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Invalidating Spousal Exemption: Need of Marital Rape Law in India

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ABSTRACT

The Constitution of India guarantees equality before law and protection of life and personal liberty². However, these rights have proven to be iniquitous to married women by not being able to protect their dignity in their own homes. Women in India are discriminated on the basis of their marital status. A man having sexual intercourse with a woman without her consent is called a rapist, and is punished accordingly by the Court for his crimes. On the other hand, the Indian Judiciary puts on a blindfold when a man forces his wife to have sexual intercourse with him against her will. Section 375 of the Indian Penal Code only recognizes marital rape in cases where the wife is under the age of eighteen years.³ The question that arises is that how can a woman's bodily integrity be discriminated on the basis of her marital status. Indian Constitution ensures equality to all, but refuses to recognize the sexual autonomy of a married woman. A country which claims to be progressing and modernizing is still under the shackles of patriarchy that tries to own women in the name of marriage. The Indian Judiciary has been helping these patriarchs by claiming to support the pillars and sanctity of marriage.

I. INTRODUCTION

The institution of marriage has had a religious and cultural effect on the Indian society in a way that joins two families in an emotional bond. This bond has been structured on the foundation of patriarchy that dictates a woman's life choices in every possible way. In addition to the husband making most of his wife's decisions, he also owns the woman's sexual autonomy. This stance can be corroborated with the Indian judiciary's decision of not recognizing the concept of marital rape. The Courts refrain from dealing with the issue of marital rape because they do not want to tamper the institution of marriage. Even after the implementation of right to privacy in *Justice K.S. Puttuswamy v. Union of India*, that is intrinsic to Article 21 of the Constitution⁴, Indian judiciary has declined the requests of the

¹Author is a student at Jindal Global Law School, India.

² INDIAN CONST. art 14

³ Indian Penal Code § 375, No. 45 of 1860, India Code.

⁴*Justice K.S. Puttuswamy (Retd.) v. Union of India*, (2017) AIR 2017 SC 4161 (India)

women activists to criminalize marital rape. The Courts stated that consenting to a marriage is an implied consent of the woman to have sexual intercourse with the man.⁵ This proves that the Courts deliberately choose to ignore the fact that arranged marriages have been an integral part of the Indian society. The Court's decision to not take any action against marital rape of a woman older than the age of eighteen years has been supporting the regressive ideologies of the Indian society that forces women to provide the men with everything, including their bodies.

Several women are forced into marriages by their family members, and further forced to have sexual intercourse with their husbands. In such cases, the women's consent was not taken into consideration at any given point. The brutal harm that is inflicted on these women's bodies and integrity has been a result of the iniquitous rape laws that govern the country.

Moreover, women who consensually marry a man don't consent to give their bodies to their husbands at their discretion. But through the legislations of the country, marriage guarantees the man access to his wife's body at his discretion, and the wife has to comply with all his demands because that is what the Indian judiciary has interpreted marriage to be.

II. JUDICIAL APPROACH TOWARDS EXCEPTION 2 TO SECTION 375 OF THE IPC

The definition of rape has been codified in section 375 of the Indian Penal Code which involves all forms of sexual assault on women which are non-consensual in nature.⁶ Exception 2 to the said section decriminalizes non-consensual sexual intercourse between husband and wife, provided that the wife is over the age of eighteen years.⁷ Earlier, this exemption was not applicable to wives under the age of fifteen years. However, in *Independent Thought v. Union of India*, the Supreme Court read down this exemption to mean that sexual intercourse or sexual acts by a man with his own wife, the wife not being under 18 of age, is not rape.⁸

The Indian society, including the Indian judiciary, assumes that a woman consenting to marriage means that she has given perpetual consent to have sexual intercourse with him.⁹ The current laws don't only assume but also dictate a woman to provide her husband with sexual needs on his demand.

⁵Sahajveer Baweja, *MARITAL RAPE AND THE DISPUTED CONCEPT OF IMPLIED CONSENT*, Law Audience Journal (June. 30, 2020, 9:40 AM), <https://www.lawaudience.com/marital-rape-and-the-disputed-concept-of-IMPLIED-consent/>

⁶ Indian Penal Code § 375, No. 45 of 1860, India Code.

