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## MARITAL RAPE IN INDIA: JUDICIALLY SANCTIONED HUMAN RIGHTS VIOLATIONS AND THE DEHUMANIZATION OF WOMEN IN THE BIGGEST DEMOCRACY OF THE WORLD

### **Abstract**

*India, the largest democracy in the world, is a modern-day nation that considers marital rape not to be a crime. Not only is not a crime, but it is also a judicially sanctioned form of sexual abuse many Indian women suffer from, sometimes daily, without any possible recourse from the law. This paper will examine the legal position of the Government of India as well as the judicial system in India hold with respect to marital rape. The marital rape exception clause in the Indian Penal Code is unlawful and unconstitutional and creates an unreasonable arbitrary distinction between married women and unmarried women in India. The marital rape immunity, as it currently exists in the law books of India, violates Indian domestic law, constitutional law, as well as India's international treaty obligations and must be abolished. In making this case, I will examine several articles of the Indian Penal Code, several articles of the Constitution of India, Indian Supreme Court decisions examining marital rape, and India's international obligations under various conventions India is a signatory to, arguing that India is illegally and unconstitutionally suppressing the rights of women as it pertains to marital rape, thereby denying women justified recourse in violation of domestic as well as international law. Through silence, the judiciary in India recognizes and authorizes marital rape by Indian men, thus legitimizing this particular form of violence against women, simply because they are women and their status exist within society. However, a deeper analysis of the Indian Penal Code, the Constitution of India as well as Indian Supreme Court decisions shows that the marital rape exception clause has lost its legal legitimacy. The State of India must take several steps to ensure the real and transformative change in a society that battles a significant human rights problem with the marital rape exception clause.*

### **Annotasiya**

*Dünyanın ən böyük demokratiyası olan Hindistan ailə təcavüzünü cinayət hesab etməyən müasir bir xalqdır. Bu nəinki yalnız cinayətdir, həmçinin əksər hindistanlı qadının qanunla heç bir müraciət olmadan hər gün əziyyət çəkdiyi və məhkəmə tərəfindən icazə verilən cinsi təcavüz növüdür. Bu məqalədə Hindistan hökumətinin, eləcə də Hindistandakı məhkəmə sisteminin ailə təcavüzü ilə bağlı hüquqi mövqeyi araşdırılacaq. Hindistan Cinayət Məcəlləsindəki ailə təcavüzünü istisna edən maddə qeyri-qanunidir və konstitusiyaya ziddir və Hindistanda evli qadınlarla subay qadınlar arasında əsassız bir özbaşına fərq yaradır. Hal-hazırda Hindistanın hüquq kitablarında mövcud olan ailə təcavüzü toxunulmazlığı, Hindistanın daxili qanunlarını, konstitusiyaya qanunlarını, eləcə də Hindistanın beynəlxalq müqavilə öhdəliklərini pozur və ləğv edilməlidir. Hindistanın qeyri-qanuni və konstitusiyaya zidd olaraq qadın hüquqlarını basdırmasını, bununla da milli və beynəlxalq hüquqa zidd şəkildə qadınların haqlı müraciətlərini inkar etməsini iddia edərək Hindistan*

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*Cinayət Məcəlləsinin, Hindistan Konstitusiyasının bir neçə maddəsini, Hindistan Ali Məhkəməsinin ailə təcavüzü ilə bağlı qərarlarını və Hindistanın tərəfdar çıxdığı müxtəlif konvensiyalardan irəli gələn öhdəliklərini araşdıracağam. Hindistandakı məhkəmə sistemi, əsassız şəkildə hindistanlı kişilər tərəfindən ailə təcavüzünü tanıyır və icazə verir, beləliklə sadəcə qadın olduqlarına və onların cəmiyyətdəki statusuna görə qadınlara qarşı bu xüsusi şiddəti qanunlaşdırır. Buna baxmayaraq, Hindistan Cinayət Məcəlləsinin, Hindistan Konstitusiyasının və Hindistan Ali Məhkəməsinin qərarlarının daha dərinə təhlili, ailə təcavüzünü istisna edən maddənin qanuni legitimliyini itirdiyini göstərir. Hindistan dövləti, ailə təcavüzünü istisna edən maddə ilə bağlı əhəmiyyətli insan hüquqları problemi ilə mübarizə aparan bir cəmiyyətdə gerçək və dönüşdürücü dəyişiklik təmin etmək üçün bir neçə addım atmalıdır.*

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## Introduction

**D**ipak Misra<sup>1</sup> said that “I do not think that marital rape should be regarded as an offense in India, because it will create absolute anarchy in families and our country is sustaining itself because of the family platform which upholds family values”. The analysis of domestic statutes, constitutional provisions and legal decisions by the Supreme Court of India, in a way, represent this complex issue. India's highest court has already addressed and ruled upon various constitutionally protected rights, including equality before the law as well as physical integrity. The Supreme Court of India created the constitutional legal framework that ultimately challenges the marital rape exception clause. By analyzing the text, structure and purpose of these legal sources, it becomes clear that no legal foundation

<sup>1</sup> Dipak Misra, Former Chief Justice of India.

exists for the marital rape exception clause codified in §375 of the Indian Penal Code (hereinafter IPC), making it unlawful, unconstitutional and an arbitrary invention of the legislature and the judiciary, not based in the rule of law. The marital rape exception clause can no longer remain on the law books of India as it has no legal purpose or value due to its unconstitutionality, requiring its immediate removal from the IPC.

In a sense, India's domestic law, constitutional law, as well as the interpretations of its most prominent jurists constitute the legal obligations the State of India holds in protecting its citizens. In this light, the court decisions and constitutional provisions discussed in this paper primarily shed light on India's obligations and establish the standards of protection owed by the State which, in the opinion of the author, India has yet to deliver to married women. The standards issued by the Supreme Court of India provide important standards for the State of India on how to effectively tackle the problem and efficiently implement workable solutions that will trickle down to every facet of society, including the family.

In addition to the domestic legal framework established through statutes, constitutional provisions and the decisions of the Supreme Court of India, international treaties India is a signatory will complement the analytical framework in addressing India's position regarding the human rights of women. For example, as a signatory to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), India took on various responsibilities to remedy important issues regarding the human rights of women. By analyzing CEDAW and the selected General Comments, the author will complement the domestic framework with the international framework in establishing India's obligations to address the problem. The currently unlawful application of the marital rape exception clause by the judiciary in India authorizes men to sexually assault or rape their wives without having to fear any repercussions.

This paper is divided into three parts. The first part discusses domestic law in India to lay the groundwork and background in order to discuss the illegality of the marital rape exception clause. In addition to the analysis of domestic statutes, this part of the paper will also examine selected provisions of the constitution of India, reviewing each article in-depth and discussing the main legal conclusions that ultimately establish the analytical framework for the remainder of the paper. This section of the paper will conclude with the discussion of three cases by the Supreme Court of India and the systematic developments of women's rights as interpreted and expressed by India's most prominent jurists. The author will discuss the importance of these cases considering the development of women's rights in India and their application to the overarching analysis of the unconstitutionality of the marital rape exception clause. The second part of the paper will complement the domestic analytical framework and discuss India's international human rights

obligations with an emphasis on CEDAW and its General Comments. The third part of the paper will discuss the required due diligence by the State of India and examine measures the State of India needs to take in order to realize meaningful and transformative change for women.

## I. The clash between the Marital Rape Exception Clause and India's domestic laws, constitutional obligations and the Supreme Court of India

*"To deny people their human rights is to challenge their very humanity".*

*Nelson Mandela*<sup>2</sup>

### A. Domestic law of India

It is not easy growing up as a woman in India. Rape and sexual assault continue to be a very serious issue for Indian women.<sup>3</sup> "In India, the question of rape is linked to women's status within society".<sup>4</sup> "Social customs and values, religious beliefs, and the idea of marriage as a sacrament ..., all create an environment in India where sexual violence against married women is not only tolerated but appears to be expected".<sup>5</sup> "According to India's National Crime Records Bureau (NCRB), around 100 sexual assaults are reported to police in India every day. In 2017, more than 32,000 rapes were reported across the country - but experts say that the real number is likely much higher, owing to the shame attached to sexual assault and the social barriers faced by victims".<sup>6</sup> This is not to say that women who are not married do not face similar atrocities, however, the IPC, as the various branches of government in India appear to have interpreted it, at least provides some protection and legal recourse for the unmarried, female population of India.<sup>7</sup> By putting custom

<sup>2</sup> Andrea Mohin, *The Mandel Visit; Excerpts from Mandela Speech to Joint Meeting of Congress*, The New York Times (1990). Available at: <https://www.nytimes.com/1990/06/27/world/the-mandel-visit-excerpts-from-mandela-speech-to-joint-meeting-of-congress.html> (last visited Dec. 31, 2020).

<sup>3</sup> Swati Gupta, A shocking gang-rape and murder of a woman is raising familiar tough questions for India (2019), <https://www.cnn.com/2019/12/03/asia/india-hyderabad-rape-intl-hnk/index.html> (last visited Dec. 31, 2020). This case highlights that India continues to have a pervasive problem of sexual violence against women. The examples of atrocities committed against women in this article shed light on the fact that punishment alone, to include the death penalty, is not an effective deterrent and that change needs to come through a change in mindset of the people.

<sup>4</sup> Geetanjali Gangoli and Nicole Westmarland, *International Approaches to Rape*, 102 (2011).

