

The marital rape exemption law family essay

Law



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Introduction" If man is a God, wife is also a Goddess. She is not a slave, but a friend and companion with equal rights. Each is a Guru, a teacher for the other"-M. K. Gandhi. Idyllic marriage is described as act which is more than a physical act. It is an act of sharing. It is regarded as a sacred communion of two souls united by the divine hands of God. Marriage may be ' made in heaven', but in reality of this mortal world, it is regulated by societal norms. Marriage is one of the main institutions of human civilization. It is a social union and legal contract between two people that establishes rights and obligations between the spouses. Universally marriage is seen as an institution in which interpersonal relationships, usually intimate and sexual in nature is acknowledged. Since the beginning of human civilization in the patriarchal societal setup , women were seen as chattel transferred by the father to the husband in a marriage. Manus, in Roman law, was autocratic power of the husband over the wife, corresponding to patria potestas of the father over his children. A daughter ceased to be under her father's potestas when she came under the manus of her husband.[1]Historically marriage was seen as a way of procreation, women as a medium of progeny. It came to be universally acknowledged that satisfaction of the husband's sexual demands was one of the marital obligations of women which in turn gave rise to the marital rape exemption that existed in all most all societies across the globe. In this paper I have attempted to deal with the issue of marital rape and analyse the need for its criminalization in the Indian context. The first chapter briefly discusses the concept of marital rape, meaning and its repercussions. Followed by a detailed discussion on the historical background of the exemption of marital rape in law in the second chapter . The Third chapter deals with a comparative analysis of the laws in various

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countries with respect to marital rape and its exemption. The fourth chapter deals with an in-depth analysis of the various arguments in support and in defence of abolition of marital rape exemption in the Indian context. In the end I have expressed my own opinion on the issues addressed above and made certain suggestions to tackle with the problem of marital rape in India.

II Concept of Marital Rape

" Man is the hunter; woman is his game: The sleek and shining creatures of the chase, We hunt them for the beauty of their skins; They love us for it, and we ride them down. Man for the field and woman for the hearth: Man for the sword and for the needle she: Man with the head and woman with the heart: Man to command and woman to obey; All else confusion." In The Princess - Alfred Tennyson

The above quoted lines from Tennyson's poetry in not a mere Victorian reminiscence, it is reality of the patriarchal society that relegates women to the status of lesser beings, and unfortunately if they happen to married, they are treated as a chattel transferred by her father to her husband. The ' scared bond' of marriage then becomes an iron curtain behind which violence can be meted out on a woman in the name of marital obligations. Marital rape or Spousal rape can be defined as a performance of sexual act without the consent of the wife or against her will, or when the consent is given under coercion or fear.[2]Relying on Michel Foucault's understanding of the relation between power and sex, where he understood power as essentially that which seeks to dictate its law to sex,[3]rape within in marriages can be understood to be motivated by a desire to assert power, establish control over women.[4]It is a non-consensual act of violent perversion by a husband against the wife where she is physically and

sexually abused.[5] Marital rape is not a new phenomenon it is in fact a result of age old gender bias and repression of women, throughout centuries women have been subjugated by their male counter parts.[6] The sexual behaviour between a man and woman in marriage has been determined and regulated by social norms since time immemorial. Despite the great cultural, linguistic, religious and racial diversity in communities around the globe some basic similarities in this context can be traced back to the deep rooted patriarchal ideologies that governed the institution of marriage across borders. The idyllic notion of marriage propagated by all religions[7] stands to be an oxymoron when the same religion imposes burden in form of marital duties on the women. Women are made 'beast of burden' to carry out all the marital obligations. Sexual relations within the marriage are held to be the part of that duty and it is mentioned in various scriptures.. Marital rape is not only seen as a way of asserting the 'marital right' by the husband but it is further reinforced by the religious tenet. Under every religion whether Hinduism, Islam, or Christianity, women are treated as subservient to husband . For example, Judeo-Christian tenets established rape as a legitimate means of acquiring wives. In words of Florence Rush[8]: " Judaism ordained that bride could be legally acquired by contract, money or sexual intercourse, but since the church was against materialism by contract , sexual intercourse emerged as a validating factor Pope Gregory in 16th cen. ordained that ' any female taken by a man in copulation belonged to him and his kindred. Copulation with or without consent establish male possession on the female.' So, women were treated as merely a ' property' of the husband." According to Susan Brownmiller , " The exemption from rape prosecutions granted to husbands who force their wives into acts of <https://assignbuster.com/the-marital-rape-exemption-law-family-essay/>

sexual union by physical means is as ancient as the original quaint phrase of Biblical origin, 'unlawful carnal knowledge'.^[9] According to Bible any carnal knowledge outside marriage was deemed unlawful, while any carnal knowledge within the marriage contract was considered lawful'.^[10] Under Hinduism, it is mentioned that a wife must submit to her husband as a part her marital duty. There is an obligation put on a wife that ' a dutiful should never say no to her husband. The Vedas clearly stated that a woman's body is not her own, and she should always surrender to her husband without a murmur.^[11] The Maitrayani Samhita and the Taittiriya Samhita stresses upon the same and sanctions the use of force against the wife in a situation where she did not submit to his wishes.^[12] Under the personal laws a ' non consensual intercourse' is not treated as an offence or a ground of divorce. ^[13] Thus, although rape within marriage existed since the time institution of marriage first came into existence, the concept of marital rape was unknown to history as most societies considered it as acceptable to force their wives to have intercourse as a part of marital obligation. From the beginning of the 19th century women's movement, activists challenged the presumed right of men to engage in forced or coerced sex with their wives. Around the 20th and 21st century as the discourse of human rights gained momentum, the believe of forced sexual intercourse as marital obligation was vehemently challenged. It is only around the 19th century that the concept of marital rape first took shape. Feminists worked systematically since the 1960s to overturn the marital rape exemption and criminalize marital rape. In December 1993, the United Nations High Commissioner for Human Rights published the Declaration on the Elimination of Violence Against Women. This established marital rape as a violation of human rights. This marked the <https://assignbuster.com/the-marital-rape-exemption-law-family-essay/>