⁷See generally *id*

⁸*Independent Thought v. Union of India*, (2013) 382 SCC (2017) (India).

⁹Baweja, *supra* note 4

The above mentioned case brought the Indian judiciary to take one step towards de-immunizing a violent crime that takes place within the purview of marriage. This judgement has led to several writ petitions challenging the constitutionality of the said exception.

(A) VIOLATION OF ARTICLE 14 OF THE CONSTITUTION:

Article 14 of the Constitution ensures that the State does not deny any person equality before the law or equal protection of the laws within the territory of India.¹⁰ Irrespective of what the Indian Constitution guarantees, the Indian Criminal laws do not provide equal protection to its female victims and deny them the provisions to protect themselves from being raped by their own husbands.

The Indian Penal Code was drafted in the 1860s, when a married woman was not considered an independent legal entity.¹¹ Her identity was merged with that of her husband's, which is why she did not possess many of the rights now guaranteed to her as an independent legal entity by the Indian judiciary.¹² Exception 2, which essentially exempts actions perpetrated by husbands against their wives from being considered acts of "rape," is largely influenced by and derived from this already existing doctrine of merging the woman's identity with that of her husband.¹³ But with time, Indian laws changed their views by granting both men and women their individual rights. Moreover, the Indian judiciary ensured that women had provisions to protect themselves by introducing The Protection of women against Domestic Violence Act, 2005.¹⁴

Article 14 guarantees equality to all. However, this guarantee comes with an exception. In *Budhan Choudhry v. State of Bihar* and *State of West Bengal v. Anwar Ali Sarkar*, the Supreme Court held that any classification under Article 14 of the Indian Constitution is subject to a reasonableness test that can be passed only if the classification has some rational nexus to the objective that the act seeks to achieve.¹⁵ But, the Indian Criminal Law's distinction between its female victims on the basis of their marital status frustrates this classification, as well as the purpose of section 375 of IPC. As no rational nexus can be

¹⁰INDIAN CONST. art 14

¹¹*To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99(6) Harv. L. Rev. 1255, 1256 (1986).

¹²*See generally id*

¹³Sarthak Makkar, *Marital Rape: A Non-criminalized Crime in India*, HARVARD HUMAN RIGHTS JOURNAL (June. 30, 2020, 10:04 AM), <https://harvardhrj.com/2019/01/marital-rape-a-non-criminalized-crime-in-india/>

¹⁴Protection of Women from Domestic Violence Act, 2005, No. 43, Acts of Parliament, 2005 (India).

¹⁵*Budhan v. State of Bihar*, AIR (1955) SC 191 (India); *State of West Bengal v. Anwar Ali Sarkar*, AIR (1952) SC 75 (India).

decrypted between the classification created by the Exception and the underlying objective of the section, it does not satisfy the test of reasonableness, and thus violates Article 14 of the Indian Constitution.

(B) VIOLATION OF ARTICLE 15(1) AND 15(3) OF THE CONSTITUTION:

Article 15(1) prohibits discrimination against any citizen on grounds of religion, race, caste, sex, or place of birth.¹⁶ In *NALSA v. Union of India*, the Supreme Court stated that the specific categories in Article 15 are not exhaustive, and include gender identity.¹⁷ Therefore, making it clear that marital status of a woman may be read into ‘sex’, and may be recognized as gender or sexual discrimination. Exception 2 to section 375 of the IPC assumes that women give perpetual consent to have sexual intercourse with their husbands upon marriage. These provisions discriminate against married women vis-a-vis women who are married but separated and/or unmarried. This assumption that has been the foundation of the said exception creates gender stereotypes leading to subordination of women, making it violative of Article 15(1).

Article 15(3) allows the State to make special provisions for women and children.¹⁸ In *Sir Mahedab Jiew v. Dr. B.B. Sen*, the Calcutta High Court that the special provisions for women in Article 15(3) cannot be construed as authority a discriminatory against women and the word “for” in the context means “in favour of”.¹⁹ Therefore, exception 2 to section 375 of the IPC infringes Article 15(3) by discriminating against women.

