Proposals To Reform the Law Pertaining to Sexual Offences in India

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The Indian Penal Code, 1860 contains antiquated provisions that fail to address the sexual offences committed today. In light of the same, this article seeks to explore some pertinent issues that lend an archaic undertone to the I.P.C. The central premise of this paper is to tackle the stark discrepancy in the quantum of punishment between penile and non-penile sexual-offences. It does so by proposing the gradation of sexual-offences into four broad categories, based on the U.K. Sexual Offences Act, 2003. To further this premise, the article comprehensively analyzes the legislative flaws in the I.P.C. with respect to the definition of consent and the legal age of consent in India. Thereafter, the author examines the legal framework pertaining to the sexual abuse of minors and the necessity of drafting gender neutral laws. Finally, the paper traces the paradigm shift in the corresponding legal provisions in the international sphere from legalizing to eventually criminalizing marital rape, and accordingly argues against the retention of the marital rape exemption in India.

I. Introduction

"The law must be stable but it must not stand still." -Roscoe Pound.

The Indian Penal Code, 1860 (hereinafter I.P.C.) is an all embracing legislation pertaining to sexual-offences in India.[1] There has been no substantial change in the I.P.C. apropos of the provisions dealing with sexual-offences, since Lord Macaulay drafted the I.P.C. nearly a hundred and fifty years ago. In fact, the history of law reforms

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1 Pen. Code [hereinafter the "I.P.C."] (The provisions pertaining to sexual-offences in the I.P.C. are § 354, § 375, § 376, § 376A-376D, § 377 and § 509).

in India reveals the hesitation of the Parliament to legitimize pertinent improvements in the area of sexual-offences like rape, molestation, sexual-harassment etc. Notwithstanding the laudable efforts of the 42nd Law Commission Report,[2] the 84th Law Commission Report, the 156th Law Commission Report[3] and the 172nd Law Commission Report,[4] the I.P.C. still remains antiquated and fails to remedy the changing nature of sexual-offences in India. For instance, the 42nd Law Commission Report[5] as well as the Malimath Committee Report on Criminal Justice Reforms (2003)[6], had recommended a gender-neutral drafting for the offence of adultery under § 497. However, the said recommendation never crystallized into substantive law in India. Similarly, the 172nd Law Commission Report had sought to address the rampant abuse of the penile penetration rule, by replacing the offence of 'rape' with that of 'sexual assault'.[7] The said recommendation was reaffirmed by the Criminal Law (Amendment) Bill of 2010 and 2012.[8] These instruments of positive reinforcement are yet to be passed by the Indian Parliament.

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2 *See* 42nd Law Commission of India Report, Government of India, *The Indian Penal Code* (1971), *available at* http://lawcommissionofindia.nic.in/1-50/Report43.pdf.

3 *See* 156th Law Commission of India Report, *Report on the Indian Penal Code-Vol. II* (1997), *available at* http://lawcommissionofindia.nic.in/101-169/Report156 Vol2.pdf.

4 *See* 172nd Law Commission of India Report, *Review of Rape Laws* (2005), *available at* http://www.lawcommissionofindia.nic.in/rapelaws.htm.

5 *See* 42nd Law Commission of India Report, *supra* note 2.

6 Committee on Reforms of Criminal Justice System, *Report of the Committee on Reforms of Criminal Justice System* (Ministry of Home Affairs, 2003), http://mha.nic.in/pdfs/criminal_justice_system.pdf.

7 *See* 172nd Law Commission of India Report, *supra* note 4.

8 *See* Press Information Bureau, Government of India, *Review of Rape Laws*, (Jul 20, 2010), http://www.pib.nic.in/newsite/erelease.aspx?relid=85422 (discussing the Criminal Law (Amendment) Bill, 2012 which has sought to replace the offence of 'rape' by that of 'sexual assault' and to make the offence of sexual assault gender neutral. The punishment for sexual assault will be for a minimum of seven years which may extend to imprisonment for life and also fine. The said Bill also seeks to punish 'acid attacks' with imprisonment between 10 years and life (*see* § 326A and § 326B), 'stalking' is punished with imprisonment for upto 7 years (*see* § 509B), 'sexual assault in custody' is punished with imprisonment for life or

Needless to say, the I.P.C. must be considerably reformed in order to effectively penalize sexual-offences. As per the statistical data collated by the National Crime Records Bureau, the instances of sexual offences against women in 2011 were as follows: *rape*- 23,582 lakh; *molestation*- 42,238 lakh; *sexual harassment*- 8,377 lakh; *immoral trafficking of women*- 2,388 lakh; *indecent representation of women*- 452 lakh; *sexual abuse of minors*- 6,742 lakh.[9] In view of this, the article discusses certain pressing issues that must necessarily be addressed in order to tackle the rising instances of sexual crimes in India. Part II explains how the bifurcation of sexual-offences across §§ 375, 354 and 509 relies heavily on the penile-penetration rule hence failing to adequately address other forms of sexual-offences. The author also addresses the question of including sexual abuse of minors within the ambit of unnatural offences under § 377. Part III proposes a definite grading of sexual-offences, to remedy the ramifications arising from the penile-penetration rule. Propositions pertaining to redefining the term 'consent' and altering the legal age for consensual sex are also explored. The final issue addressed under Part IV focusses on the constitutionality of the marital rape exemption in India. The conclusion re-iterates the recommendations proposed by the article and calls for their urgent implementation.