development of the concept of marital rape and it became a burning issue of women rights and individual liberty. Ever since then there has been a gradual increase in criminalization of spousal rape in countries around the globe. However present day studies indicate that marital rape is very common form of sexual violence and millions of women face this sort of violence every year.[14]Research reveals that that between 10 to14 % of married women are raped by their husbands:[15]. Sexual assault by one's spouse accounts for approximately 25% of rapes committed.[16]It is a conscious process of intimidation and assertion of the superiority of men over women. Finkelhor and Yllo (1985)[17]distinguish between different forms of coercion which facilitates marital rape: Social coercion is the pressure of cultural expectations or social conventions. Social coercion regarding marital sex is institutionalized in every culture and internalized in individuals. Interpersonal coercion occurs when a woman has sex with her husband in the face of threats that are not violent in nature such as threat to withhold money or have an affair or nasty behaviour towards the children. Threatened or actual physical coercion, in contrast, is at the core of marital rape. Physical threats can range from explicit threats to kill a woman if she doesn't comply with or implied threat that she will get hurt if she doesn't cooperate.

- Veena Das in an enlightening account seeks to explain how ' sex is placed by power in a binary system of licit versus illicit and permitted versus forbidden[18]. In the context of marital rape , the exemption that exists in law can be seen as a state protected sanction that treats marital rape as licit

as opposed to the illicit form of non marital rape. Thus term " Marital Rape" is seen to be highly contentious and creates confusion for rape is widely regarded as a sexual transgression, whereas the realm of marriage is seen as a space where sex is socially sanctioned.[19]Moreover women themselves do not recognize sexual assaults by a husband as rape (compared with sexual assaults by strangers or acquaintances) and so are less likely to report it.[20]Further there are many stereotypes about women and sex which continue to be reinforced across cultures through both mainstream and pornographic media misleading men into believing that they should ignore a woman's protests taking ' no' for a ' yes', but also misleads women into believing that they themselves must have " sent the wrong signals," blaming themselves for unwanted sexual encounters, or believing that they are " bad wives" for not enjoying sex against their will. Women seldom realise that every non-consensual sexual act whether with force or without force is a violation of her right to bodily autonomy.[21]Hence " rape in marriage" is still a hidden phenomenon and considered as a non-issue. Some researchers argue that marital rape is an extension of domestic violence because majority of women who are raped by their partners are also battered. In fact, violence cannot be compartmentalized, it is a continuum. Finkelhor and Yllo have tried to categorize the sexual assault into three forms[22]:-Battering rape: In " battering rapes", women experience both physical and sexual violence in the relationship and they experience this violence in various ways. Some are battered during the sexual violence, or the rape may follow a physically violent episode where the husband wants to make up and coerces his wife to have sex against her will. The majority of marital rape victims fall under this category. Force-only rape: In " force-only"

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rape, husbands use only the amount of force necessary to coerce their wives; battering may not be characteristic of these relationships. The assaults are typically after the woman has refused sexual intercourse. Obsessive rape: Other women experience what has been labelled " sadistic" or " obsessive" rape; these assaults involve torture and/or " perverse" sexual acts and are often physically violent. The fact is how much marital rape exists cannot be determined with any precision. Offence of rape has a legal remedy in all jurisdictions yet it remains to be one of the most underreported crimes, then one can imagine the fate of marital rape victims , where this sort of sexual violence within marriage is not even considered a crime in society Rape is a crime against basic human rights and a violation of the victim's most cherished of fundamental rights protected by the constitutions and international covenants. Marital rape, therefore, is a scar on the sacrosanct institution of marriage and a formidable kind of sexual violence more so as it is committed by someone a woman knows, trusts and loves .

III. Historical Background of the Marital Rape Exemption

" A female Slave has an admitted right and is considered under a moral obligation to refuse her master the last familiarity not so the wife however brutal and unfortunate a tyrant she may be chained to...he can claim from her the lowest degradation of human beings that being made an instrument of an animal function contrary to her inclinations."- John Stuart

Mill(1869)From time immemorial rape, virginity and marriage have been intrinsically linked. Together they form the " Unholy Trinity".[23]Originally, the word ' rape' was akin to Latin term ' rapine' or ' rapere' and referred to the more general violations - looting, destruction, enslavement, talking away

and capture of citizens-inflicted upon a tribe, town, city or country during war.[24]Compensating the father for the rape of daughters was institutionalized in ancient law. Susan Brown Miller stated that " Rape entered the law through the back door, as it were as a property crime of man against man. It was theft of virginity, an embezzlement of his daughter's fair price in the market".[25]Sexual connotation associated with it came much later and then developed an inseparable link between rape and marriage as both sort to regulate sexuality. The relationship between marriage and rape can be traced backed to some religious texts like the Bible provides " if a man happens to meet a virgin who is not pledged to be married and rapes her and they are discovered he shall pay the girl's father fifty shekels of silver. He must marry the girl, for he has violated her. He can never divorce her as long as he lives."[26]Following this the Babylonians considered and put down that if the rapist is unmarried, he should pay the father of the victim three times the marriage price and marry the victim.[27]This historic relationship between rape and marriage is seen to have given rise to the exemption of marital rape. Throughout the history of most societies it has been acceptable for men to force their wives to have sex against their will. [28]The traditional definition of Rape in most countries was " sexual intercourse with a female not his wife without her consent". This provided husbands with an exemption from prosecution for raping their wives . The marital rape exemption came to be seen as a licence to the husband to rape their wives.[29]The foundation of this exemption can be traced back to the Statements made by Sir Mathew Hale Chief justice in 17th century England. Lord Hale wrote that " the husband cannot be guilty of rape committed by him on his lawful wife, for by their mutual matrimonial consent and contract