(C) VIOLATION OF ARTICLE 19(1) (A) OF THE CONSTITUTION:

Article 19(1)(a) guarantees freedom of speech and expression to its citizens.²⁰ Exception 2 to section 375 of the IPC does not recognize the right of a married woman to consent or not to consent to have sexual intercourse with her husband. In addition to this, in *NALSA v. Union of India*, the Court stated that freedom of speech and expression includes one’s right to expression of his/her self-identified gender.²¹ The marital rape exception restricts a married woman’s sexual behaviour with no rationale to be justified under any of the heads of Article 19(2) of the Constitution, therefore making it violative of Article 19(1)(a).

(D) VIOLATION OF ARTICLE 21 OF THE CONSTITUTION:

Article 21 of the Constitution guarantees that no individual shall be deprived of their life or

¹⁶INDIAN CONST. art 15, cl. 1

¹⁷*NALSA V. Union of India*, 2014 AIR SC 1863 (India)

¹⁸INDIAN CONST. art 15, cl. 3

¹⁹*Sir MahedabJiew v. Dr. B.B. Sen*, AIR 1951 Cal 563 (India)

²⁰INDIAN CONST. art 19,cl. 1,cl. a

²¹*NALSA V. Union of India*, 2014 AIR SC 1863 (India)

personal liberty except according to procedure established by law.²² It is pertinent to note that this clause has been interpreted to go beyond the literal meaning of life and liberty by the Supreme Court in various judgements which will be discussed below. The interpretation has been extended to include right to privacy, health, dignity, safe living conditions and safe living environment. Hence, these interpretations provide enough corroboration to state that exception 2 to section 375 of the IPC that grants immunity to husbands who engage in forced sexual activities with their wives inflicting a lot of emotional and physical damage, weakens their ability to live with dignity, further violating their rights enshrined in Article 21 of the Constitution.

As mentioned above, right to privacy was included in the enshrined rights of Article 21 of the Constitution in *Justice K.S Puttuswamy (Retd.) v. Union of India*.²³ The Court further held that the right to privacy includes “decisional privacy reflected by an ability to make intimate decisions primarily consisting of one’s sexual or procreative nature and decisions in respect of intimate relations.”²⁴ Moreover, in *The State of Karnataka v. Krishnappa*, the Supreme Court held that “sexual violence apart from being a dehumanizing act is an unlawful intrusion of the right to privacy and sanctity of a female, further stating that non-consensual sexual intercourse amounts to physical and sexual violence.”²⁵ In *Suchita Srivastava v. Chandigarh Administration*, the Supreme Court also stated that the right to make choices in regards to sexual activities come under the purview of the rights enshrined in Article 21.²⁶ Right to sexual privacy is meant to be exercised by both the marital partners in terms agreeable to both of them. This right should not be used to shield abuse within the institution of marriage.

None of the above judgements or Articles granting fundamental rights to its citizens discriminate against married women. The damage that is inflicted on these victims are the same, irrespective of their marital status. Moreover, the emotional damage that these victims face might be more traumatizing for the women raped by their own husbands in their own homes, as they are forced to cohabit with their sexual predators who were supposed to be their trustful partners.

(E) VIOLATION OF ARTICLE 13 OF THE CONSTITUTION:

Clause 1 of Article 13 clearly states that all laws in force in the territory of India immediately before the commencement of the Constitution, inconsistent with the provisions of Part III of

²² INDIAN CONST. art 21

²³ *Justice K.S. Puttuswamy (Retd.) v. Union of India*, (2017) AIR 2017 SC 4161 (India)

²⁴ See generally *id*

²⁵ *The State of Karnataka v. Krishnappa*, (2000) 4 SCC 75 (India)

²⁶ *Suchita Srivastava v. Chandigarh Administration*, (2008) 14 SCR 989 (India)

the Constitution that guarantees fundamental rights to its citizens, to the extent of such inconsistency, be void.²⁷

The Indian Penal Code was drafted in the year 1860 and the Indian Constitution was adopted in the year 1950. As examined earlier in the paper, the marital rape exemption is in violation of Articles 14, 15(1), 15(3), 19(1)(a) and 21 of the Constitution, hence making it violative of Article 13(1).