<sup>5</sup> Chhavi Sachdev, *Rape Is A Crime In India – But There Are Exceptions* (2016), <https://www.npr.org/sections/goatsandsoda/2016/04/13/473966857/rape-is-a-crime-in-india-with-one-exception> (last visited Dec. 31, 2020).

<sup>6</sup> Helen Regan, Vedika Sud and Swati Gupta, *Suspects in Indian gang-rape murder shot dead by police during night "reconstruction"* (2019), <https://www.cnn.com/2019/12/06/asia/india-hyderabad-rape-suspects-shot-intl-hnk/index.html> (last visited Dec. 31, 2020).

<sup>7</sup> "Representatives of Sakshi wanted us to recommend the deletion of the Exception, with which we are unable to agree. Their reasoning runs thus: where a husband causes some physical injury to his wife, he is punishable under the appropriate offence and the fact that he is the husband of the victim is not an extenuating circumstance recognized by law; if so, there is no reason why concession should be made in the matter of offence of rape/sexual assault where the wife happens to be above 15/16 years. We are not satisfied that this Exception should be recommended to be deleted since that may

and religion on a higher level than the constitution and the laws of India, it is evident that the rule of law, as it pertains to the marital rape exception is, and has been for centuries, under siege.

### ***1. Indian Penal Code - §375 - Rape***

To fully understand India's views about marital rape, one must first analyze the domestic laws that pertain to the subject. §375<sup>8</sup> of the IPC specifies the circumstances under which rape is a prosecutable and punishable offense under Indian law. In analyzing the text and construction of the statute, inherently conflicting is being clear. The statute provides the legal basis for discrimination and rape of married women while, at the same time, recognizing that the taking of sexual intercourse without consent is a criminal act. The main object and purpose of this statute is the criminalization of rape, an act that society, through the legislature, has deemed to be a criminal offense under the law. Rape is committed by a man against a woman when the man obtains sexual intercourse without the consent of the woman. One of the most important elements of any rape prosecution is to prove that the woman gave no consent to the act the man perpetrated. A close reading of §375 reveals that the statute places consent at the forefront of importance. A closer analysis of the construction of the statute also reveals that consent must be affirmatively given and is not something that can be inferred. §375 provides the foundation through which the marital rape clause must be analyzed. An act cannot be inherently evil and subject to criminalization and, at the same time, depending on who the victim is, legal. This inherent conflict is pervasive in §375 of the IPC, particularly the marital rape exception clause. To understand the inherent conflict even further, an analysis of §376B of the IPC is warranted.

### ***2. Indian Penal Code - §376B – Sexual intercourse by husband upon his wife during separation***

When it comes to marital rape, Indian law differentiates between the facts whether the married couple lives together or not. Indian Penal Code §376B states:

*“Sexual intercourse by husband upon his wife during separation:*

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

*Explanation - In this section, “sexual intercourse” shall mean any of the acts mentioned in clauses (a) to (d) of §375.”<sup>9</sup>*

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amount to excessive interference with the marital relationship”. Shri Ram Jethmalani, Law Commission of India, One Hundred and Seventy Second Report on Review of Rape Laws, (2000).

<sup>8</sup> The Indian Penal Code §375, Act No. 45 (1860) (as Amended in 2013).

<sup>9</sup> *Id.*, §376B.

In reading §375 and §376B together, the State of India not only differentiates between married couples and non-married couples in the eyes of the law but also considers the fact whether married couples live together or live separately, whether temporarily or permanently. §375 and §376B both address sexual intercourse between married couples. The main difference between §375 and §376B is “consent”. Indian law suggests that if you are married and you live together, a man need not seek consent from his wife for sexual activities. Consent seems not to matter under the law, simply because the woman already consented when she decided to marry her husband. India seems to interpret the union of marriage as broad-sweeping consent during all aspects of marriage, so long as the couple lives together. However, if a husband and a wife have sexual intercourse while they are living apart, consent appears to be an element of the crime and forced sexual intercourse against the woman’s will is now to be considered a criminal offense which could lead to a minimum of two years in confinement. This incompatible differentiation in the law suggests that consent is apparent when a husband and wife live together and cannot be presumed when they do not live in the same household (whatever the reason may be). Essentially, Indian law codified the notion of marriage as a holy sacrament, placing it above all in Indian society, whether it violates the law, the constitution or basic principles of human rights.

“The exemption for marital rape stems from a long-outdated notion of marriage which regarded wives as no more than the property of their husbands. According to the common law of coverture, a wife was deemed to have consented at the time of the marriage to have intercourse with her husband at his whim. Moreover, this consent could not be revoked”.<sup>10</sup>

This antiquated and outdated belief system that considers women property of their husbands is, unfortunately, still a common belief in many parts of India and §375 of the IPC is one of those outdated remnants of the law. However, from a constitutional and legal perspective, this notion cannot stand. The European Commission of Human Rights in *C.R. v. U.K.* took “the view that the time has now arrived when the law should declare that a rapist remains a rapist subject to the criminal law, irrespective of his relationship with his victim”.<sup>11</sup>

By reading §375 and §376B of the IPC in conjunction with each other, one can arrive at The European Commission of Human Rights’ legal conclusion. Reading the language of these sections, it becomes clear that the law was designed to address a criminal act, namely rape that is committed by a man against a woman. Not considering that men cannot be victims under this provision, the law, by its terms, appears clear that forceful and non-

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<sup>10</sup> Justice J.S. Verma Committee, Report of Committee on Amendments to Criminal Law, 72 (2013).

<sup>11</sup> *C.R. v UK* Publ. ECHR, Ser. A, No. 335-C.

consensual sexual acts are illegal and will be punished. That is the basic premise the law was designed to fulfil. According to the Merriam-Webster online dictionary, a woman is “an adult female person”.<sup>12</sup> On the other hand, a “wife,” according to the same source, is “a female partner in a marriage”.<sup>13</sup> There is no difference between a woman and a wife besides the stage of life they are in at that time. For purposes of criminalization of an act, legally, it cannot matter whether a woman is single, married, divorced, separated, or in any other stage in her life. A woman is a woman, irrespective of her social status in life. Differentiating between women based on the specified capacity they may be in is unlawful and discriminatory. It defies logic that raping a married woman (your spouse) is legal but raping a single woman is considered a heinous crime. Both scenarios cover the same heinous conduct and a literal analysis and reading of the law make it clear that Indian law must perceive it the same way if a true, legal reading of the law is the desired end-state. Marriage, in and of itself, cannot be regarded as a shield which eliminates legal rights a person may otherwise enjoy outside of the sanctity of marriage, creating a specific, unlawful gender dimension against women as it pertains to this crime.

Another considerable problem in India that results from the marital rape exception clause is the negative impact “in the attitudes of prosecutors, police officers and those in society more generally”.<sup>14</sup> This unlawful exception to rape merely creates another hurdle for women to gain equality in India. Besides being discriminatory, this exception will continue to promote the wrong belief that marital rape is lawful and acceptable by creating a policy that provides for “acceptable types of rape” and “non-acceptable types of rape”. Creating and maintaining such a legal system is not only dangerous for women in India, but it also promotes a negative mindset amongst jurists, lawyers, law-enforcement personnel and society, in general, sending the wrong message that a married woman’s rights do not matter or exist in the eyes of the law. This is simply untrue and has the danger of creating a dangerous precedent, likely leading to increased violence against women, as seen by the heinous gang-rape and murder of a veterinarian in Hyderabad a few days ago.<sup>15</sup> Unfortunately, specific data is not available for analysis since the Indian Police do not register complaints of marital rape since the exception to §375 decriminalizes the offense.

Ultimately, the relationship between the rapist and the victim is an irrelevant and dangerous factor to consider to the inquiry of whether a criminal offense was committed, as such an inquiry will in most cases result

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<sup>12</sup> Definition of woman, <https://www.merriam-webster.com/dictionary/woman> (last visited Dec. 31, 2020).

<sup>13</sup> Definition of wife, <https://www.merriam-webster.com/dictionary/wife> (last visited Dec. 31, 2020).

<sup>14</sup> *Supra* note 10, 78.

<sup>15</sup> *Supra* note 3.

in an abrogation of rights for the woman. The legal status between a man and a woman, or lack thereof, is not a valid, legal defense to rape and not a relevant decision point in determining whether consent was given by the woman. Consent needs to be expressly stated and cannot be presumed by the union of marriage. Allowing such presumptions merely continues to foster the outdated mindset that women are property and not equal to men in India. The purpose, idea and language of §375 and §376B clearly establishes that the marital rape exception clause is inherently contradictory as it decriminalizes an offense only against one specific sub-set of society without a reasonable explanation as to why that sub-set of society does not deserve the protections of the law. As will be discussed in the upcoming sections, such a discriminatory distinction is unlawful and must be struck down.

### ***3. Other Indian Penal Code provisions and the Protection of Women from Domestic Violence Act, 2005***

When analyzing the legality and rationality of the marital rape exception clause considering §375 and §376B, the exception becomes even more illogical when considered in conjunction with other national laws in India. It is irrational that men can be held responsible and are routinely punished for offenses committed against women that amount to arguably less “serious” offenses as compared to rape, for example, sexual harassment<sup>16</sup> and yet, escape liability when they rape their wives. For example, under §354A of the IPC, a man could go to prison for a term up to three years for “making physical contact and advances involving unwelcome and explicit sexual overtures”, or for showing pornography to a woman against her will.<sup>17</sup> Or consider §354B of the IPC<sup>18</sup>, violation of which could result in imprisonment of no less than three years. Reading these sections of the IPC clearly establish a theme and reveal the purpose behind these criminal laws, which is to protect all women from various forms of *non-consensual* sexual acts by men. §354B even establishes that the stated offenses are punishable if committed against *any woman*.<sup>19</sup> None of these provisions excludes protections for single women, married women, or separated women, but *any woman* is protected under these statutes. Additionally, an analysis of the underlying prohibitions of §354B establishes that the marital rape exception clause appears contradictory as it relates to other Indian criminal law including §354B. Presumably, if a married man would forcibly disrobe his wife to rape her, thereby compelling her to be naked, he would be violating §354B as that is the exact behaviour this law prohibits. Confinement for this offense is set at a term of no less than three

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<sup>16</sup> *Supra* note 8, §354A. While I am not trying to diminish the seriousness of sexual harassment, it is arguably less atrocious than rape and will be used as an example to demonstrate India’s illogical application of the marital rape exception clause.