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the wife hath given herself up in this kind unto her husband which she cannot retract."^[30]For over a period of 330 years this statement has been used to justify the concept of marital rape exemption and has served the backbone for judicial recognition of spousal immunity.^[31]the basic principle behind this provision is that the husband is the lord and master of his wife and has full authority and control over the person and body of his wife and sexual intercourse between the husband and the wife , even without her consent is lawful as it is the husbands marital right.^[32]Lord John Holt, CJ described the act of a man having sexual relations with another man's wife as " the highest invasion of property".^[33]Thus we can Marital rape exemption was a vestige of the common law.^[34]However what is surprising to note is the fact that when Sir Mathew Hale made this statement which became the backbone of spousal immunity for centuries, he had no argument, case law or legal basis to support his statement. Some critics believe that this exemption had its origin in the concept of ' marital debt' in medieval moral theology and the law of church. The concept derived from biblical statement on marriage that" both the husband and the wife had a duty to perform sexually at the request of the mate"^[35]Some say that it was hales on creation based on the contractual principles. This theory of implied consent came up as both a novel idea as well as a fallacious one.^[36]Hale's comments were discussed in the Virginia case of *Weishaupt v. Commonwealth*,^[37]the court held that " the true state of English common law was that marriage carried with it the implied consent to sexual intercourse; but that consent could be revoked. The court stated that " Hale's statement was not law, common or otherwise. At best it was Hale's pronouncement of what he observed to be a custom in 17th century

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England." [38] The court concluded that English common law never recognized an absolute irrevocable marital exemption that would protect a husband from rape charges in all circumstances. Similarly, in *State v. Smith*, [39] the Supreme Court of New Jersey criticized Hale's statement when confronted with the defendant's argument that New Jersey's rape statute incorporates the common law marital rape exemption. The court criticized Hale for citing no authority for his extrajudicial proposition. Nonetheless, Hale's statement has traditionally been accepted as the origin for the marital rape exemption. However apart from the concept of implied consent there were two other theories that the courts traced back to justify the marital rape exception. The first of these rested on the origin of the offence of rape. As discussed above rape was seen as an offence against property rather than a crime against the person. Women were chattel, and men had a property interest in their wives and daughters' s sexuality. [40] Therefore the original purpose of rape statutes was to protect property rights of men rather than the body and person of women. [41] The second was the doctrine of marital unity propagated by Blackstone. Blackstone was of the opinion that " by marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, - protection, and cover, she performs everything; and is therefore called in our law-French a *feme-covert*, *femina viro co-operta*; is said to be *covert-baron*, or under the protection and influence of her husband, her *baron*, or *lord*; and her condition during marriage is called her *coverture*." [42] Marriage merged the identity a woman's identity into her husband's, and the two were considered as one this premise made it

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physically impossible to commit rape within marriage because the man could not rape himself. This legal euphemism reinforced the notion of women being man's own (property).[43] Katherine O'Donovan states in the context of marital rape that: "Its immunity from the purview of criminal law is explained on the grounds that the female victim is wife . This justification can be understood in the context of the dominant family ideology and female sexuality which treats wife as the property and as having no sexual agency or decision making ability in sexual activity within the marital context"[44] Another traditional justification behind emergence of this exemption can be traced back to the biblical phrases which laid down that ' any carnal knowledge outside marriage was deemed unlawful, while any carnal knowledge within the marriage contract was considered lawful'. [45] Such type of societal perceptions laid the foundation for the common law principle that was cemented by the infamous statement of Sir Mathew Hale , which became the basis of the marital rape exemption in law over centuries. [46]

IV. Comparative Analysis

England

Sir Mathew Hale gave birth to common law's ' marital exemption' in rape in 1736.[47] Ever since then up till 1991 the marital rape immunity in England was given institutional legitimacy. Research have shown that there were no circumstances in which the wife could be held to have retracted her matrimonial consent to sexual intercourse It was for the first time in the case of R v Clarke[48], that an exemption to the general common law rule of marital exemption was first recognized. An allegation of rape made by wife

against husband as the forceful sexual intercourse occurred when there was a separation order in force. The court held that in such a situation the wife was under no obligation to cohabit with the husband. Bryne J. held that " in those circumstances consent of wife had been revoked by an order of the court for non-cohabitation". However in 1954 in R v. Miller[49]in a regressive decision by Lynskey J., court granted the benefit of marital exemption and held that the wife had not legally revoked her consent despite having presented a divorce petition. In this case the act was held to be an assault and not considered as ' rape'. Later in Reg v. Reid[50]the court observed that " the notion that a husband can , without incurring punishment treat wife whether she be a separated wife or otherwise , with any kind of hostile force is obsolete".[51]Similarly in R v. Roberts[52]the court of Appeals further expanded the definition of marital rape and held that forceful sexual intercourse after order of separation would amount to rape. However it was only in the year 1991 in case of R v. R[53], that the ' marital rape exemption' was finally completely abolished by the Appellate Committee of the House of Lords. The court held thus:" Accepting that it is implied or presumed that a wife consents to sexual intercourse when she marries her husband on agreement between the parties sufficient to displace the marital exemption to law of rape may both be informal and implied from conduct . Furthermore a wife may unilaterally withdraw implied consent to sexual intercourse by withdrawal from cohabitation accompanied by a clear indication that the consent to sexual intercourse has been terminated" Again in R v. C,[54]the court held that there is no " marital exemption" to the law of rape and accordingly the husband may be convicted of rape of his wife in case of non consensual sexual intercourse whether he is living together or apart from his

