²³*Criminalising Marital Rape Will Hurt Family, Says Parliamentary Panel*, TIMES OF INDIA (Mar. 15, 2016, 4:53 PM), <https://timesofindia.indiatimes.com/india/criminalizing-marital-rape-will-hurt-family-says-parliamentary-panel/articleshow/51408978.cms>.

focused on the burden of proof, highlighting the difficulty of proving the defendant's innocence in court. ²⁴So question here arise, Are these reasons sufficient to justify not amending the rape laws in India? Doesn't it infringe on women's rights guaranteed under Articles 14, 15, and 21? Why is it that the marital status or age of a woman determines whether she has been raped or not? Why should women alone carry the burden of protecting their marriage? In the case of *State of MP v. Munna Choubey*²⁵, The hon'ble Supreme Court of India has repeatedly emphasized that Rape is a violation of a woman's basic human rights and infringes upon her most fundamental constitutional right, the right to life and personal liberty given under Article 21 of the Indian constitution.

Why are women categorized and discriminated against? Simply because they are married and above 18 years of age, do they lose their basic rights? Marriage cannot be the sole criterion in concluding whether a criminal offense has been committed or not. In marital rape cases, in two cases perpetrator gets punished. First, in cases where if victim (married) is less than 18 years, and second, in cases where the wife is leaving separately because of judicial separation. Suppose a woman gets married while she is still a minor, but the next day she becomes a legal adult. If she is raped by her husband on the day of her wedding, the law may protect her, but if it happens the next day, she might not receive the same protection. The same girl is being treated differently. What has changed? Just because she has become a major, she is not getting the protection. Has her innocence changed over time? No, it has not.

Before the landmark judgment of *Independent Thought vs. Union of India* (2017) the victim's age was below 15 years. In this case, the Supreme Court has criminalized sexual intercourse with a minor wife aged between 15 and 18 years, arguing that it is arbitrary and violative of the rights of the girl child and is unjust and unreasonable. Excusing the marital rape of a minor was contrary to and violative of articles 14, 15, and 21 of the constitution of India. It is inconsistent with the provisions of the POCSO

²⁴Aditi, *Marital Rape: A Heinous Crime*, TIMES OF INDIA (Readers' Blog) (July 18, 2023, 9:53 PM), <https://timesofindia.indiatimes.com/readersblog/thoughts-on-marital-rape/marital-rape-a-heinous-crime-56562/>.

²⁵ *State of MP v. Munna Choubey*; 2005 (2) SCC 710.

Act, as the POCSO Act defines 'child' as any person below the age of 18 years.²⁶ Second, in case of, non-consensual sexual intercourse when the wife and husband are living separately on account of judicial separation or otherwise, section 67²⁷ of BNS(section 376B of the IPC) will apply, in which milder punishment of 2 years but may extend to 7 years are given as compared to rape punishment. Separated husbands get protection on the ground that marriage still exists in the eyes of the law so they can't be treated as other rapists.

Section 67²⁸ Sexual intercourse by the husband with his wife during separation²⁹ Whoever has sexual intercourse with his 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.³⁰ Explanation. — In this section, "sexual intercourse" shall mean any of the acts mentioned in clauses (a) to (d) of section 63.

In *Hrishikesh Sahoo v. State of Karnataka*, Justice M Naga Prasanna³¹ Held that under the specific facts of the case, a husband who rapes his wife, cannot seek the protection of exception enumerated under Section 375 of the Indian Penal Code (IPC)(now section 63 of BNS), as the exemption is not absolute. The court stressed that no legal exemption should be so absolute that it permits a crime against society. The court stated, "A man is a man; an act is an act; rape is a rape, whether it is committed by the 'husband' on his 'wife or anyone else.'"³² The Karnataka High Court held the marital rape exception could not be absolute in 2022, the Supreme Court later stayed this judgment.

²⁶The Protection of Children from Sexual Offences Act, 2012, Act No. 32 of 2012.

²⁷The Bhartiya Nyaya Sanhita, 2023, Act No. 45 of 2023, S. 67 (India).

²⁸The Bhartiya Nyaya Sanhita, 2023, Act No. 45 of 2023, S. 67 (India).

²⁹The Bhartiya Nyaya Sanhita, 2023, Act No. 45 of 2023, S. 67 (India).

³⁰The Bhartiya Nyaya Sanhita, 2023, Act No. 45 of 2023.

³¹ *Hrishikesh Sahoo v. State of Karnataka* 2022 SCC OnLine Kar 371: (2022) 2 KCCR 145: (2022) 2 KCCR (SN 109) 145.