Clause 2 of Article 13 prohibits the State from making any law which takes away or abridges the rights conferred in Part III of the Constitution. Any law made in contravention of this clause is to be declared void.²⁸

In *Independent Thought v. Union of India*, the Supreme Court read down the exception 2 to section 375 of the IPC by increasing the age of a minor wife who can use the provisions of section 375 from fifteen years to eighteen years.²⁹ Although this amendment improved the conditions of minor wives, it is still discriminating against major wives by violating their fundamental rights. Hence, the current exception amended by the Supreme Court in the said case is in violation of Article 13(2).

III. RATIONALES PROVIDED TO KEEP THE EXEMPTION

Several arguments have been advanced by the Indian Courts in defence of the validity and necessity of the marital rape exemption that shields the husbands from being punished for the gruesome crimes committed by them on their wives who trusted them to be their life partners. It is said that the stigma of being called a rape victim sticks with the woman for eternity, making it difficult for her to live a normal life and re-marry in the future. These stances put forward by the Indian society is a form of victim blaming that makes it extremely difficult for a woman to come forward and raise her voice against the damage imposed on her body and mind. Moreover, it seems like it is the men whom the Courts have been trying to save from the stigma of being called a rapist.

(A) IMPLIED CONSENT:

The patriarchal ideology that is ingrained into the Indian society though Mathew Hale of England's declaration that states "the husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath

²⁷INDIAN CONST. art 13, cl. 1

²⁸INDIAN CONST. art 13, cl. 2

²⁹*Independent Thought v. Union of India*, (2013) 382 SCC (2017) (India).

given herself up in this kind unto her husband which she cannot retract.”³⁰This assumption has always undermined women by treating them as chattel that belong to their husbands. It is assumed that upon marriage, the wife makes her body perpetually accessible to her husband. She has no right over her own body as upon marriage, because the society expects her husband to own her sexual autonomy. This implies that an unmarried woman’s consent on every act of intercourse is necessary, however the virtue of consent is different for a married woman.

When a woman consents to marry a man, she does it with the knowledge of having sexual intercourse with him in the future. But she also believes that she will have a right to refuse sexual intercourse depending on her health or her mood. Marriage is supposed to bind two individuals together as equal partners, thus requiring mutual consent in every sexual act from both the parties. As stated in *Nimeshbhai Bharatbhai v. State of Gujarat*, “It has long been time to jettison the notion of ‘implied consent’ in marriage. The law must uphold the bodily autonomy of all women, irrespective of their marital status.”³¹

(B) DIFFICULT TO PROVIDE EVIDENCE:

The rationale of difficulties of providing evidence to prove a charge of forced sexual intercourse between a husband and a wife has been used to state the offence of marital rape as unprosecutable.

This concern is valid, but not reasonable enough to provide immunity to the offenders of a highly violent crime. There are various cases in which evidence is difficult to provide, yet the victims of those cases are heard and measures are taken by the Courts to provide justice. Moreover, the law does not bar an unmarried woman from lodging a charge of rape against a man she is sexually familiar with, but a married woman, who might also be sexually familiar with her husband, is barred by law to use those provisions.³²

(C) MISUSE OF THE PROVISIONS:

The concern of vindictive wives lodging false complaints against their husbands with an intention of vengeance or using the threat of prosecution to coerce their husbands into settling for an amount that is favourable to the wife upon divorce has also been advanced. An affidavit submitted to the Delhi High Court in the case *RIT Foundation v. Union of India* stated that a law criminalizing marital rape can become an “easy tool to harass the

³⁰Pallavi Prasad, *Why It’s Still Legal For India Men To Rape Their Wives*, THE SWADDLE (June. 30, 2020, 11:24 AM), <https://theswaddle.com/marital-rape-inda-decriminalized-crime/>

³¹*Nimeshbhai Bharatbhai v. State of Gujarat*, 2018 SCC ONLINE GUJ 732 (India)

³²Note on the Marital Rape Exemption, 52 *N.Y.U.L.R* 306 at 314 (1977)

husbands.”³³

This concern is not sufficient to state the offence of marital rape as unprosecutable because even with the exemption provided to the husbands by exception 2 to section 375 of the IPC, there are several other provisions provided to married women, for instance, Protection of Women from Domestic Violence Act 2005³⁴ and cruelty under section 498A of the IPC³⁵ that can be misused by fabricating complaints against the husbands.