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wife. Lord Keith of Kenkel held that " the fiction of implied consent has no useful purpose to serve today in the law of rape and that the marital rights exemption was a common law fiction which had never been a true rule of English law". Court further held that " marriage in modern times is regarded as partnership of equals. And Hales position involves that by a marriage a wife gives her irrevocable consent to sexual intercourse with her husband under all circumstances irrespective of her health.....but a wife is not obliged to obey her husband in all things nor to suffer excessive sexual demands on part of her husband." Lord lone CJ. held this common law fiction as ' anachronistic and offensive'.[55]In 1994, Sexual Offences Amendment Act was passed which by way of Section 147 abolished the ' marital exemption' in England.[56]

European Union

European Commission of Human Rights in C. R. v UK,[57]endorsed the conclusion that a rapist remains a rapist regardless of his relationship with the victim. It was acknowledged that this change in the common law was in accordance with the fundamental objectives of the Convention on Human Rights, the very essence of which is respect for human rights, dignity and freedom.[58]

United States of America

For over years Sir Mathew Hale's statement[59]alone served as a justification for a spousal immunity involving rape charges, and was the origin for judicial recognition of the marital rape exemption in the United States. It also served to maintain the position of men in our society as dominators and women as their property.[60]In Common wealth v.

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Forgarty[61] court following the Sir Hales proposition held that ' a husband cannot be convicted of raping his wife'. This was the first case where Hales proposition was first time followed. And after this there is plethora of cases where this proposition was followed in United States. The state of Michigan was the first states to have achieved rape law reforms with the initiative and support of women activists.[62] One of the most significant changes was the redefinition of " rape" to " criminal sexual conduct".[63] In Smith v. State[64], where the court observed that " the principal of ' implied consent' should be abandoned. Forced sexual intercourse is a violation of the person's bodily integrity whether it is committed within or outside marriage".[65] And in 1984 People v. Liberta[66] New York court held ' marital exemption' clause as unconstitutional and violative of the equal protection clause guaranteed under the constitution. The court in this case could not find any rational basis for distinguishing between the marital rape and non-marital rape. Marital rape is now illegal in almost all American states.[67]. In South Dakota state there is a classification of rape cases into two degrees. Rape is of the first degree if the victim is not the defendant's voluntary social companion on the occasion of crime and has not previously permitted him sexual contract . Marriage or previous sexual intercourse however reduces the offence to second degree .[68] Hawaii also classifies rape in a similar classification. Later on, state of Oregon in 1977 made ' spousal rape' a new offence. Under this new offence a husband could be convicted for raping his wife. State of Nebraska also enacted a law under which even live-in husband can be convicted under the offence of rape.[69]

Canada

Marital rape was abolished in year 1983 after the introduction of the bill C-127 which repealed the existing rape statute and marital rape was criminalized. In 2011, The Canadian Supreme Court in R v. J. A[70], Chief Justice McLachlin emphasized that the relationship between the accused and the complainant does not change the nature of inquiry. The defendant cannot argue that the complainant's consent was implied by the relationship between the accused and the complainant.[71]

New Zealand

The marital rape exemption was abolished in 1985 by the present Section 128 of Crimes Act, 1981. Subsection 4 provides that ' a person can be convicted of sexual violence in respect of sexual connection with another person notwithstanding that they are married at the time sexual connection occurred.'[72]

Bhutan

In 1996, marital rape was criminalized by way of amendment to the marriage Act.[73]

South Africa

In 1993, South Africa criminalized marital rape, reversing the common law principle that a husband could not be found guilty of raping his wife. The Prevention of Family Violence Act, 1993, Section 5 provides that " Notwithstanding anything to the contrary contained in any law or in the common law, a husband may be convicted of the rape of his wife." In 2007 Criminal Law (Sexual Offences and Related Matters) Amendment Act in ' Sexual

Offences Act' was done which provides in Sec. 56 (1), that ' a marital or other relationship between the perpetrator or victim is not a valid defence against the crimes of rape or sexual violation'.[74]

Australia

In Australia, the common law ' marital rape immunity' was legislatively abolished in 1976.[75]In 1991, R v. L[76]Australian High Court through Mason CJ, held that: ' If it was ever the common law that by marriage a wife gave irrevocable consent to sexual intercourse by her husband, it is no longer the common law'.[77]In other jurisdiction like Czechoslovakia[78], and Poland[79](which has a law dating back to procommunist days of 1932), husbands may be charged with marital rape. Marriage does not give a right to force one's wife to have sexual intercourse with him. In Sweden it has been possible to prosecute a husband for marital rape since 1965, though the crime is considered less grave in view of the spousal relationship. Rape by a stranger carries a prison term of no less than two and not more than ten years. Husbands can be prosecuted only for valdforande (sexual coercion or assault), which carries a maximum sentence of four years' imprisonment. In Denmark, the Penal Code defines rape as sexual intercourse obtained by force with any woman. Once again the penalties to which husbands-and others who have had a sexual relationship of a lasting kind-are lighter.' The Norwegian law is similar to the Danish law in this regard.

India

In India under Sec. 375 Indian Penal Code 1860 (hereinafter referred to as IPC), a man is said to commit ' rape' when he has sexual intercourse with a woman ' against her will' or ' without her consent'. However, exception to <https://assignbuster.com/the-marital-rape-exemption-law-family-essay/>

Section 375 says that 'sexual intercourse by a man with his own wife, the wife not being below 15 years of age, is not a rape'.^[80] However under Indian Law 'marital rape' is partially recognized. It is mentioned in Sec. 375-A^[81] where intercourse by a man with his wife during separation under a custom or usage or a decree of judicial separation without her consent is made punishable with imprisonment of maximum two years and fine.