³² Kaleeswaram Raj, *Why Karnataka Marital Rape Verdict Is Problematic*, THE NEW INDIAN EXPRESS (Apr. 14, 2022), <https://www.newindianexpress.com/opinions/2022/Apr/14/why-karnataka-marital-rape-verdict-is-problematic-2442098.html>.

In the case of *RIT Foundation vs. Union of India*, 2022, the Delhi High Court³³ Delivered a split verdict hearing the constitutionality of marital rape. Justice Rajiv Shakti has stated that the provision regarding marital rape violates Articles 14, 15, 19(1)(a), and 21³⁴ The Indian Constitution creates an unreasonable and discriminatory distinction. He argued that immunity based on the relationship between the parties is unjust and arbitrary. He emphasized that a husband does not have the right to sexual intercourse without his wife's consent under the guise of conjugal rights. In the case of *Justice K. S. Puttaswamy (retired.) v. Union of India*³⁵ The Hon'ble Supreme Court recognized individual autonomy and privacy as essential components of freedom.³⁶ This case is currently on appeal, and we are awaiting the Hon'ble Supreme Court's decision.

In another recent case of May 2024, where FIR was filed by the wife against her husband of unnatural sex under section 377 of IPC, but it was quashed by the Madhya Pradesh high court stating that Unnatural intercourse by a husband with a wife is not rape and women's consent is immaterial as she is wedded to him and marital rape is not an offense in India.³⁷

After reviewing various cases related to marital rape in India, it is evident that judges have taken differing views. In most cases, judges are reluctant to recognize marital rape as a crime. However, in some instances, judges have moved beyond the patriarchal mindset and expressed strong opinions in favor of criminalizing marital rape.

VII. REASON FOR THE NEED TO CRIMINALISE MARITAL RAPE

The constitution is dynamic, and it is progressive as the society is progressive. It is required that citizens' right to justice, life, liberty, equality, and fraternity be protected.

³³ *RIT Foundation v. Union of India*, 2022 SCC OnLine Del 1404 at para 237. 17. (2008) 4 SCC 720. 18.

³⁴ INDIA CONST. art. 14, 15, 19, cl. 1(a).

³⁵ *Justice K. S. Puttaswamy (retired.) v. Union of India* (2017) 10 SCC 1.

³⁶ Yashika Aneja, *A Split Verdict on Marital Rape*, LEGAL EAGLE ELITE (JUN. 18, 2022), <https://legaleagleweb.com/articledetail.aspx?newsid=22>.

³⁷ *Ritu, Unnatural Sex by Husband with Wife Not Offence Under Section 377 IPC: MP High Court*, SCC ONLINE TIMES (May 4, 2024), <https://www.sconline.com/blog/post/2024/05/04/unnatural-sex-by-man-with-wife-residing-with-him-not-offence-under-section-377-ipc-mp-high-court-scc-times/>.

Our constitution is a living document, and with time, it transforms for the growth of society. There is a need to criminalize marital rape because it violates articles 14,15,19,21 of the constitution. And also by criminalizing marital rape government will address issues which is present in our law since colonial times.

Article 14 talks about the Right to equality³⁸ As everyone is equal before the law, society where a wife is treated as subservient to her husband, equality is compromised. MRE establishes an irrational, discriminatory, and blatantly arbitrary classification and, therefore, violates the right to equality, which is protected by Article 14.³⁹ The exception creates two categories of women based on marital status, granting immunity to actions committed by men against their wives.

This approach does not meet the standards of "intelligible differentia" or "rational nexus."The classification should be based on intelligible differentia and must have a rational nexus with the objective sought to be achieved by the provision as a whole. This allows married women to be victimized solely because of their marital status, while unmarried women are protected from the same acts.MRE denied equal protection to women, as it allows sex workers to refuse sex but not a married woman.⁴⁰ A married woman cannot be treated as a chattel, and she has every right to say no to sexual intercourse with her husband.⁴¹

Article 21⁴² Talks about the right to life and personal liberty, so by not giving women an individual identity, and by putting shackles around their necks that their identity is defined by their husbands and he has control over their bodies, and even over their consent, is a violation of their right. Living continuously in fear of getting hurt, sexually assaulted, raped, and violence is a violation of her right. Women have the same rights as men do. Women also have the right to live with dignity and liberty, and to pursue their happiness on their terms.

³⁸ INDIA CONST. art. 14.

³⁹ RIT Foundation v. Union of India, 2022 SCC OnLine Del 1404.

⁴⁰Yashika Aneja, *A Split Verdict on Marital Rape*, LEGAL EAGLE ELITE (June. 18, 2022), <https://legaleagleweb.com/articlsdetail.aspx?newsid=22>.

⁴¹ RIT Foundation v. Union of India, 2022 SCC OnLine Del 1404.

⁴² INDIA CONST. art. 21.