(D) DISCOURAGES RECONCILIATION:

Indian Courts have argued that criminalizing marital rape would prevent reconciliation and harm the husband and wife’s marital relationship.³⁶ The Indian society as a whole considers marriage to be a sacred institution which should be maintained by taking any and every possible measures. The fact that criminalizing this offence would promote marital discord makes the said action bad in law.

However, the Courts have failed to realize that criminalizing marital rape would not harm a marriage, rather a woman being raped by her own husband would harm a marriage. The fact that the woman wants to press rape charges against her husband is enough proof that her marriage is not harmonious. Moreover, the Courts should not put the maintenance of a marriage above a woman’s dignity and her bodily integrity.

(E) ALTERNATE REMEDIES PROVIDED BY THE JUDICIARY:

Married women have been given certain provisions like the Protection of Women from Domestic Violence Act, 2005 and section 489A of the Indian Penal Code to protect themselves from the mental and physical harm that is inflicted upon them in their domestic homes.³⁷

The Protection of Women from Domestic Violence Act, 2005 includes sexual abuse as a form of domestic violence.³⁸ In *Bhartiben Bipinbhai Tamboli v. State of Gujarat*, the purview of sexual abuse was further explained by stating that “this is a form of physical force and includes any act in which a woman is forced to perform any unwanted, unsafe or degrading sexual activity. It includes calling her sexual names, hurting her with objects and weapons during sex and includes forced sex even by a spouse or intimate partner with whom she has

³³Prasad, *supra* note 29

³⁴Protection of Women from Domestic Violence Act, 2005, No. 43, Acts of Parliament, 2005 (India)

³⁵Indian Penal Code § 498, cl. A, No.45 of 1860, India Code

³⁶M. V. Sankaran, *THE MARITAL STATUS EXEMPTION IN RAPE*, 20 Journal of the Indian Law Institute 594, 602 (1978)

³⁷Protection of Women from Domestic Violence Act, 2005, No. 43, Acts of Parliament, 2005 (India); Indian Penal Code 1860 § 498, cl. A, No. 45 of 1860, India Code

³⁸*See generally id*

consensual sex.”³⁹ The said Act protects women by giving residence or protection order, and only sentences imprisonment which can extend upto one year in case the defendant violates the protection order.⁴⁰

Section 498A of the IPC deals with the husband or relative of the husband subjecting the wife to cruelty, punishment for which may extend upto three years.⁴¹ As per clause (a) of the said section, cruelty includes grave injury or danger to life, limb or health (whether mental or physical) of the woman.⁴²

Both the alternative remedies provided to the married women of the country is a positive approach taken by the Indian judiciary with the sole purpose of protecting women from the torture that they face within the purview of marriage. However, these remedies are not enough to protect them from the grave violent offence of rape. The said Act mentions sexual abuse as a form of domestic violence. It does not consider rape being an offence between a husband and a wife. The offence of rape is much more graver than the offence of sexual abuse. Moreover, the Act provides women with a ground to seek divorce or judicial separation. It does not punish the offenders for committing such crimes. Section 498A of the IPC also does not mention marital rape as an offence. Mention of mental and physical injury to women in clause (a) of the section leaves a vast room for interpretation. In addition to this, imprisonment of a term extending upto three years is not enough for committing a grave offence like that of rape.

IV. LAW OF MARITAL RAPE IN SOME OTHER JURISDICTIONS

India is one of the 36 countries that provide spousal rape exemption to the husbands.⁴³ But more than 50 countries have laws criminalizing the offence of marital rape.⁴⁴ These countries recognized the gravity of this offence and took appropriate measures to eradicate it. Poland in 1932 was the first country to have a law explicitly making marital rape a criminal

³⁹Divya Rai, *Protection of Women from Domestic Violence Act*, iPleaders (June. 30, 2020, 11:45 AM), <https://blog.ipleaders.in/protection-of-women-from-domestic-violence-act/>

⁴⁰Protection of Women from Domestic Violence Act, 2005 § 18, § 31, No. 43, Acts of Parliament, 2005 (India)

⁴¹Indian Penal Code § 498, cl. A, No. 45 of 1860, India Code

⁴²See generally *id*

⁴³Sheikh Saaliq, *Every Third Woman In India Suffers Sexual, Physical Violence at Home*, NEWS 18 INDIA (June. 30, 2020, 12:05 PM), <https://www.news18.com/news/india/the-elephant-in-the-room-every-third-woman-in-india-faces-domestic-violence-1654193.html#:~:text=Ironically%2C%20India%20is%20one%20of%20the%2036%20countries,only%20when%20the%20wife%20is%20below%20age%2015.>