Attempts to Reform the Law Relating to Marital Rape in India.

The law relating to marital rape has remained more or less unchanged since its introduction in the IPC in 1860. In fact till the year 1983, the law on marital rape was amended thrice, only to change the age of the wife mentioned in the exemption to marital rape under section 375. Even after 1983 the status quo relating to marital rape was maintained as the successive law commission missed the opportunities to bring a positive change in law. In the 42nd Law Commission^[82] report there was a recommendation relating to marital rape exemption in section 375. The report recommended two major changes in the law relating to marital rape exemption as it existed at that time, they were:-The Commission recommended that marital rape should be removed from the scope of section 375 and intercourse by a man with his minor wife to be placed as a separate offence^[83] The commission also considered the position of legally separated wives vis-à-vis the offence of rape. The recommendations were again made by the 84th Law Commission.^[84] Following which the Criminal Law Amendment Bill was passed in 1983, which recognised sexual intercourse with a minor wife (below the age of 15 years) and sexual intercourse

without the consent of a judicially separated wife an offence under section 375 and section 376A respectively.[85]Another opportunity was missed when the 172nd Law Commission[86]submitted its report on review of rape laws pursuant to the writ petition filed by SAKSHI[87], an organization involved in issues related to women and children , asking for a revised definition of rape under IPC. The petitioner on the issue of marital rape contended that the exemption of marital rape should be deleted. They based their argument on the fact that when the husband causes some physical injury to the wife, he can be punished under appropriate section of IPC and the fact that he is husband of the victim is not an extenuating circumstance recognised by law , then why should it be made one in case of sexual assault by husband. However the Law commission refused to recognise this argument and stated that deleting the marital rape exemption would amount to unnecessary interference with marital relationship. In the petition filed by SAKSHI, similar contentions were raised against section 376A. Although the Law Commission appreciated the force of the argument , it said that it cannot turn a blind eye to the fact that even when the wife is living separately the bonds of marriage remains unsevered. Equally shocking was statement of the Joint Committee which had introduced Sec 376 A[88], when it justified lower punishment under this section on the ground that " rape" of judicially separated wife may lead to a reconciliation of the spouse and therefore , it deserves lesser punishment.[89]Lok Sabha debates show that some members of the legislature doubted the propriety of concept of marital rape itself and thereby suggested that sexual relationship between husband and wife under no circumstance be treated as an offence.[90]The Indian mindset not only overlooked the existence of something like rape within

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marriage but also justified it by looking at it as a means of reconciliation. A significant step towards protection of women was taken in the form of the Protection Of women from Domestic Violence Act 2005 . Although the act is comprehensive in its categorization[91]of domestic violence it is inadequate to deal with the problem of marital rape . It only provides for a civil remedy which may not be a proper sanction in cases of such sexual violence. It has been contended by critics that treating the problem of marital rape under civil law will undermines the serious nature of the issue. The problem of marital rape goes far beyond domestic violence . It is a unique kind of violence which encompasses physical sexual psychological trauma of being raped by someone who has vows to love and honour the spouse.[92]The UN Committee on the Elimination of Discrimination against Women (" CEDAW Committee") in February 2007 has recommended that the country should " widen the definition of rape in its Penal Code to reflect the realities of sexual abuse experienced by women and to remove the exception of marital rape from the definition of rape....."[93]In a recent report by the Committee on Amendments to Criminal Law recommended that the exception for marital rape should be removed.[94]The committee also recommended that the law ought to specify that: A marital or other relationship between the perpetrator or victim is not a valid defence against the crimes of rape or sexual violation. The relationship between the accused and the complainant is not relevant to the inquiry into whether the complainant consented to the sexual activity; The fact that the accused and victim are married or in another intimate relationship may not be regarded as a mitigating factor justifying lower sentences for rape. In the aftermath of the report an ordinance was promulgated by the president on the 3rd February 2013[95]. The ordinance <https://assignbuster.com/the-marital-rape-exemption-law-family-essay/>

changed the age of consent from 16 years of age to 18 years [96] despite of the recommendations Committee on Amendments to Criminal Law and it also it increased the age of consent of married women from 15 years to 16 years of age, [97] but it was silent on the issue of abolition of the marital rape exemption. It also enhanced the punishment under section 376A from 2 years of imprisonment to up to 7 years of imprisonment. Parliamentary committee supported the government's decision to not treat marital rape as a criminal offence. " Justifying the panel's recommendation to keep " marital rape" out of the purview of anti-rape laws, chairman of the standing committee on home affairs M Venkaiah Naidu said that leaving scope for the wife to accuse her husband of rape " has the potential of destroying the institution of marriage." The report tabled by the parliamentary panel examining the Criminal Law (Amendment) Bill 2012, went on to state, " there is also a provision under the law for cruelty against women, it was, therefore, felt that if marital rape is brought under the law, the entire family system will be under great stress and the committee may perhaps be doing more injustice." [98] Recently the Criminal Law Amendment Act 2013 [99] was passed in March 2013. The Act has incorporated certain changes in IPC. The changes were mostly in line with the changes incorporated by the Criminal Law Amendment Ordinance. However the age of consent which was increased from 15 to 16 years by the ordinance has been relegated to the previous position by the Criminal Law Amendment Act. Thus the marital rape exemption under section 375 of IPC has not yet been abolished in India as the legislature is of the view that it will detrimentally affect the institution of marriage.