In today's society, marriage is seen as a partnership based on mutual companionship, equality, and emotional support. Rather than one partner being dominant or the marriage being solely for traditional roles or societal expectations, modern marriages focus on both individuals enhancing each other's lives and sharing responsibilities as equals. To deny a married woman the right to call a rape a rape if committed by her husband, would strike at the very core of her right to life and liberty guaranteed under Article 21 of the Constitution.

Article 15⁴³ It is violated as MRE discriminates on the grounds of the sex and marital status of women. By criminalizing marital rape then it will protect the victim from the perpetrator regardless of the relationship. It will make relationships based on mutual respect and trust.

It will provide gender justice. The Hon'ble Supreme Court has shown progressive thinking in the case of *Navtej Singh Johar V. Union of India*.⁴⁴ And decriminalized all consensual sex among adults, including homosexual sex. Also in the case of *Joseph Shine V. Union of India*,⁴⁵ The Hon'ble Supreme Court struck down Section 497 of the IPC.⁴⁶ As unconstitutional, being violative of Articles 14, 15, and 21. The Court held that Section 497 was unconstitutional and archaic as it deprived women of their autonomy, dignity, and privacy. Section 497 of the IPC disregarded substantive equality as it reaffirmed the idea that women were not equal participants in a marriage and that they were deemed incapable of independently consenting to a sexual act in a society and legal system that regarded them as the chattel of their spouse.

Article 19(1)(a)⁴⁷ Right to freedom of expression also includes a woman's right to her sexual autonomy. MRE limits the married woman's right to freedom concerning sexual expression.

If we temporarily forget that they are husband and wife and view them as two adults, then after committing rape, shouldn't he be treated as a perpetrator, if so, then why

⁴³ INDIA CONST. art. 15..

⁴⁴ *Navtej Singh Johar v. Union of India*, AIR 2018 SC 4321.

⁴⁵ *Joseph Shine V. Union of India*, AIR 2018 SC 4898.

⁴⁶ THE INDIAN PENAL CODE, 1860, Act No. 45 of 1860, Sec (497).

⁴⁷ INDIA CONST. art.19,cl.1(a).

does he receive blanket protection, just because he is married to the victim avail him getting protection. Isn't it against constitutional morality, the rule of law, and natural justice to make a woman her husband's sexual property? In modern society, women are becoming independent, and the relationships are equal between husband and wife, so they can not be treated as subordinate to their spouse. MRE gives blanket protection to husbands, and subsections (a to d) of section 63 BNS⁴⁸ Do not apply to them.

VIII. CHALLENGES IN THE CRIMINALISATION OF MARITAL RAPE

- The government is of the view that it could increase false allegations, disrupt marital harmony, destabilize the institution of marriage, create absolute anarchy in families, and put families under stress.⁴⁹ But why does the government not consider that any marital ties depend on mutual love and respect? If it breaks, then what is the point of binding two individuals forcibly?
- Does the marital rape violate a married woman's right to equality by denying her the same legal remedies as unmarried women? The Supreme Court will see this issue as this is a challenge where the court will see constitutional morality and social norms.
- Private sphere: The creation of an impenetrable marital sphere, where the court cannot intervene, leaves the women without any recourse. The challenge before the court is whether it can step in and intervene in private spaces.
- Is our society ready to adopt this change? MRE is not treated as rape in India. It is going to be challenging for the court to criminalize it. Our society is patriarchal society i.e. male dominant and the Government is also opposing it giving reasons like India is not ready to criminalize marital rape.

⁴⁸The Bharatiya Nyaya Sanhita, 2023, Act No. 45 of 2023.

⁴⁹*Criminalizing Marital Rape Will Hurt Family, Says Parliamentary Panel*, TIMES OF INDIA (Mar. 15, 2016), <https://timesofindia.indiatimes.com/india/criminalizing-marital-rape-will-hurt-family-says-parliamentary-panel/articleshow/51408978.cms>.

- How to prove marital rape in court, and the burden of proof will be on the accused and Government argues that a law criminalizing marital rape could be exploited by women, raising concerns about the potential for false accusations against husbands.⁵⁰ The researcher does not think that this logic is substantial, If in Rape cases agencies can find evidence so why can't they find evidence in marital rape just because it is difficult to find evidence that doesn't mean that we wouldn't criminalize MRE.
- Differentiating between consensual and non-consensual will be challenging.
- How to eradicate root causes like patriarchal and archaic society views. It is traditionally believed that marriage implies perpetual consent to sexual activity, based on outdated notions of conjugal rights, suggesting that once a woman marries, she is considered to have given permanent consent to her husband's advances.
- Other laws also provide -while opposing the criminalization of marital rape, the govt is of the view that there are already other laws like the Protection of Women from Domestic Violence Act (2005)⁵¹In which sexual violence is already covered, Section 3 of the D.V. Act defines sexual abuse to include any conduct of a sexual nature that abuses, humiliates, degrades, or otherwise violates the dignity of women. This includes non-consensual sex, various personal laws dealing with marriage and divorce, cruelty(section 85 of BNS), sexual assault, and sexual harassment that protects married women's rights. But if we see and compare the ingredient of these provisions with rape, we will find that these are different and also they do not address the non-consensual sex between husband and his wife.⁵²
- Critics are of the view that Cultural and societal values will be affected. If that is the case, aren't women also a part of this society? If they are being treated badly, will it not affect their cultural and societal values?