⁴⁴ELLEN WULFHORST, *UN URGES COUNTRIES TO END MARITAL RAPE AND CLOSE LEGAL LOOPHOLES*, GLOBAL CITIZEN (JUNE. 30, 2020, 12:15 PM), [HTTPS://WWW.GLOBALCITIZEN.ORG/EN/CONTENT/UN-WOMEN-MARITAL-RAPE-LAWS/](https://www.globalcitizen.org/en/content/un-women-marital-rape-laws/)

offence.⁴⁵The current position of some of the countries in respect to the offence of marital rape will be discussed below.

(A) THE UNITED KINGDOM:

The grounds for marital rape exemption was laid down by Chief Justice Sir Mathew Hale in *The History of the Pleas of the Crown*, published in 1736.⁴⁶ This ‘Implied Consent Theory of Sir Hale’ found its way into the legal system of all former British colonies that adopted the common law system.⁴⁷

In *R v. Clarke*, it was held that if the Court had made an order stating that the wife is no longer bound to cohabit with her husband, the implied consent to marital intercourse given by the wife at the time of the marriage would be revoked and the husband would no longer have immunity as he would not be entitled to have intercourse with her without her consent.⁴⁸ In *R v. Miller*, the Court held that if a wife leaves her husband and presents a petition of divorce, her acts would not amount to revocation of the implied consent to marital intercourse given by her at the time of the marriage.⁴⁹ The exemption provided to the husband would cease to apply only if an order or decree of separation was granted by the Court.⁵⁰

Finally, in the year 1991, in *R v. R*, the Court struck down the marital rape exemption further stating that any non-consensual sexual activity performed by the husband on the wife is rape.⁵¹

(B) ISRAEL:

In 1980, the Israeli Supreme Court held in *Cohen v State of Israel* that a husband may be convicted for raping his wife, and that English common law in that regard, in so far as it treated the marriage relationship as conferring on the husband a right to impose his sexual will on his wife, was inapplicable to residents of the Jewish faith in Israel.⁵²

(C) NEW ZEALAND:

Earlier, immunity was provided to husbands in cases of marital rape, unless at the time of the

⁴⁵ Shalini Nair, *Marital rape a crime in many countries, an exception in many more*, *The Indian EXPRESS* (June. 30, 2020, 12:25 PM), indianexpress.com/article/explained/marital-rape-a-crime-in-many-countries-an-exception-in-many-more4821403/#:~:text=Poland%20in%201932%20was%20the%20first%20to%20have,countries%20have%20legislatively%20abolished%20the%20marital%20rape%20immunity.

⁴⁶See generally *id*

⁴⁷Nair, *supra* note 44

⁴⁸*R v. Clarke*, [1949] 2 AH E.R. 448 (U.K)

⁴⁹*R. Miller*, [1954] 2 All E.R. 529 at 583 (U.K)

⁵⁰See generally *id*

⁵¹*R v. R*, [1972] 2 All E.R. 1353 (U.K)

⁵²*Rape within Marriage*, The Law Commission, Working Paper No. 116, London, at pg. 126

offence, the husband and the wife were living separately in different residences.⁵³ However, a 1983 report, commissioned by the New Zealand Minister for Justice, concluded that there were no real arguments of logic or principle to justify the present immunity; and that there were, conversely, positive arguments for abolishing it.⁵⁴ The point highlighted in the report was that whatever was the historical basis for the immunity, it is obviously untenable in the present day. It is unreasonable and contrary to common sense to infer that a wife, by marrying her husband, intends to make herself available to him for the purpose of intercourse whenever he wishes.⁵⁵

New Zealand completely abolished the marital rape immunity by section 2 of the Crimes Amendment Act (No. 3) 1985, and created a generic offence of sexual violation, one species of which was the offence of rape.⁵⁶