V. Arguments in favour and in defence of Criminalization of Marital Rape. Under The Hindu Law marriage is a sacrament and the

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women's most pious obligation is to live with her husband, save him and bear him children . The entire code of feminine morality as defined under the Hindu law determines the degree of her submission and her ability to give pleasure and progeny to her husband . Mulla principles Of Hindu law states that the duty of the wife is to live with her Husband , to Submit herself to his authority and remain under his roof and protection.[100]The patriarchal ideologies embodied in the Hindu law impose an obligation upon the wife to perform the marital obligation at all cost .[101]The social expectations, conventions and norms reinforce female subjugation to her male counterpart. In fact law endorses the same in various ways; one such endorsement of patriarchal norms is manifested in the form of the marital rape exemption that still exists in the Indian Penal Code. Ved kumari stated that various provisions of the IPC relating to sexuality reinforce not only the Victorian morality but also the non agency of women.[102]Marital rape exemption is a colonial legacy which the Indian legislature and judiciary has failed look past, despite of the fact that in various jurisdictions around the world the offence of marital rape is being increasingly criminalised. Several arguments have been advanced in defence and in criticism of this marital rape exemption. Thus the problematic issue of marital rape calls for a careful scrutiny into the need and propriety of its criminalisation. This chapter is an attempt to look into the various nuances of this sensitive issue in hand. Following are certain arguments and counter criticisms that have been raised by the legal intelligentsia in the context of marital rape exemption under IPC. The Anomalies of ConsentThe traditional view that on marriage or merger of entities an implied consent is given to have sexual intercourse has been consistently used to reinforce the rationale behind the exemption of

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marital rape. The implied Consent theory propounded by Sir Hale^[103] that was cemented in common law centuries ago still survives as a colonial legacy in the form of the anachronistic provision of marital rape exemption in IPC. A distinction is drawn between the consent of unmarried women for sexual intercourse and the consent of a wife.^[104] There is a fine line between presumption of the wife's consent and dispensation with consent.^[105] Critics are of the view that even if the theory of implied consent was applied to justify the exemption of marital rape, it would logically mean that the presumption was a rebuttable presumption. The wife in such cases would have an opportunity to prove otherwise. Ironically the wife is denied any such opportunity, she can neither make complaint nor can the husband be punished. This is where the theory of implied consent falls flat.^[106] Further in the case of consent in marital rape it becomes important to consider the scope of passive submission. While most of the feminist scholars opine that passive submission should be included within the purview of marital rape, some believe that passive submission in marital rape should be viewed differently.^[107] However in the Indian social context where women may submit to her husband for various social, cultural economic reasons, some critics believe that passive submission should also be included in cases of marital rape. " Social coercion is enforced by societal messages regarding appropriate sex roles for men and women operate on married women as they tend to believe that their wifely duty is to submit to her husband regardless of their own desires"^[108] Moreover, in an attempt to safeguard the outdated law of marital rape several problems have arisen in various related areas.^[109] The legal age of maturity^[110] and minimum age for marriage^[111] is 18 years of age, where as the age of consent for sexual <https://assignbuster.com/the-marital-rape-exemption-law-family-essay/>

intercourse in marriage is set at 15 years.[112]. A girl below 18 years of age is denied the right to consent but a wife of 15 years of age is placed beyond the protection of law to be sexually abused by her husband. In this context one of the critics writes that in a culture where rape is defined as sex without consent, where right to consent is denied to the ' minors' and right to consent is denied to married women above the age of 15 years the intentions, ambiguities and perplexities that get played out in the court room are theatrical and pathetic in extreme.[113] This kind of differentiation gives rise to a number of problems related to the constitutionality of marital rape exemption which are discussed below. The Rationale of Differential Criminalization and the argument of Unreasonable Classification. The rationale given behind differential criminalization is that the husband enjoys total monopoly over the body of the wife. Therefore unless there is some other form of sexual aggression on her body that amounts to some other form of crime like grievous hurt or attempted homicide; it is not treated as a form of sexual violence under section 375. In Queen Empress v. Haree Mythee,[114] the court observed that in case of a married woman the law doesn't apply between husband and wife after the wife is over 15 years, unless in certain exceptional cases of injuries.[115] Under this section women are classified into 2 categories, unmarried and married.[116] In the second category of classification, married women are further sub categorized into, below 15 years of age and above 15 years of age. Sexual intercourse with a female below 15 years of age is rape as they are considered legally incapable of giving consent but once they cross the age bar they are rendered legally voiceless, they are denied the right to not to consent. [117] While in case of non marital rape the consent of the women becomes

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the focal point in deciding liability in case of marital rape the age of consent becomes the deciding factor that whether the wife is a victim or an extralegal voiceless subject devoid of all legal remedies by the misfortune of being above the age of consent. This sort of a classification raises several questions related to the justification of such differential classification not only between married and unmarried women but also the sub-classification between married women . It raises questions like whether marriage can be used as an iron shield to escape from criminal liability . Is the bond of holy matrimony a license to rape? Is marriage a sufficient reason for dehumanising a woman by rendering her consent meaningless in matters relating to personal autonomy and bodily integrity?[118]This classification is not a legislative slip but a deliberate immunization of the husband. A legal endorsement of the patriarchal setup at the cost of welfare provisions in process.[119]In the Indian constitution the right to equal protection of law is one of the most fundamental rights guaranteed to all citizens . Article 14 of the Indian Constitution reads that the State shall not deny equal protection of law or equality before law within the territory of India . Under the Indian constitution the legislature can make classifications and give differential treatment on the basis of reasonable classifications . the two requirements for reasonable classification was laid down by the apex court in the case of State Of West Bengal v. Anwar Ali Sarkar[120]as follows:-The classification must be founded on an intelligible differentia which distinguishes those that are grouped together. The differentia must have a rational relationship to the object sought to be achieved by the legislation. The exemption of marital rape is neither based on an intelligible differentia nor does it have any rational relationship with the object and purpose of criminal law , as the <https://assignbuster.com/the-marital-rape-exemption-law-family-essay/>

primary core function of criminal law is protection of individual rights.