<sup>17</sup> *Ibid.*, The Act does not specifically differentiate between single or married couples.

<sup>18</sup> *Id.*, §354B.

<sup>19</sup> *Ibid.*



years. The question then becomes, what is the difference between assaulting or using criminal force against one's own wife "intending to disrobe her or compel her to be naked"<sup>20</sup> compared to doing the same things and raping the victim? The answer is none! It is evident from the basic structure, purpose and text of these provisions that the underlying goal is to protect women and not to create an exception for criminal behaviour. §354B provides no exception that would preclude married women from the protection of this section. If the law creates opposite consequences despite the application of similar facts, that result cannot stand under basic, legal, and constitutional principles.

In 2005, the Indian Parliament enacted the "Protection of Women from Domestic Violence Act". The Preamble of the Act begins by stating the main purpose of the law, which is "to provide for more effective protection of the rights of women guaranteed under the constitution who are victims of any kind occurring *within the family*".<sup>21</sup> Two things become clear by simply reading the Preamble, 1) that women do need more effective protection and 2) that women are guaranteed certain rights under the constitution of India. "The Protection of Women from Domestic Violence Act" is not a criminal law that provides extensive punishments to men who abuse women but rather a civil law that provides for certain civil remedies an aggrieved woman can potentially resort to when she finds herself abused by her husband. However, the analysis does not end there. Irrespective of the fact that this Act does not provide criminal remedies, it nonetheless determines that certain behaviour by men towards women is, at the minimum, considered wrong and unacceptable under any circumstances. This is an important distinction because the recognition about the incorrectness of certain behaviour shows the legislature's "legal" mindset towards these egregious offenses. The definition of "domestic violence" in this Act is as follows: "Harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse,<sup>22</sup> verbal and emotional abuse and economic abuse".<sup>23</sup> Sexual assault and rape are offenses that are encompassed within the protections of this law since the Act specifically includes physical and sexual abuse under its definition of domestic violence. In addition, this Act contains no exception that precludes married women from enjoying any of the protection granted therein. This Act seems quite revolutionary considering some of India's criminal laws since one of the Act's main goals is to stop and prevent violence *of any kind within the family*. Furthermore, the Indian Parliament charged the central government and every state

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<sup>20</sup> *Ibid.*

<sup>21</sup> The Protection of Women from Domestic Violence Act, No. 43 of 2005, INDIA CODE (2005).

<sup>22</sup> *Id.*, Chapter II, 3(d) (ii).

<sup>23</sup> *Id.*, Chapter II, 3(a).

government of India to take positive measures<sup>24</sup> to ensure that the provisions of this Act are followed and implemented. Here, amongst other obligations, the central government and state governments are required to widely publicize this Act at regular intervals and provide training to law enforcement and judicial officers regarding the requirements of this Act. This is quite groundbreaking in that the legislature, through domestic law, is trying to involve the sanctity of the home to change certain outdated mindsets about women within the homes of India. The legislature also clearly admits and recognizes, just by the implementation of this Act, that any sort of domestic abuse is wrong, to include sexual abuse. Irrespective of the civil nature of this law, this admission and realization in this Act is in stark contravention to the marital rape exception clause in §375. How can one argue that domestic violence, to include sexual violence, against women is wrong, yet, provide criminal defense for men who rape their wives? Once again, this Act is another example of the clear incompatibility of some of India's crucial domestic laws on the rights of women with the marital rape exception clause. As the evolution of these laws shows, the Indian legislature recognizes that any sort of violence against women is wrong, including marital rape, yet refuses to strike the marital rape exception clause from the law books of India. However, even though the legislature may refuse to remove this exception from §375 of the IPC, by operation of law, certain provisions of the constitution of India provide for the same desired outcome.

## **B. The Constitution of India**

Sexual intercourse between a husband and his wife provided she is over the age of 18, without the explicit consent of the wife, and, it appears, even if obtained by force or threat of physical violence is not a criminal offense under the laws of India. Whether the sexual intercourse demanded by the man is undesired or whether it is given out of fear is of no significance. The wife's mental and physical well-being is insignificant under the current state of the law. Husbands are authorized to exercise their "right" to sex with wide latitude without having to fear any repercussions since the government and the judiciary specifically authorize this conduct. While such conduct seems inconceivable, this is the current state of the law for married women in India. The provisions of the constitution of India are supposed to be the supreme law of the land<sup>25</sup> and they set out the fundamental principles for the government of India and also the fundamental principles and rights every human being within the boundaries of India enjoys or at least should enjoy. These fundamental rights apply to all citizens, irrespective of their religion, birthplace, status in life, or gender. Under basic constitutional principles, the

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<sup>24</sup> Positive obligations require the Central Government and State Governments to take all necessary measures to provide for and safeguard the rights this Act provides.

<sup>25</sup> The Constitution of India, articles 12, 13.

rights enshrined thereunder place upon the government an affirmative responsibility in ensuring that those fundamental, sacrosanct rights in the text of the constitution are observed, but more importantly, secured.

### *1. Equality before the law*

Article 14 of the constitution of India reads as follows:

“The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India”.<sup>26</sup>

The term “State” is further defined in Article 12<sup>27</sup> of the constitution and includes the government, parliament, and the legislature. As such, under this definition, any acts by the government, the parliament and the legislature shall not violate Article 14 and its enshrined rights. The equal protection under the law provision in the Indian constitution establishes a responsibility on the country to ensure the equal protection to all persons, irrespective of any socially differentiating factors such as religion, caste, place of birth, or gender. Once a differentiation occurs based on any factor equality is no longer present. It is important to recognize that such social differentiation does not only take place based on “hard characteristics”<sup>28</sup> such as gender, religion, place of birth, etc. but can also manifest itself in a person’s status in life, i.e. married versus unmarried, which I will call “soft characteristics”.<sup>29</sup> As such, any provisions in the law that create special provisions for any group within society or treat people differently based on hard or soft characteristics are unconstitutional. The application of Article 14 does not mean that every law in India must have equal application for all people in India, as such a reading cannot be maintained since any society has varying classes of people that may require some different treatment. However, even such distinctions must be based on a *reasonable* distinction and justification whose primary purpose is not to exclude a certain group from certain privileges and rights arbitrarily. The key is reasonableness and non-arbitrariness. However, the unequal treatment of equals in the same circumstance amounts to a discriminatory targeting of a specific sub-set of people, which would result in an unconstitutional application of the law.

Although the constitution promises and guarantees equality to every person in India, the IPC under §375, one of its exceptions establishes that sexual intercourse by a man with his own wife, as long as she is not under the age of 18, is not rape. This exception in §375 makes an arbitrary distinction between married women who are 18 years or older and single women, presumably of any age. Neither the legislative history behind this exception in §375 nor any analysis provides a *reasonable* explanation on why this

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<sup>26</sup> *Id.*, art. 14.

<sup>27</sup> *Id.*, art. 12.

<sup>28</sup> I use the term “hard characteristics” to describe traits a person generally inherits through birth.

<sup>29</sup> I use the term “soft characteristics” to describe traits a person generally obtains at some point after birth.

exception is needed and is not arbitrary and, hence, a discriminatory and unconstitutional provision, worthy of immediate elimination. There is no reasonable reading of Article 14 in conjunction with the marital rape exception clause in §375 that would make this exception fair and lawful on its face. But considering Articles 12 and 14 of the constitution in conjunction with the marital rape exception clause in §375 shows even more clearly that the legislature overreached by implementing this exception as it clearly violates multiple constitutional provisions and guarantees. The marital rape exception clause “applied and administered by the public authority with an evil eye and an unequal hand so as to practically make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice”<sup>30</sup> which is within the prohibitions of the constitution. Through the constitution, the State is making a promise to its people to create a fair and equal climate for all, men and women. The constitution of India contains no bias or discriminatory tendencies towards women. On the contrary, it is the constitution that guarantees equality and liberty for all, to include women. Hence, where lies the disconnect between the supreme law of the land and an inferior criminal law provision that is, on its face, unconstitutional? The answer is society. India, to this day, is primarily a patriarchal society, seeing the equality of women as a threat to its authority. This supposed threat is the consequence of decades-old, outdated cultural beliefs that have simmered through all facets of society and remains one of the biggest obstacles to true equality for women. While the law can help women advance their quest for full equality, the law alone without changed attitudes will never lead to the sought-after liberation.