II. Should the Bifurcation of Sexual Offences Across §§ 375, 354, 377 and 509 of the I.P.C. be Retained?

The offence of 'rape' under the I.P.C. is only limited to instances of penile penetration under § 375, while non-penetrative sexual offences are strewn across §§ 354, 377 and 509. This part of the article previews the inherent flaws in the aforesaid bifurcation.

A. Defining the Offences under §§ 375, 354, 377 and 509

The word 'rape' is derived from the Latin word *rapio*, which literally means to seize or to take by force.[10] In the context of criminal

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rigorous imprisonment for 10 years term plus fine).

9 *See Crimes in India: 2011,* National Crime Records Bureau, Ministry of Home Affairs (2011), http://ncrb.nic.in/.

10 *See* K.I. Vibhute, PSA Pillai's Criminal Law 961 (10th ed. 2008).

jurisprudence the term 'rape' refers to the non-consensual penetration of the victim's vagina by the perpetrator's penis.[11] The offence of 'rape' under the I.P.C. refers to the carnal or physical integration between two individuals. The term 'penetration' is "*the insertion by a male of his penis into the vagina or anus of a sexual partner*".[12] Hence, penile penetration is a *sine qua non* to perpetuate an offence of 'rape' under the I.P.C.

In *Smt Sudesh Jhaku v. KCJ & Ors,*[13] the Delhi High Court was urged to interpret the terms 'sexual intercourse' and 'penetration' used under § 375 to include not only penile-vaginal penetration but also penetration of any part of the body (like fingers) or any foreign object (like a stick or bottle) into the bodily orifice of woman (vagina, anus or mouth). The court ruled that 'sexual intercourse' and 'penetration' meant penile- vaginal penetration and could not be interpreted to bring within its fold the vaginal penetration by fingers or any other object. Furthermore, the court declared that the legislature, and not the judiciary, was enabled by law to re-interpret the words 'sexual intercourse' and 'penetration'. Similarly in *Sakshi v. Union of India,*[14] the Supreme Court held that the Parliament alone could give a legislative blueprint for altering the ill-conceived definition of 'rape' under the I.P.C.

In view of the aforesaid discussion it can be concluded that an offence of 'rape' under § 375 occurs only in cases of penile penetration. Therefore, offences like *fellatio*[15] or *cunnilingus*[16]; penetration by any other object or part of the body; profane gestures etc. fall

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11 *See* WHO, WORLD REPORT ON VIOLENCE AND HEALTH, 147 (Etienne G. Krug et al. eds. 2002) *available at* http://whqlibdoc.who.int/publications/2002/9241545615_chap6_eng.pdf.

12 SHORTER OXFORD ENGLISH DICTIONARY 2145 (5th ed. 2002).

13 (1998) Crim.L.J. (Del) 2428 (May 23, 1996).

14 A.I.R. 2004 S.C. 3566.

15 *See* WEBSTER'S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 707 (2001) ("[O]ral stimulation of the penis, esp. to orgasm").

16 *Id.* at 489 ("[A]ct or practice of simulating the female genitals").

beyond the realm of § 375 and are not punishable under § 376.[17] Under the present scheme of the I.P.C., the aforementioned offences are punished under the following sections:

1. § 354- Assault or criminal force to woman with intent to outrage her modesty

2. § 509- Word, gesture or act intended to insult the modesty of a woman

3. § 377- Unnatural Offences (to be discussed under Part III *infra*)

Thus, it is amply evident that under the prevailing legislation sexual offences are scattered across §§ 354, 375 to 377 and 509. The next section examines the flaws in the aforementioned bifurcation.

B. Flaws in the Bifurcation of Sexual Offences across §§ 375, 354 and 509, I.P.C.

Under the I.P.C. as it stands, § 375 deals with the offence of 'rape' involving penile penetration, the punishment of which is provided under § 376. Any non-penile or non-penetrative sexual offence is either punished under § 354 or § 509. To be more specific, § 354 covers any sexual assault/molestation that *outrages the modesty of a woman*, while § 509 deals with any word, gesture or act that *insults the modesty of a woman*.