Withdrawing the protection of law solely on the basis of marital status fails to stand the test of reasonable classification and thus can be seen as violative of Article 14 of the Indian Constitution. The Public and Private Dichotomy
In India the whole issue of marital rape is kept outside the judicial discourse in the name private space . The culture card is invoked without fail to draw a distinction between the public and the private realm. Limits of legitimate intervention are drawn in regulating familiar and sexual relationships. Law chooses to make a very selective entry into the realm of sexualities.

[121] Certain forms of culturally and socially accepted sexuality are legitimised by placing them in the realm of private sphere which can exemplified by way of the marital rape exemption law in India. Women's sexuality within the private sphere becomes the space for articulation and preservation of Indian cultural values.[122] The marital rape exemption has been justified in the name of protecting the institution of marriage. The state intervention in marriage in any form is looked upon as an intrusion into the private realm of family and seen to be detrimental to marital harmony and impede reconciliation efforts. Critics of marital rape exemption are of the view that once marital rape happens in a family, the sanctity of marriage is already breached.[123] Professor Kumaralingam is of the view that criminalization of marital rape will only ensure the protection of individual and cannot be against the interests of marriage as marital privacy is only to protect mutually agreeable acts of husband and wife and not to shield violence and abuse.[124] Rules of Alliance: Normalization of Male Desire. There has been an inseparable relationship between the law of rape and institution of marriage since time immemorial. This can be traced back to the <https://assignbuster.com/the-marital-rape-exemption-law-family-essay/>

ancient social and religious way of viewing marriage as a substitute for punishment in cases of rape. The legal fraternity has time and again re-established this relationship in an attempt to normalise the male sexual desire. The legal system in many ways tries to normalise sexual violation of women not only within marriage but also outside it. It does so, either by adhering to the anachronistic idea of implied consent to sanction sexual violence within marriage in the name of marital obligations or by 'husbanding' a man's ' unholy lust' by facilitating tying of the ' holy knot' with the women he violated.[125]Judges have often tried to ' cure' the injustice committed upon a victim of rape by getting her married to the rapist himself. Thus marriage has been seen as alternative remedy not only in the religious sphere but also endorsed by the so called ' secular' judiciary as well. The illicit non marital sexual intercourse becomes licit once it is integrated into the institution of marriage. As a natural corollary to that logic the issue of marital rape is either brushed aside or treated with complete disbelief. [126]The legal system believes that ' marriage is the prescribed institution for the satisfaction of the ' natural' sexual instincts -hence sexual intercourse within marriage cannot be considered a sexual offence.[127]In State of Rajasthan v. Shri Narayan,[128]the court acquitted for the charge of rape and overlooked the injury marks on the body of the victim. The supreme court although upheld the conviction seemed to be invisibilizing the realities of ravished women by stating that intercourse within marriage cannot be forcible.[129]This shows that in the Indian society the institution of marriage not only gives moral and legal recognition to rape within marriage but also legitimises and encourages it by looking at marriage as a way of cleansing ' rape' off its barbarity and inhumanity.[130]Sanctity of Marriage <https://assignbuster.com/the-marital-rape-exemption-law-family-essay/>

Pitted Against Personal LibertyIt is often argued that the abolition of the marital rape exemption would detrimentally affect the institution of marriage. In the case of *Harvinder Kaur v. Harvinder Singh*[131]the court held that " the introduction of the constitution in marriage would not be desirable as it would be a destroyer of institution of marriage, application of institution of marriage will onlt weakens the bond of marriage". Despite of being one of the repugnant forms of masochism in the Indian society the problem of marital rape behind the iron curtain of marriage.[132]As Robin West remarks " the marital rape exemption creates, fosters and encourages not matrimonial intimacy harmony, or recognition, but a separate state of sovereignty ungoverned by law and insulated from sate interference.

[133]However this argument is countered by critics by stating that the IPC already intrudes into the private sphere in certain cases eg : section 498A .

[134]Moreover it is contended that when the Indian constitution upholds the right of an individual to personal liberty and bodily integrity under Article 21 can it be denied to a married women to safeguard the institution of marriage. In *Bodhisatva Gautam v. Subhra Charaborty*,[135]the court observed:-" In Rape is a crime against human rights and a violation of the victims most cherished of fundamental rights, namely the right to life contained in article 21." A careful study reveals that although rape is most eloquently condemned by the judiciary, in reality the judiciary has failed to recognise rape especially rape within marriage as a brutal assault against women's right to their body and sexuality.[136]While in other countries either the legislature or the judiciary has played an important role in recognition of marital rape as a criminal offence in India tragically it has failed to gather any attention from the law makers or adjudicators.[137]

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According to Justice Brennan ' The common law fiction has always been offensive to human dignity and incompatible with the legal status of a spouse.[138]The critics contend that the exemption of marital rape is one example of such gross violation of human dignity . The National Human Rights Commission has also held the government accountable and responsible for the violation of human rights within its jurisdiction, observing:"...it is the primary and inescapable responsibility of the State to protect the right to life, liberty, equality and dignity of all of those who constitute it. It is also the responsibility of the State to ensure that such rights are not violated either through overt acts, or through abetment or negligence. It is a clear and emerging principle of human rights jurisprudence that the State is responsible not only for the acts of its own agents, but also for the acts of non-State players acting within its jurisdiction. The State is, in addition, responsible for any inaction that may cause or facilitate the violation of human rights"[139]In that light the critics contend that despite of the argument of protection of sanctity of marriage or marital privacy the state cannot forget its role as a preserver and protector individuals in the society against violence. In this regard the Supreme Court of New York held that " just as the husband cannot invoke a right to marital privacy to escape the liability for beating his wife, he cannot justifiably rape his wife under the guise of a right to privacy."[140]In the Indian context it is important to note that the judiciary has on various occasions upheld the right to live with dignity and right to good health can be brought under purview of right to life under Article 21 of the Indian constitution. Sexual violence within marriage violates all such basic human rights and is gross form of