Furthermore, the distinction the marital rape exception clause creates between married and unmarried women establishes a classification in the eyes of the law has no rational basis. The Supreme Court of India in *Budhan Choudhry And Other v. The State of Bihar*<sup>31</sup> stated that “it is well-settled that while Article 14 of the Constitution forbids class legislation, it does not forbid reasonable classification for the purposes of legislation”.<sup>32</sup> The Justices created a two-pronged test<sup>33</sup> that must be to establish a permissible classification under Article 14. What this two-pronged test ultimately establishes is that there has to be some sort of “nexus between the basis of the classification and the object of the Act under consideration”.<sup>34</sup> Finally, Article 14 is very broad in that the Supreme Court of India has stated that “it is also well established ... that Article 14 condemns discrimination not only by a substantive law but

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<sup>30</sup> *Yick Wo v. Hopkins*, 118 U.S. 356, 373 -374 (1886).

<sup>31</sup> *Budhan v. State of Bihar*, AIR SC 191 (India) (1955).

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

also by a law of procedure”.<sup>35</sup> When applying this precedent by the Supreme Court of India to §375 it becomes abundantly clear that the marital rape exception clause contained therein is facially unconstitutional. First, the object and purpose of §375 are to prevent and punish rape. The law’s object and purpose are to protect women from those men who attempt to engage in non-consensual sexual relations through force or otherwise. However, the marital rape exception clause contained in §375 carves out a sub-set of women to whom this protection does not apply, namely married women over the age of 18. This provision is clearly contradictory to the underlying object and purpose of §375. It is inconceivable that the purpose of the law is to prevent and punish rape, yet, an exception to the law authorizes rape in certain circumstances if you fall under a certain classification of women under the law. It is impossible to conclude under the Supreme Court’s reasonableness test that the classification that §375 creates (married women and unmarried women) is based on “intelligible differentia”. Rather, criminalizing rape against one class of women and legalizing rape against another class of women is an arbitrary classification that has no basis in the law. It has no rational relation to the object and purpose sought to be achieved by the statute (prevention and punishment of rape) and, as such, cannot meet the requirements the Supreme Court of India established in its two-pronged test in *Budhan Choudhry And Other v. The State of Bihar*, resulting in the conclusion that this exception in §375 is unconstitutional and must be struck down. The physical, emotional and psychological consequences of rape are the same for *all* women and are not mitigated by marriage. Besides encouraging men to rape their wives, the marital rape exception clause otherwise serves no intelligible purpose, is clearly against the object and purpose of §375, as well as other statutes, and violates various constitutional provisions and Supreme Court precedent.

## ***2. The right to life, liberty, and the security of person***

Article 21 of the constitution of India reads as follows:

“No person shall be deprived of his life or personal liberty except according to procedure established by law”.<sup>36</sup>

As with all other provisions of the constitution of India, the Supreme Court of India ultimately holds the key to the interpretation of the provisions of the law of the land. In *Suchita Srivastava & Anr v. Chandigarh Administration*, the Supreme Court interpreted Article 21 in the context of a reproductive rights case and held that “there is no doubt that a woman’s right to make reproductive choices is also a dimension of “personal liberty” as understood under Article 21 of the Constitution of India”.<sup>37</sup> By its literal definition,

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<sup>35</sup> *Ibid.*

<sup>36</sup> *Supra* note 24, art. 21.

<sup>37</sup> *Suchita Srivastava & Anr v. Chandigarh Administration*, 14 SCR 989 (India) (2009).

making choices regarding reproductive must include the choice to engage in sexual activity as reproduction can only be accomplished through sexual activity. Furthermore, in *Justice K.S. Puttuswamy (Retd.) v. Union of India*,<sup>38</sup> the Supreme Court of India held that:

“apart from being a natural law right, the right to privacy was held to be a constitutionally protected right flowing from Article 21. Privacy is an indispensable element of the right to life and personal liberty under Article 21 and as a constitutional value which is embodied in the fundamental freedoms ... of the Constitution”.<sup>39</sup>

The Supreme Court further stated that “decisional privacy allows individuals to make decisions about their own body and is an aspect of right to self-determination. It is underscored by personal autonomy, which prevents the State from using citizens as puppets and controlling their body and decisions”.<sup>40</sup>

None of these Supreme Court decisions distinguishes between married women and unmarried women nor do these decisions hold that the protections provided for in the constitution of India extinguish upon entering into marriage or any other arbitrary factor. Consequently, the Supreme Court of India clearly recognizes the right of all women to decide whether or not they wish to engage in sexual activities as enshrined in a right to privacy and decisional authority in controlling their own bodies as per Article 21 of the constitution of India. Thus, if from a constitutional standpoint, a woman can decide when and under what circumstances she desires to engage in reproductive or sexual activities, how that right can be lost through a statute that provides for an exception for marital rape? It cannot. If the constitution of India protects the safety and bodily autonomy of all women, without exception as to your marital status, then any law that calls for an opposite or conflicting result cannot stand and must be struck down based on strict constitutional norms. Any other interpretation is a violation of the law and an arbitrary construction of constitutional principles and Supreme Court precedent. Allowing the marital rape exception clause authorizes the State to control the bodies of women and deprive them of the ability to consent to or refuse sexual intercourse, the exact suggestion the Supreme Court of India held is unlawful and unconstitutional.

### **C. Decisions of the Supreme Court of India**

The limitations that are placed on the judiciary in India through the law, especially the marital rape exception clause, is disappointing. However, what is even more disappointing is the fact that women, to this day, suffer at the hands of men. Outlawing non-consensual sex within marriage must be the

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<sup>38</sup> *K. S. Puttaswamy v. Union of India*, Writ Petition (Civil) No. 494 of 2012 (2017).

<sup>39</sup> *Id.*, 21.

<sup>40</sup> *Id.*, 310.

first and necessary step to change the mindset of society by providing the message that dehumanizing treatment of women in marriage will no longer be tolerated. While the Indian judiciary has one of its hands tied behind its back, on the other hand, it refuses to give women the constitutional guarantees every Indian deserves. The fact that Indian society considers marital rape as an inevitable part of marriage is disturbing. However, just because something has been recognized as “normal” for centuries does not mean it is the right thing to do. While change requires the will of the people as well as the engagement of and empowerment through the government, one aspect the government of India is long due to provide to its female citizenry.

It is equally important to note that the Supreme Court of India has consistently held in various opinions that the law does provide extensive protections to women, including the right to refuse unwanted sexual advances by men.

### ***1. State of Maharashtra v. Madhukar Narayan***

In *State of Maharashtra v. Madhukar Narayan*<sup>41</sup> the Supreme Court of India set the groundwork for the argument that irrespective of a woman’s place or status in her life, she has a right to privacy, deserves the right of integrity of her body as well as the protection of the law, all facets that the marital rape exception clause denies married women. In this case, a police inspector, in uniform, went to the house of a woman and demanded sexual intercourse from her. When she refused, he attempted to rape her. Upon hearing cries for help, the woman’s husband and other villagers gathered outside of the house. The accused then called his police station and asked for officers to come to his location for assistance. Upon the arrival of the officers, the accused instructed his subordinates to place the woman he attempted to rape under arrest. His subordinates complied. The accused maintained that he came to the woman’s house to investigate a crime. He subsequently falsified documents and elicited false testimony from others to maintain his story. The woman filed a complaint against the accused and his behaviour which the police decided to investigate. Upon the conclusion of the investigation, it was determined that the accused attempted to rape the woman and he falsified records and elicited false testimony from others to maintain his lies. After the investigation, the accused was terminated from the police force. The accused filed a lawsuit with the High Court of Bombay. The High Court of Bombay sided with the accused and quashed his termination from the police force, arguing that the career of a police officer with years of service could not be terminated solely based on the uncorroborated words of a woman with loose moral character, as she was known to have sex with various men. The State appealed this ruling, which ultimately led this case to be heard by the Supreme Court of India.

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<sup>41</sup> *State of Maharashtra and Another v. Madhukar Narayan Mardikar*, AIR 1991 SC 207 (India) (1990).

The Supreme Court of India held that: “Even a woman of easy virtue is entitled to privacy, and no one can invade her privacy when he likes. So also, it is not open to any and every person to violate her person when he wishes. She is entitled to protect her person if there is an attempt to violate it against her wish. She is equally entitled to the protection of the law. Therefore, merely because she is a woman of easy virtue, her evidence cannot be thrown overboard.”<sup>42</sup> This case clearly illustrates that Indian law does provide various protections to women, irrespective of who they are and what stage of their lives they may be in. Yet, the same rights that the Supreme Court acknowledges exists for women cannot be, at the same time, taken away through the marital rape exception clause. Such a conflict in laws must clearly give way to the interpretations of the Supreme Court of India as well as the constitution of India. As held by the Supreme Court, “even a woman of easy virtue”<sup>43</sup> is entitled to basic rights of autonomy over her body and nobody can invade that privacy as he pleases. This is an instrumental holding by the highest court of the land as it clearly establishes an inviolable privacy interest of women in their bodies. The Supreme Court did not distinguish between married women or single women in their ruling and merely referenced the term “woman,” from which can be deduced that this right applies to all women. But what is even more clarifying is the fact that the Supreme Court said that even a woman of easy virtue, which can be defined as a woman who may sleep with various men or a woman of loose moral character is entitled to this basic right of privacy over her body which nobody can pierce without consent. Hence, a married woman should also certainly enjoy the same rights and must be protected by the same laws. The marital rape exception clause stands in clear violation of these basic principles and must be abolished as unconstitutional and clearly unlawful.

## ***2. Bodhisattwa Gautam v. Subhra Chakraborty***

In *Bodhisattwa Gautam v. Subhra Chakraborty*<sup>44</sup>, the accused, a university professor, convinced one of his students to repeatedly have sex with him by giving her false assurances of marriage. The young woman became pregnant twice and the professor insisted to abort the pregnancies, always falsely promising the young woman that marriage would commence if she listened to him. The woman continued to have sex with the accused based on false assurances and after several years of living with her, the accused abandoned the young woman. The young woman filed criminal charges against the accused for rape allegations, and also requested from the court that the accused should be ordered to pay compensation to her until the resolution of the criminal charges against him.