In *R v. N*, the Court of Appeal considered whether the court should apply a separate regime of sentencing in cases where the parties are married.⁵⁷ It concluded that it should not, by stating that application of different sentencing policies for married and unmarried women would be discriminating and would deny a married woman rights to her own body.⁵⁸ It also stated that the severity of the offence can be equal in both cases, hence discriminating against a woman on the basis of her marital status would be highly unfair to her.⁵⁹

(D) NEPAL:

In 2002, Nepal got rid of the marital rape exception after its Supreme Court held that it went against the constitutional right of equal protection and the right to privacy.⁶⁰ It stated that the classification of the law that an act committed against an unmarried girl to become an offence and the same act committed against a married woman not to become an offence is not a reasonable classification.⁶¹

V. CONCLUSION

As elucidated above, every country in the world once interpreted marriage to be a process of owning women like property. The norm was that the women were supposed to follow every instruction given to them by their husbands. They had no rights of their own because they had

⁵³The Crimes Act 1961 § 128, cl. 3, New Zealand Act

⁵⁴Warren Young, Rape Study, A Discussion of Law and Practice (1983), pg. 121

⁵⁵*Id* at 119

⁵⁶The Crimes Amendment Act § 2, No. 3 of 1985, New Zealand Act

⁵⁷*R v. N*, [1987] 2 NZLR 268. (New Zealand)

⁵⁸*Id* at 270

⁵⁹Young *supra*note53

⁶⁰Nair, *supra* note 44

⁶¹Nair, *supra* note 44

no identity of their own. Their identity was merged with that of their husband's. Following the said norms, it was expected of women to submit their bodies completely to their husbands upon marriage. Having constitutional rights was a far-fetched dream for these women who could not even have a right to their own bodies. But with time, the conditions improved. It was recognized that these norms are extremely derogatory in nature and appropriate steps were taken to protect the dignity of these battered women. It is pertinent to note that these changes could only take place when the judicial system of a country decided to penalize offenders harming the mental and physical state of a married woman. The measures taken by the countries mentioned above is a proof that the social and cultural beliefs of a society can be changed for the better if its judiciary decides to do so, as the laws that govern the country are the ones that can help people understand the difference between right and wrong, and encourage those women to fight for their rights who believe that it is their duty to provide for their husband's every sexual desire at all times.

The Indian judiciary recognizes the husband and the wife to be equal partners in a marriage with a legal identity of their own. It recognizes the degree of violence that takes place within a marriage and has taken steps to protect married women from the said violence. However, it refuses to believe the occurrence of rape within a marriage. The former Minister of State for Home Affairs Haribhai Parathibhai Chaudhary stated that the concept of marital rape, as understood internationally, cannot be suitably applied in the Indian context due to various factors including level of education/illiteracy, poverty, myriad social customs and values, religious beliefs, mindset of society to treat marriage as a sacrament, etc.⁶² Although, these reasons have not stopped the government from introducing the domestic violence act or the section dealing with dowry and cruelty into the India legislation.⁶³ Moreover, the defence of social backwardness of a country cannot be used by a judicial system to shield a violent and grave crime that continues to prevail within the purview of marriage. The marital rituals that are vital in order to perform a marriage can be considered as religious beliefs, however every other aspect of a marriage is governed by statutory legislation.⁶⁴ Poverty or illiteracy has no logical relation with the crime of rape. It cannot be used to support an inhumane act done by a husband on his wife. The fact that the laws do not offer enough criminal remedies to married women elucidates the incompetence of the Indian judicial system in regards to the offences that prevail within a marriage. Hence, it can be deduced that the Indian judiciary

⁶²*India not to criminalize marital rape*, THE HINDU (June. 30, 2020, 12:48 PM), <https://www.thehindu.com/news/national/concept-of-marital-rape-cannot-be-applied-in-india/article7154671.ece>

⁶³Protection of Women from Domestic Violence Act, 2005, No. 43, Acts of Parliament, 2005 (India); Indian Penal Code 1860 § 498, cl. A, No. 45 of 1860, India Code

⁶⁴*See generally id*

understands the violence that a married Indian woman faces, but refuses to take measures for the same because of the regressive and patriarchal mindset of the society. It is high time that the judicial system takes measures and finally abolishes exception 2 to section 375 of the IPC because they are the only ones that can ultimately put an end to this patriarchy that exists in the Indian society, and shield the women from the tortures inflicted on them instead of shielding the men who inflict these tortures.