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degradation and humiliation that the wife suffers at the hands of her intimate partner which has been vehemently criticised by International conventions.[141]Qualitative and Quantitative ArgumentThe supporters of marital rape exemption are of the view that the issue of marital rape is both quantitatively and qualitatively different from non marital rape. Quantitative argument is that the phenomenon of marital rape was rare, and the quantitative argument contends that the damage is lesser in case of wife. Both these contentions fall flat as the surveys reveal that almost 25% of sexual violence cases are that of marital rape.[142]The psychological damage in marital rape is more as the woman is subjected to immense humiliation in the hands of a person of trust.[143]The Problem of Evidence and Possibility of Fabricated ComplaintsSome supporters contend that it would be virtually impossible to prove marital rape as the married couple may have had consensual sexual intercourse several times . Moreover it is contended that criminalization of marital rape can be a dangerous weapon in the hands of a vengeful wife to harass husbands. Counter arguments to the problem of proof is that a proper medical examination can establish the fact of forceful sexual intercourse. Similarly the possibility of malicious prosecution can be taken care of by strict application of law. Moreover critics contend that the threat of malicious complaints cannot be a valid argument favour of the marital rape exemption. The Supreme Court of New York stated in this context" the criminal justice system with all of its built in safeguard , is presumed to be capable of handling any false complains. Indeed if the possibility of fabricated complaints were basis for not criminalising behaviour then virtually all crimes other than homicide would go unpunished."[144]Alternative RemediesAnother argument put forward in <https://assignbuster.com/the-marital-rape-exemption-law-family-essay/>

defence of the marital rape exemption is that sexual violence can be easily covered under various sections of the IPC and domestic violence act.

[145]The critics of the marital rape exemption are of the view that to hold that sexual violence can be covered by other provisions is to neglect the seriousness of this offence . Moreover the punishment under section 498A is 3 years imprisonment or fine whereas the punishment for rape is

imprisonment for 7 years (which may extend to life imprisonment or 10

years). The remedy available under Domestic Violence Act 2005 is only a civil remedy which is not sufficient in such cases of sexual violence.[146]All

above arguments show that the concerns raised against criminalization of marital rape can very well be rebutted, which further strengthens the case for a serious consideration of the need to criminalise such forms of sexual violence within marriage. However in my opinion although in the wake of the 21st century there is a need to break free from the shackles of patriarchal ideologies that govern such redundant sections, one cannot overlook the consequences that it may have on the institution of marriage in the Indian context. Thus in my opinion there is need to consider this issue from a

balanced perspective to come up with a solution that can hold good in the Indian society , rather than blindly following the other countries unmindful of the Indian realities. Conclusion" We have to get away from the tradition of man's necessities and woman's obedience to them."- Alice Stockham, (An American feminist) 1898. In the Indian society where premarital sex is a taboo, marital rape is an accepted social reality. For an average Indian the concept of marital rape is a social oxymoron as marriage is an institution that legalises sexual intercourse (irrespective of consent). In this social milieu where male sexual desire is seen as a matter of right within marriage

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and a dutiful wife's marital obligation, the justification of non-criminalization of marital rape on the pretext of protecting the sanctity of marriage seems to be well founded. At one hand the Government and the judiciary makes eloquent statement upholding equality of women and indulges in promotion and welfare of women, on the other it has for ages neglected the lacunas in law that have detrimentally affected women over centuries. One such example is the archaic provision of marital rape exemption that was a colonial legacy that has died a slow death in the place of its origin but has managed to survive in India. Opportunities of positive change in law have been deliberately missed time and again. Although the Indian society has come a long way and there has been a gradual emancipation of the Indian mind but it is still haunted by the phantom of patriarchy . The preservation of anachronistic provisions like marital rape exemption shows that it has failed to realise the demands of the changing times . In the name of holy matrimony the reality of marital rape cannot be denigrated to be a myth. It is highly detrimental to the physical and mental health of the victims . It has serious repercussions such as unwanted pregnancies, miscarriages, it also increase the chances of sexually transmitted diseases. Moreover, this provision which prescribes a lower age of consent for marital intercourse in the Indian Penal Code, 1860 is also a specific illustration of legislative endorsement and sanction to child marriages, which need to discouraged by removing the marital rape exemption from law. Thus in my opinion considering the above issues the legislature should realise the need for abolition of this legal protection that legitimises such sexual violence against wives. Thus my suggestions are :-In LawThe marital rape exemption under section 375 should be abolished. This in my opinion would lead to better

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protection of women against sexual violence in the domestic sphere and recognise their constitutional right to live with dignity and bodily autonomy . It will also act as deterrent for erring husbands. Another way of dealing with the issue of marital rape is a modified application of the 42nd Law Commission's suggestion regarding incorporating a separate section in IPC to deal with sexual violence in marriage.[147]In my opinion a separate section can be incorporated to deal with such cases of sexual violence within marriage where a judge may have the discretion to impose a lighter punishment depending upon the nature of the violence and coercion exercised by the spouse. Thus abolishing the marital exemption and incorporating a separate section would strike equilibrium between the conflicting demands of protecting the sanctity of marriage and protection of individual rights. In the Social RealmThere is a need to increase social awareness related to sexual violence within marriage. So that hapless women who are mute victims of such violence have recourse to legal remedies. NGO's can be encouraged to set up advisory forums to deal with such cases to enable the victims to seek effective remedy in individual case, suggesting whether a civil remedy should be sought or criminal law should be invoked depending upon the facts and circumstances of each case. Moreover there is a need to sensitise the people in our society to enable them look beyond the redundant patriarchal notions of male female relationship to enable a movement toward an egalitarian society.