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<sup>42</sup> *Id.*, § 8.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Bodhisattwa Gautam v. Subhra Chakraborty*, AIR 1996 SC 922 (India) (1995).



This case is very fundamental as it, amongst other things, stands for the proposition that certain fundamental rights, such as the right to life, under the constitution of India are simply absolute in that they cannot be contradicted or diminished by any other law. These rights provide such fundamental protections to all people of India that any act of the legislature that goes against these fundamental rights is *ultra vires*.<sup>45</sup> “Any of the Fundamental Rights guaranteed in Part III of the Constitution, can declare an Act to be *ultra vires* or beyond the competence of the legislature”.<sup>46</sup> The Supreme Court of India “has, innumerable times, declared that “right to life” does not merely mean animal existence but means something more, namely, the right to live with human dignity”.<sup>47</sup> The right to live with human dignity includes the right to autonomy over one’s own body. The Supreme Court recognizes in this case, the hardships women in India suffer and takes a firm stance that any sort of discriminatory behaviour towards women shall not be tolerated any longer.

“Unfortunately, a woman, in our country, belongs to a class or group of society who are in a disadvantaged position on account of several social barriers and impediments and have, therefore, been the victim of tyranny at the hands of men with whom they, fortunately, under the Constitution enjoy equal status. Women also have the right to life and liberty; they also have the right to be respected and treated as equal citizens. Their honour and dignity cannot be touched or violated. They also have the right to lead an honourable and peaceful life. Women, in them, have many personalities combined. They are Mother, Daughter, Sister and Wife and not play things for centre spreads in various magazines, periodicals or newspapers nor can they be exploited for obscene purposes. They must have the liberty, the freedom and, of course, independence to live the roles assigned to them by Nature so that the society may flourish as they alone have the talents and capacity to shape the destiny and character of men anywhere and in every part of the world”.<sup>48</sup>

This recognition by the Supreme Court is tremendous considering the plight many women go through at hands of their husbands, particularly based on the marital rape exception clause. At the same time, the Supreme Court of India came to this realization in 1995, almost 25 years ago. In 1995, the Supreme Court of India, by penning these very important 179 words provided the blueprint for India in how to treat women but also the blueprint that must serve as the sword that finally cuts through the marital rape exception clause in §375 of the IPC. Recognition of basic, fundamental rights does not decay over time. It becomes stronger. In 2019, the need for reforms is needed more than ever. Married women can no longer be said to have equal status with

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<sup>45</sup> *Ultra Vires* Definition, [https://www.law.cornell.edu/wex/ultra\\_vires](https://www.law.cornell.edu/wex/ultra_vires) (last visited Dec. 31, 2020).

<sup>46</sup> *Supra* note 44, 6.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Id.*, 7.

men under the constitution of India, yet, be treated differently under the marital rape exception clause. As the Supreme Court has further held:

“Rape is thus not only a crime against the person of a woman (victim); it is a crime against the entire society. It destroys the entire psychology of a woman and pushed her into deep emotional crises. It is only by her sheer will power that she rehabilitates herself in the society which, on coming to know of the rape, looks down upon her in derision and contempt. Rape is, therefore, the most hated crime. It is a crime against basic human rights and is also violative of the victim’s most cherished of the Fundamental Rights, namely, the Right to Life contained in Article 21. To many feminists and psychiatrists, rape is less a sexual offence than an act of aggression aimed at degrading and humiliating women. The rape laws do not, unfortunately, take care of the social aspect of the matter and are inept in many respects”.<sup>49</sup>

India must finally recognize that marriage cannot legalize rape. The Supreme Court has recognized this almost a quarter-century ago and now it is time for the State of India to do the same.

### *3. Independent Thought v. Union of India*

In this 2017 landmark opinion, the Supreme Court of India considered whether sexual intercourse between a man and his wife being a girl between 15 and 18 years of age is rape. The Supreme Court considered this very narrow question, deliberately avoiding the issue whether marital rape of a woman over the age of 18 ought to be criminalized. India’s supreme jurists held that “sexual intercourse with a girl below 18 years of age is rape regardless of whether she is married or not”.<sup>50</sup> Most importantly, the Supreme Court held that:

“The exception carved out in the IPC [Indian Penal Code] creates an unnecessary and artificial distinction between a married girl child and an unmarried girl child and has no rational nexus with any unclear objective sought to be achieved. The artificial distinction is arbitrary and discriminatory and is definitely not in the best interest of the girl child. The artificial distinction is contrary to the philosophy and ethos of Article 15(3) of the Constitution as well as contrary to Article 21 of the Constitution and our commitments in international conventions. It is also contrary to the philosophy behind some statutes, the bodily integrity of the girl child and her reproductive choice”.<sup>51</sup>

The ideas mentioned above essentially capture the entire argument that this paper attempts to make. While the Supreme Court of India has confirmed the unconstitutionality of the marital rape exception clause in the Indian Penal Code, albeit, in a narrow scope, it too makes an arbitrary and discriminatory

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<sup>49</sup> *Ibid.*

<sup>50</sup> *Independent Thought v. Union of India* 10 SCC 800 (India), 1 (2017).

<sup>51</sup> *Id.*, 1-2.

distinction between young girls, ages 15 to 17, and older girls who are 18 and older. What is the rational nexus or objective of having a marital rape exception clause for girls who are 18 and older? How is the legalization of marital rape of women 18 and older not an arbitrary and discriminatory distinction contrary to the philosophy and ethos of various constitutional articles and India's commitments under international conventions? Do not married women 18 and older have a right to their bodily integrity and reproductive choice? These are all questions the Supreme Court of India did not answer in this monumental decision, however, arguably, the same legal principles that the Court stated that apply to married children ought to apply to married women. Opponents of this idea may argue that the Indian judiciary essentially carved out a statutory rape exception for any sexual acts with women below the age of 18. While that argument at first glance makes sense, it is important to note that the constitution of India, as well as previous Supreme Court of India precedent, do not create an arbitrary age group of women who are entitled to the protection of constitutional rights. Furthermore, any statutory rape argument usually hinges on the fact of consent, the idea being that a certain age group of individuals is too young to make an informed decision about sexual activity. While that argument is generally correct, the word rape also implies the non-consensual taking of sexual intercourse. Whether or not a girl who is 18 or older has the legal capacity to consent is irrelevant as rape almost always is perpetrated without the consent of the other party. As such, that argument must fail. Ultimately, one of the rights being violated is the bodily integrity of a human being, irrespective of age, and, as such, cannot be defined to be a crime only in a particular set of circumstances. A 15-year-old married girl is as much a human being as a 19-year-old married woman. They both are entitled to the same protections under the law and any other result is manifestly unjust and contrary to the ethos of the constitution of India. The Court noted in this case that "there is a plethora of material to clearly indicate that sexual intercourse with a girl child below the age of 18 years (even within marriage) is not at all advisable for her for a variety of reasons, including her physical and mental well-being".<sup>52</sup> However, it is irrational to believe that a married woman's physical and mental well-being, when she is raped by her husband is less affected than that of a girl below the age of 18.

The Court also reiterated in its decision that:

"It must be remembered that those days are long gone when a married woman or a married girl child could be treated as subordinate to her husband or at his beck and call or as his property. Constitutionally a female has equal rights as a male and no statute should be interpreted or understood to derogate from this position. If there is some theory that propounds such an

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<sup>52</sup> *Id.*, 18.

unconstitutional myth, then that theory deserves to be completely demolished”,<sup>53</sup> and tradition and custom cannot trump constitutional provisions.

The marital rape exception clause cannot be viewed through the lens of tradition and history, but must be considered “with the social realities of today”.<sup>54</sup> “If times and situations change, so must views, traditions and conventions”.<sup>55</sup> “Apart from constitutional and statutory provisions, constitutional morality forbids us from giving an interpretation to Exception 2 to Section 375 of the IPC that sanctifies a tradition or custom that is no longer sustainable. The view that marital rape of a girl child has the potential of destroying the institution of marriage cannot be accepted”.<sup>56</sup>

The fact that rape, in general, is an abhorrent crime is not disputed by the Supreme Court of India in this case. It is also not disputed that rape is per se a criminal offense. Every argument the Supreme Court made in this case, albeit only limited to married girls between the ages of 15 and 18, is exactly the same argument and reasoning for any married woman above the age of 18. Any classification that law makes to differentiate people, or a group of people, must have some logical nexus to a goal that the State wants to achieve. There is no logical argument to be made why a girl who is 17 and raped by her husband has not endured the same crime as a girl who is 18 years and more. Rape remains a rape, irrespective of the age of the victim and, unfortunately, the Supreme Court of India has not committed to those words in their holding. For now, the Supreme Court has held that the marital rape exception clause is unconstitutional as to a specific age group of girls. While that is a good step forward, it remains a decision on shaky legal ground. Unconstitutionality is generally not determined by the age of a victim rather by the incompatibility of superior law to inferior law. While this case provides the blueprint for the legal arguments to be made on why the marital rape exception clause is unconstitutional, it remains to be seen when the Supreme Court of India decides to officially pen an official decision to finally strike down the marital rape exception clause for good. If marital rape violates a young girl’s constitutional and human rights, it also violates a young woman’s constitutional and human rights. Age cannot be the determining factor as to the constitutionality of a legal principle.