⁵⁰ RIT Foundation v. Union of India, 2022 SCC OnLine Del 1404.

⁵¹ The Protection of Women from Domestic Violence Act, 2005, Act 43 of 2005.

⁵² RIT Foundation v. Union of India, 2022 SCC OnLine Del 1404.

- Govt is of the view that just because Western countries have criminalised rape that doesn't mean we are going to do the same. The government also talks about the separation of powers, in which one organ cannot encroach on the function of another organ. The government is stating that the judiciary cannot make law; it is the power of legislation.⁵³
- The government is admitting that not considering the consent of married women in sexual acts is wrong but they are of the view that it would be injustice and harsh to call it rape.⁵⁴
- The government is of the view that a non-consensual act with a wife and another woman to whom he is not married is different.⁵⁵
- The government is of the view that in judicial separation, husband and wife are mentally and physically separated; therefore wife's consent is withdrawn from the date of separation. Therefore, MRE does not violate Article 14 of the Constitution of India.

IX. CONCLUSION

Marriages are believed to be sacrosanct in Indian culture. It is a legally and socially sanctioned union between a man and a woman. In India, marriage is considered a lifelong union that cannot be broken. In India, the constitution is supreme. If there is a conflict between constitutional morality and social morality, then constitutional morality should prevail, as the Hon'ble Supreme Court has done in the past few years, whether it is the Joseph Shine case.⁵⁶ The triple talaq case⁵⁷. The Hon'ble Supreme Court has followed the transformative constitutionalism view.

MRE is incompatible with modern constitutional values as it represents a form of negative state action whereby allowing the violation of a woman's bodily autonomy within marriage, the state not only undermines her control over her own body but also breaches her fundamental right to live with dignity and respect. MRE is not only

⁵³ RIT Foundation v. Union of India, 2022 SCC OnLine Del 1404.

⁵⁴ RIT Foundation v. Union of India, 2022 SCC OnLine Del 1404.

⁵⁵ The Telegraph Online, <https://www.telegraphindia.com/opinion/once-again-editorial-on-centres-affidavit-on-marital-rape/cid/2054453>.

⁵⁶ Joseph Shine v. Union of India, (2019) 3 SCC 39 (India).

⁵⁷ Shayara Bano v. Union of India, AIR 2017 SC 4609.

bad for married women but also for society, it provides a sense of protection in the mind of husbands that they can rape their wives whenever they want because there are no laws that criminalize marital rape.

So by giving blanket protection to husbands, the government is giving the wrong message to society. As jurisprudential essence of our constitution is the rule of law, natural justice, equity, good conscience, reasonableness, non-arbitrariness and it is already enshrined in our constitution that no one can be discriminated against on sex, caste, etc. (ARTICLE 15), so why should be there any discrimination in marital rape as Rape is Rape whether within marriage or outside marriage. It is high time for society to move beyond its patriarchal and outdated mindset and create a path where a woman's consent truly matters, as Justice delayed is justice denied.

X. SUGGESTION

These are a few suggestions the researcher can think of.

- The government needs to think of a solution for MRE at the ground level. Even if MRE is overturned and a husband's rape of his wife is made illegal, the courts will still need to evaluate the evidence; there is no good reason to doubt the court's competence. Therefore, rather than claiming that fictitious cases will be filed, why doesn't the government attempt to make the system better? Like trained Investigating officer, trained medical officer, well-equipped court, improved medical facility, forensic Lab equipped with up-to-date modern equipment, so that other evidence can be collected like DNA sampling, fingerprint, hair, blood stain, etc.
- Education is also important; if children learn how to behave with women and respect them, there is a chance that these problems will be reduced.
- Government should take this issue seriously and also provide free counseling for marital rape victim, psychiatric treatment, facility to improve their skill so that they can be self-independent.
- The role of mainstream media, digital media, and movies also influences the mindset and thinking of the person. In movies, the depiction of a hero treating his partner inhumanely, forced sexual intercourse, and showing that

it is manly behavior, all these things affect our societal mindset because some people follow actors as their ideal. The government needs to address this issue as well.

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