## II. India’s International Human Rights obligations

Discrimination and violence against women are not just problems in India but also in many, if not all, countries around the world. While domestic changes are the most powerful measures to take for countries to effectuate

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<sup>53</sup> *Id.*, 52.

<sup>54</sup> *Id.*, 55.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Id.*, 57.

within their borders, many countries also sign on to international obligations to address various issues, to include discrimination and violence against women. The primary problem with international treaties is that many countries sign on to the various treaties in existence that address a certain problem or a set of problems, yet, when it comes to actual implementation within their own countries, many countries fail to act or fail to act in a timely fashion. It is undisputed that “violence against women under international law includes physical, sexual and psychological violence occurring in the family, including battering ..., marital rape, ... and violence related to exploitation”,<sup>57</sup> including any gender-based violence that is excused by a State.

### **A. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)**

CEDAW is an extremely significant, and maybe the most important, international human rights treaty devoted to gender equality. The basic ideas that CEDAW promulgates can be summarized as follows:

1. Women are inherently equal to men in all regards;
2. Signatory’s domestic laws should reflect that equality.

Article 1 of CEDAW<sup>58</sup> encapsulates the definition of what “discrimination against women” means in this context. The State of India ratified CEDAW on 9 July 1993. India filed two declarations and one reservation.<sup>59</sup> Even taking these declarations and the reservation into account, India has undertaken the international obligation to eliminate any distinction between men and women based on sex, irrespective of their marital status, amongst other obligations, in nearly all spheres of society. Despite the undertaking of these international, legal obligations, it is evident by analyzing India’s domestic laws, particularly the marital rape exception clause of §375 of the IPC, that India is far from keeping its promises to the international community. The marital rape exception clause is in direct violation of Article 1 of CEDAW, and yet India has done nothing to strike down that unconstitutional provision in their domestic laws.

#### ***1. General Recommendation 19 of the CEDAW Committee***

CEDAW, in and of itself, does not mention the term “gender violence”. However, the United Nations and various other treaties have concluded that violence against women exemplifies the evil that prejudices the exercise of

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<sup>57</sup> United Nations, Rep. of the Fourth World Conference on Women, § 112, 113, 117, 118, U.N. Doc. A/CONF.177/20/Rev. 1 (1996).

<sup>58</sup> UN General Assembly, Convention on the Elimination of All Forms of Discrimination against Women, art. 1 (1979).

<sup>59</sup> Convention on the Elimination of All Forms of Discrimination against Women, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-8&chapter=4&lang=en#EndDec](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-8&chapter=4&lang=en#EndDec) (last visited Dec. 31, 2020).

women's rights, whether this violence occurs in the public sphere or the private sphere. "The CEDAW Committee has specifically identified these rights as being impaired or entirely nullified by gender violence".<sup>60</sup> In its General Recommendation 19, the CEDAW Committee clarified that "gender-based violence is a form of discrimination".<sup>61</sup> However, the committee went even further in declaring that family violence, including rape, "impairs or nullifies the enjoyment by women of human rights and fundamental freedoms<sup>62</sup> under general international law or under human rights conventions, (and) is discrimination within the meaning of article 1 of the Convention".<sup>63</sup>

While General Recommendation 19 has no binding legal status, the recommendations that are produced by the committee on the Elimination of Discrimination against Women are nonetheless of great legal importance and value and must not be disregarded. The committee's recommendations are generally considered "soft law",<sup>64</sup> and are considered interpretations to CEDAW to which many nations have legally signed on. Completely ignoring these recommendations would be reckless on the part of countries who have signed on to and ratified CEDAW.

Under General Recommendation 19, "any form of gender-based violence is discrimination".<sup>65</sup> When analyzing the importance of the recommendations provided in General Recommendation 19, one must first consider the object and purpose of CEDAW. CEDAW was enacted to recognize and eliminate all forms of gender violence and to identify practices that countries ought to analyze when developing countermeasures directed to any form of discrimination against women. While recognition is the first step, without fully understanding or internalizing the true meaning of the words in CEDAW simply makes the words meaningless.

When analyzing the marital rape exception clause in the light of CEDAW and General Recommendation 19, it is important to note that the marital rape exception clause legalizes a form of gender-based violence simply because the victim is a married woman. Paragraph 6 of General Recommendation 19 provides that "the definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately".<sup>66</sup> The marital rape exception clause of §375 is only directed against married women and since

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<sup>60</sup> Melanie Randall, Vasanthi Venkatesh, *The Right to No: The Crime of Marital Rape*, Women's Human Rights, and International Law, 41 *Brook. J. Int'l L.* 153, 178 (2015).

<sup>61</sup> CEDAW General Recommendation No. 19: Violence against Women (1992).

<sup>62</sup> *Id.*, art. 7.

<sup>63</sup> *Ibid.*

<sup>64</sup> Soft Law and Legal Definition, <https://definitions.uslegal.com/s/soft-law/> (last visited Dec. 31, 2020).

<sup>65</sup> *Supra* note 61, § 1.

<sup>66</sup> *Id.*, § 6.

this exception only applies towards women, it affects women disproportionately.

Furthermore, under Article 1 of CEDAW, General Recommendation 19 clarifies that women have a right to equal protection under the law as well as the right to liberty and security of the person, amongst other rights.<sup>67</sup> This is a crucial aspect of the understanding of CEDAW since the marital rape exception clause completely fails to recognize any of these rights. As previously discussed, the constitution of India secures the same legal rights for all people of India as the supreme law of the land. While General Recommendation 19 has no legally-binding status, India cannot avoid the fact that its constitution, as well as a treaty India voluntarily signed on to, provide for basic protections of women which are legally enforceable, if not by CEDAW or General Recommendation 19 then at least through the constitution of India. Not giving married women the equal protection of the law and the right to liberty and security of their person falls squarely outside the object and purpose of the entire CEDAW construct. The more reasonable argument is that India knows that the marital rape exception clause is illegal, yet, attempts to justify its existence through other means. However, those other means do not have the force of law, hence, are meaningless.

Another key provision of General Recommendation 19 is that “States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence”.<sup>68</sup> One of the main arguments made by India is that India cannot be held responsible by acts of private persons since India is not aware of the acts as they are being perpetrated in the sanctity of a private person’s home, away from the reach of the force of the government. However, that argument is not only logically flawed, it is just another excuse provided by the government to justify its patriarchal and misogynistic system. The due diligence principle essentially prescribes the obligations a country has to prevent certain human rights violation and, if it fails to do so, the country can be held legally responsible for said violations.

Given the state of India’s domestic law, constitutional law and international obligations, India is obliged to prevent marital rape and, if it occurs, can and must be held responsible, even for purely private acts that the government may not have immediate knowledge of. One might argue that attaching such obligations to a sovereign nation for acts of private actors cannot be what the due diligence principle stands for or how it has been interpreted through judicial decisions. Yet, that argument must fail since the State apparatus, through its legislature and judiciary, has created the situation itself that allows husbands to freely rape their wives to the detriment of the

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<sup>67</sup> *Id.*, § 1.

<sup>68</sup> *Id.*, § 9.

rights recognized in Indian domestic law, constitutional law and India's international obligations. A State cannot hide behind the veil of ignorance if it is the State that created the condition that subjects married women to the discriminatory and atrocious behaviour that the State must prevent under its laws and its constitution. Only a State can create such a climate of impunity. India has brought itself into this predicament and therefore must be held responsible for all consequences of the condition that it created. Any other interpretation of the state of the law would provide India with an unreasonable and immoral mechanism to hide behind ignorance. Further, India cannot establish legal measures against this discriminatory and criminal behaviour against married women if it legalized it in the first place. India's argument that family is immune from State intervention is also flawed since a myriad of other laws criminalize behaviour that occurs within the realm of family. The oppression of women by their husbands cannot be beyond the State's reach as such an interpretation would be obscure and illogical considering the legal context. The countermeasures India is obliged to take according to the due diligence standard already exists (criminalization of rape and prescribe punishments). India merely needs to acknowledge the full equality of women in society, as it has pledged to do through its own laws and international obligations.

## **2. General Recommendation 28**

While General Recommendation 19 laid out the legal protections that women must be provided under CEDAW and the responsibilities of States in enforcing those rights, General Recommendation 28 continues on the path of providing the legal framework signatory States need to internalize, respect and promote to protect women from discrimination in its all forms, as required by CEDAW. Under CEDAW, State parties cannot just sit back and rest on the words on paper, however, the obligation to respect women requires that State parties take a wide variety of steps to ensure that women enjoy equal rights to men in all aspects of life, *de facto*<sup>69</sup> and *de jure*.<sup>70</sup>

"The obligation to respect requires that States parties refrain from making laws, policies, regulations, programmes, administrative procedures and institutional structures that directly or indirectly result in the denial of the equal enjoyment by women of their civil, political, economic, social and cultural rights. The obligation to protect requires that States parties protect women from discrimination by private actors and take steps directly aimed at eliminating customary and all other practices that prejudice and perpetuate

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<sup>69</sup> "In fact." De Facto Definition, <https://www.dictionary.com/browse/de-facto> (last visited Dec. 31, 2020).

<sup>70</sup> "According to law." De Jure Definition, <https://www.dictionary.com/browse/de-jure?s=t> (last visited Dec. 31, 2020).



the notion of inferiority or superiority of either of the sexes, and of stereotyped roles for men and women".<sup>71</sup>

Concerning the marital rape exception clause in §375, it is evident that the legislature has made a law that directly results in inequality for married women as to their social and personal rights. Instead of pursuing their obligation to protect, the State created a realm of discrimination and criminality for married men to "enjoy" while, at the same time, targeting women, thereby "perpetuating the notion of inferiority".<sup>72</sup> Under General Recommendation 28, State parties need to recognize that they have a duty to protect towards all women and not just a sub-set of women. As §375 directly discriminates against married women, another, a basic requirement of CEDAW is violated by Indian authorities.

"States parties have an obligation not to cause discrimination against women through acts or omissions; they are further obliged to react actively against discrimination against women, regardless of whether such acts or omissions are perpetrated by the State or by private actors".<sup>73</sup>

There is no more fundamental way a State can "act" than through the enactment of laws. By enacting laws, a State creates positive and negative obligations on its citizenry and itself. Through the exception clause in §375, India has "acted" in a way that does not conform to its responsibilities and obligations in domestic, constitutional or international law. India is, by maintaining this exception, actively perpetuating discrimination against married women. Through its acts, India created the discriminatory climate, hence, is responsible for any negative consequences that result from its actions. By having this exception on the books, India is directly violating its due diligence responsibilities on a variety of legal grounds. India is "thus obliged to ensure that private actors do not engage in discrimination against women as defined in the Convention".<sup>74</sup> The full realization of women's rights, a duty India undertook, cannot be realized when discrimination against women is still pervasive in its domestic laws. If the meaningful implementation of the concepts of CEDAW is truly the desired end-state for India, meaningful changes need to happen immediately. A good start is to strike down the marital rape exception clause of §375 of the Indian Penal Code.

### **3. General Recommendation 35**

General Recommendation 35 complements and updates General Recommendation 19. Pursuant to the CEDAW Committee, "gender-based

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<sup>71</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, § 9 (2010).

<sup>72</sup> *Ibid.*

<sup>73</sup> *Id.*, § 10.

<sup>74</sup> *Id.*, § 13.

violence against women is one of the fundamental social, political and economic means by which the subordinate position of women with respect to men and their stereotyped roles are perpetuated".<sup>75</sup> Gender-based violence against women, which includes marital rape, is

"rooted in gender-related factors such as the ideology of men's entitlement and privilege over women, social norms regarding masculinity, and the need to assert male control or power, enforce gender roles or prevent, discourage or punish what is considered to be unacceptable female behavior. Those factors also contribute to the explicit or implicit social acceptance of gender-based violence against women, often still considered a private matter, and to the widespread impunity in that regard".<sup>76</sup>

One of the most complex aspects of studying the situation of women in marriage, and forms of violence which occur within this institution, is the private nature in which these atrocious acts are committed against women. General Recommendation 35 establishes that gender-based violence can occur in all spheres of human interaction, whether public or private, and such violence can result "from acts or omissions of State or non-State actors".<sup>77</sup> It can be deduced from the plain reading and interpretation of General Recommendation 35 that if a State empowers<sup>78</sup> private actors to engage in certain discriminatory behavior against women and fails to take *all* appropriate legal actions and measures to prevent acts of gender-based violence, such actions can then be attributed to the State. This is especially true when the State is aware or *should be aware* that certain conditions that the State condones have a high likelihood in resulting in gender-based violence against women. It is important to note that only a State or a government can give official authority or legal power to its citizens to do something or prevent them from doing something. Therefore, if a State legalizes human rights violations, even though such a law is on its face illegal, any consequences resulting from those actions or the sphere of action the government has created thereby must be attributable to the State.

In the case of India, the marital rape exception clause in §375 not only promotes gender-based violence (rape), but it perpetuates impunity for such acts. By creating this environment, irrespective of the reasons for doing so, the State of India is aware or, at the bare minimum, *should be aware* that this exception results in human rights violations. The State is simply willing to look the other way. It is this indifference that requires that the State be held responsible for any and all violations that are enabled through its laws. The

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<sup>75</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation No. 3535 on gender-based violence against women, updating general recommendation No. 19, § 10 (2017).

<sup>76</sup> *Id.*, § 19.

<sup>77</sup> *Id.*, § 20.

<sup>78</sup> "To give official authority or legal power to" Empower Definition, <https://www.merriam-webster.com/dictionary/empower> (last visited Dec. 31, 2020).

European Court of Human Rights is one of the preeminent institutions in the interpretation of human rights laws. While its decisions are technically not binding on India, the analysis and structure of its decisions provide exceptional legal interpretation on human rights issues which the State of India should follow or, in the alternative, which should be used to create positive obligations for the State of India. In 2009, the European Court of Human Rights in its judgment in *Opuz v. Turkey*<sup>79</sup> held “governments accountable for failing to take adequate steps to protect victims of repeated domestic violence, even absent any active malfeasance on the state’s part”.<sup>80</sup> In Europe, this was an important human rights case because the court essentially held that governments have an obligation to protect women, even in matters that relate solely to the family.

The fact that governmental authorities do not offer any sort of safeguards or protections to Indian women against marital rape is a form of gender-based discrimination as this lack of protection only applies to women, particularly married women. While the State of India might argue that it cannot be held responsible for merely private matters that are not reported to its authorities, that argument must fail since §375 does not provide for any reporting mechanisms as marital rape is legalized through this statute. Moreover, opponents of any sort of governmental interference into private, marital matters might argue that any sort of governmental interference into the marriage of two individuals is excessive and cannot be tolerated. However, even that argument must fail as States routinely legislate in all spheres of human interaction, to include what could be considered purely private matters. As such, setting limitations on how a man can or cannot treat a woman during the marriage would be no different. “Respecting private and family life may include a duty to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals”.<sup>81</sup> The European Court of Human Rights in *Kontrová v. Slovakia* established a test when a State must act to protect an individual:

“For a positive obligation to arise, it must be established that the authorities knew of or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk”.<sup>82</sup>

There is a realistic, clear, and real danger that the marital rape exception clause poses a danger to women in India, as such, the State of India has an

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<sup>79</sup> *Opuz v. Turkey*, App. No. 33401/02 (Eur. Ct. H.R., 2009).

<sup>80</sup> Tarik Abdel-Monem, *Opuz v. Turkey: Europe’s Landmark Judgment on Violence Against Women*, 17 Human Rights Brief 29, 29 (2009).

<sup>81</sup> *Bevacqua and S. v. Bulgaria*, App. No. 71127/01, § 65 (Eur. Ct. H.R., 2008).

<sup>82</sup> *Kontrová v. Slovakia*, App. No. 7510/04, § 50 (Eur. Ct. H.R., 2007).

obligation to intervene. “The State’s failure to protect women against domestic violence breaches, at the bare minimum, their right to equal protection of the law and ... this failure does not need to be intentional”.<sup>83</sup> However, India’s tolerance of the marital rape exception clause is an intentional act by the State that sets the stage for massive human rights violations. Women suffer the consequences of this exception without being afforded any recourse or protection by the law. Human rights are the same whether they are applied in Europe, India, or anywhere else in the world. These are universal rights that go beyond the boundaries of nations. As such, the decisions and analysis by the European Court of Human Rights should be looked at favorably and treated as binding, customary international law. Through the indifference to and tolerance of marital rape, the State of India is complicit in every instance of rape that women endure in abusive marriages. This systemic problem must be addressed by the State of India and it is the responsibility of the State to protect its women who live through this form of gender violence.

## **B. International Covenant on Civil and Political Rights (ICCPR)**

Article 7 of the ICCPR states that no person can be subjected to “cruel, inhuman or degrading treatment or punishment”.<sup>84</sup> According to General Comment 20, “the aim of the provisions of article 7 of the International Covenant on Civil and Political Rights is to protect both the dignity and the physical and mental integrity of the individual. It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity”.<sup>85</sup> Further analyzing the language of article 7, it becomes clear that individuals have a right over their bodily integrity as well as their mental integrity which no person shall take away from another without due consent. As a signatory to the ICCPR, India has obligations to discourage violations of article 7 as well as erect legal barriers to prevent the encroachment of rights that this international covenant protects. However, the marital rape exception clause essentially provides amnesty to rape within marriage and, as such, is incompatible with the positive obligations that India has to provide women with the protection from such maltreatment in its jurisdiction. By allowing the marital rape exception clause to exist, India is encouraging and tolerating the very violation of bodily integrity, that article

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<sup>83</sup> *Id.*, § 191.

<sup>84</sup> International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1996, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, ratified by India on April 10, 1979, art. 7.

<sup>85</sup> UN Human Rights Committee (HRC), CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), § 2 (1992).

7 of the ICCPR aims to protect. Therefore, besides being a signatory to this international covenant, India has yet to provide and develop actual remedies to the people this article aims to protect. Not surprisingly, the very bodily integrity that article 7 protects is also protected by the Indian constitution. Hence, India has an international obligation as well as a domestic obligation in ensuring the protection these two legal sources demand, however, if India fails to act on its positive obligations, the State must be held responsible.

***1. International Covenant on Economic, Social and Cultural Rights (ICESC)***

Article 12 of the ICESCR states that “State Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”.<sup>86</sup> Pursuant to General Comment 14, Article 12 of the ICESCR needs to be read considering the context of gender-based violence and its repercussions on the enjoyment of the highest attainable standard of physical and mental health.<sup>87</sup> Reading article 12 in that light, the marital rape exception clause is in stark contrast to the obligation article 12 envisions. A married woman in India who may be the victim of marital rape cannot be said to enjoy the highest attainable standard of physical and mental health when she is subjected to a violation of her bodily integrity and mental well-being by her husband. Allowing rapists to shield themselves with the marital rape exception clause leaves victims far from the attainment of the highest possible physical and mental health. In fact, this statutory provision may have the opposite effect, harming the protected rights under article 12 by leaving potential victims hopeless and helpless because the crime they suffered is legally shielded from prosecution and any attainment of justice. As a signatory to the ICESCR, India has a duty to create an environment that protects the rights it is obligated to protect through this covenant. Creating such an environment can only be achieved if provisions such as the marital rape exception clause are forever eliminated from the law books of India. While that appears to be an obvious step, it is the first step India must take to implement the positive obligations it has signed onto in the international arena.

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<sup>86</sup> UN General Assembly, International Covenant on Economic, Social and Cultural Rights, § 3 (1976).

<sup>87</sup> UN Committee on Economic, Social and Cultural Rights, General Comment 14, The right to the highest attainable standard of health (Twenty-second session, 2000), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1, § 35 (1994).

### **III. National reforms are required by the central government to preserve the rule of law and not the rule of culture**

Through its decisions in *Independent Thought v. Union of India* ((2017) 10 SCC 800), *State of Maharashtra v. Madhukar Narayan* ((1991) 1 SCC 57) as well as *Bodhisattwa Gautam v. Subhra Chakraborty* (1996 SCC (1) 490), and other cases, the Supreme Court of India has already laid the groundwork for the complete abolishment of the marital rape exception clause. It has become evident throughout various Supreme Court precedent that certain fundamental constitutional rights do apply to all people of India, including women in all stages of their lives, amongst other things guaranteeing the integrity of their bodies as well as the right to sexual integrity and reproductive choice. These fundamental rights are further linked to other fundamental constitutional rights such as equality before the law. In analyzing these legal principles, it becomes increasingly difficult for the State of India to justify the marital rape exception clause. The Supreme Court of India has already held that the marital rape exception clause as it pertains to young girls between the ages of 15 and 18 is unconstitutional. While the Supreme Court has deliberately not addressed this issue for adult married women, it is an increasingly difficult argument for the State of India and the Indian judiciary to make that a law that has been deemed unconstitutional as to one particular age group of women is not unconstitutional as it pertains to an older age group of women. The only way the State of India is trying to save this outdated rule is by relying on cultural norms. However, culture must evolve and the human rights of women cannot be violated because the culture has not adapted to the year 2019.

#### ***1. Repeal the Marital Rape Exception Clause***

The question then becomes, what are the obligations of the State of India in this regard? Primarily, the marital rape exception clause needs to be eliminated from the IPC. The Supreme Court of India has already provided the legal framework for doing so. The very first step the State of India must take is to make marital rape an actual crime in the IPC. One argument against the criminalization of marital rape is that Indian society will react unfavorably to any legislation that would criminalize marital rape based on cultural norms. This argument is not persuasive as the State of India takes routine legislative actions with which much of the population may not agree. Yet, once a rule has been signed into law, most Indians will likely feel a legal obligation to abide by the rules, particularly if a possible repercussion of violation are criminal sanctions. Just like laws evolve over time, so does the mindset of people. By not criminalizing this atrocious conduct, the State of India effectively sends the message to its people that rape is acceptable

conduct if the rapist and the victim are married. The longer this irrational message remains a legal defense, the less likely it will be that the mindset of people will change. The State of India needs to take the first step in eradicating this crime and in providing equality for all people, men and women, before the law.

One argument against the elimination of the marital rape exception clause might be that it will not lead to an increase in reporting of the crime due to the patriarchal nature of Indian society. While an immediate influx in reports may not result from the criminalization of marital rape, married women must be given *the choice* to report the crime when they are ready to do so. The first step towards full equality is to be given a choice. It is true that some women may not want to report their husbands even if their husbands have violated the most sacrosanct promise a man gives his wife during marriage, to protect her till death do them apart. However, equality under the law includes the right to speak up and the option of seeking the protection of the law and remedies through the law. The argument that a change would not yield the results sought is a fallacy. Even if only 1 out of 100 women decides to seek the protection of the law should she be the victim of marital rape, that alone must be deemed a success and that option and right must be afforded to all women.

## *2. Remove barriers to justice for the victims*

Changing the law alone will likely not yield the desired results. While India has various laws addressing rape, in general, it remains difficult for victims of rape offenses, particularly in the family setting, to obtain justice for themselves. One of the main issues is the fact that most victims are unaware what help and assistance they may be able to seek or are entitled to. Others may face the obstacle of being ostracized by their family on which they are dependent. These and other barriers tend to remove viable paths to seek justice from victims of gender-based violence suffered in the family, particularly marital rape. "India is a party to core human rights treaties that obligate the government to protect the rights of survivors of sexual violence".<sup>88</sup> "However, beyond the laws and institutions, India needs a concerted government effort to educate the public and alter mindsets, to enforce promised protections, and ensure legal safeguards".<sup>89</sup> As a first step, India needs to put an effective system in place throughout the country that allows victims of sexual violence to seek necessary medical services. Such rape or trauma centers should be staffed by specially trained doctors and psychologists who can tend to the victims' medical needs, particularly their physical and mental needs. Such centers can play an important role in

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<sup>88</sup> Human Rights Watch, "Everyone Blames Me" Barriers to Justice and Support Services for Sexual Assault Survivors in India, 10 (2017).

<sup>89</sup> *Ibid.*

primarily ensuring medical care, however, also in the collection of evidence, should the victim desire judicial recourse.

### ***3. Adopt a Special Victim's Counsel Program***

Having faced extreme pressure on the handling of its rising sexual assault numbers, the United States military has adopted a Special Victims' Counsel program to provide victims of sexual assault with "victim-centered advice and advocacy through comprehensive, independent representation to sexual assault ... (by assisting) them in obtaining support and recovery resources, (promoting) greater confidence in the ... justice process".<sup>90</sup> These attorneys represent victims of sexual assault at every step of the legal process and ensure that their "rights to safety, privacy, and the right to be treated fairly and respectfully"<sup>91</sup> are enforced each step of the way throughout the judicial process. Providing a similar service to women in India who have suffered from such abuse has several advantages. First, it gives victims an additional resource they can consult to ascertain their rights. Second, it provides victims with a personal advocate who can navigate through the often-complex legal structures that need to be gone through to seek justice. Giving victims an advocate who will represent only their rights may be the first step victims may seek on the path of justice to hold their assailants responsible.

Additionally, having such an advocate may provide additional benefits. Assailants will be aware that the victim is represented by an officer of the court, which may provide additional security to the victim from potential reprisal actions by the assailant. Somewhere along the way, women were not given a voice. A program like this may provide advice, advocacy, and empowerment to many whose voices are often unheard. One of the main goals in a vast country like India must be an increase in trust and confidence in the criminal justice system. Often, being able to be heard and knowing that an advocate will be there for you until the conclusion of the process provides victims with the empowerment to hold their assailants accountable.

## **Conclusion**

The marital rape exception clause in §375 of the Indian Penal Code is an unconstitutional remnant of an outdated, patriarchal mindset that has not evolved with time. The Supreme Court of India has clearly illustrated that certain fundamental constitutional rights belong to all Indian people, men and women alike, and the superiority of constitutional norms cannot be subjugated by mere statutory provisions, at least not under the law. An analysis of the law and the constitution of India, and the Supreme Court's

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<sup>90</sup> "Special Victims' Counsel Program", United States Air Force, [https://www.afjag.af.mil/Portals/77/documents/SVC/CLSV\\_Handout\\_2018.pdf?ver=2018-05-16-091142-727](https://www.afjag.af.mil/Portals/77/documents/SVC/CLSV_Handout_2018.pdf?ver=2018-05-16-091142-727) (last visited Dec. 31, 2020).

<sup>91</sup> *Ibid.*



interpretation thereof, makes it very clear that the marital rape exception clause is unconstitutional and must be struck down. India's international obligations also enshrine women's rights into the forefront of India's responsibilities of ensuring that men do not continue to reduce women to mere "property" but that they be elevated to an equal status to men. Ignoring the plight of married women diminishes the basic humanity of women. India has a responsibility of protecting its citizens, men and women alike, and its actions cannot be dictated by a fear of uprising should it dare to change the law. The people deserve more from a State that has sworn to uphold the law and the constitution it serves under. The law and the constitution have already spoken and declared the marital rape exception clause an unconstitutional piece of legislation. Now it is time for the State of India to take the lead and eradicate this provision once and for all. Following the law is sometimes harder than breaking the law, however, not following the law destroys the very fabric that a democratic society is built upon. What Indian women yearn for is a government with the integrity to tell the truth and the charisma to make people listen. The pain a lot of Indian women have suffered is, unfortunately, a necessary investment for progress and the law will continue to shed light on the unconstitutionality of the marital rape exception clause. The time has come for India to pick up the reins and uplift its women by challenging the status quo.

The conflict between the rule of law and the rule of culture must be tackled head on by the State of India. In many parts of India, cultural norms tend to prevail over the law. However, combating stereotypes, particularly those affecting women, is an important role the State of India needs to fulfill. Educating its citizens is a critical role the State needs to meet by sending the message that women are not reduced to "property" once they enter into marriage and that their legal rights and bodily autonomy do not cease to exist at the whim of a man. Providing the victims of sexual assaults with adequate support service will lead to their empowerment and provides the option of seeking justice. By leading a national movement in eradicating social stereotypes that keep women disenfranchised, the State of India can start the process of eliminating patriarchal stereotypes and increase awareness in society that women are truly equal to men, as the constitution prescribes. Not changing the status quo is to allow the rule of culture to prevail over the rule of law. A society where the rule of law does not prevail is a society that is doomed to fail.