The central inquiry of this section is to establish the drawbacks in the aforementioned bifurcation of sexual-offences. Two arguments have been advanced to this effect. Firstly, the punishments prescribed under § 354 and § 509 are not commensurate to the varying gravity of the sexual-offences that they seek to address. Secondly, there is no straitjacket formula for distinguishing whether a sexual-offence should be punished as an 'attempt to rape' (§ 376/511) or as sexual assault/molestation that *outrages the modesty of a woman* (§ 354). The aforesaid propositions are discussed in detail hereunder.

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[17] *See* 172nd Law Commission of India Report, *supra* note 4.

a. *The varying quantum of punishment under § 375 on the one hand and § 354 & § 509 on the other hand*

A careful perusal of the punishments prescribed under §§ 376, 354 and 509, highlights the inherent flaws in the legislation.

An offence of sexual assault/molestation under § 354 is punished with imprisonment for a term, which may extend to two years, or with fine or with both[18] Any profane action under § 509 is punishable with simple imprisonment for a term, which may extend to one year, or with fine, or with both.[19]

On the contrary the punishment for 'rape' under § 376(1) is imprisonment of either description for a term, which shall not be less than seven years but which may be for life or for a term, which may extend to ten years. § 376(2), covers aggravated sexual offences such as instances of rape committed by a police officer within the precincts of the police station; or by a public servant or the management in-charge of a jail, remand home or other place of custody; gang rape; rape on a pregnant woman or a woman below 12 years. The punishment prescribed under § 376(2) is rigorous imprisonment for a term, which shall not be less than ten years but, which may be for life, and payment of a fine.

Hence, grave sexual-offences where penile penetration is absent (e.g. if a man introduces any part of his penis into the mouth of a woman or penetrates her vagina with any object other than his penis) would be meted with a much lesser degree of punishment than the one prescribed under § 376.[20] Case in point is, *Tara Dutt v. State*.[21] In the said case a 54 year old man had committed 'digital rape' [22] on a 5 year old

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18 *See* I.P.C., § 354.

19 *Id.* § 509.

20 *See* WEBSTER'S ENCYCLOPEDIA, *supra* note 17.

21 Tara Dutt v State, CRL.REV.P. No. 321 of 2008 (DELHI HIGH COURT, Apr. 29, 2009) *available at* http://indiankanoon.org/doc/1701610/ (Unreported).

22 *See* Pankaj Chaudhary v. The State (Govt. of N.C.T.) of Delhi, Crl. A. 993/2009 and 813/2011 (DELHI HIGH COURT, August 17, 2011) (Unreported). ('Digital Rape'

girl. The Delhi High Court found itself "*handicapped by the inadequacy of the law in not being able to charge the man with an offence graver than § 354 because in terms of the law as it stands today neither the offence under § 376 nor under § 377 could be attracted in the facts of the present case*".[23] The Court further hoped that the instant case would add to the growing demand before the Indian legislators to draft a more stringent law, which would penalize grave non-penile penetrative offences with as much severity as penile-penetrative crimes.[24]

The high profile *Ruchika Girhotra Molestation* case[25] further elucidates the point under consideration. In the instant case, an IPS officer had molested a class X student. He later harassed the victim to preclude the initiation of criminal proceedings, to such an extent that she committed suicide. The accused finally got away with a minor punishment of one and a half years of rigorous imprisonment under § 354. Currently, the defendant's plea against the decision of the Punjab & Haryana High Court is pending in the dockets of the Indian Supreme Court. According to the socio-legal writer, B. Dutt, the instant case highlights the insignificance of the punishment under § 354, when compared to the gravity of the sexual-offences that it was drafted to address.[26]

The aforesaid analysis boils down to one simple question, i.e. why should there be such stark inconsistencies in the punishments granted for 'rape' and other sexual-offences, solely on the ground of penile penetration?

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was defined by G.P. Mittal, J. as the penetration of any external object in the private parts of a woman with the intent to rape her.).

23 *See* Tara Dutt, *supra* note 21, ¶ 18.

24 *See* Tara Dutt, *supra* note 21, ¶ 22.

25 S.P.S. Rathore *v* Central Bureau Investigation, Crl. Revision No. 1558 of 2010, Punjab & Haryana High Court (Sep 1, 2010).

26 Barkha Dutt, *The smile has to go*, Hindustan Times, (Dec. 25, 2009), http://www.hindustantimes.com/News-Feed/viewsBarkhaDutt/The-smile-has-to-go/Article1-490571.aspx.

b. *The conflict between an 'attempt to rape' under § 376/511 and 'molestation' under § 354*

Another gross loophole in the present framework of rape laws is regarding the offence of 'attempt to rape'. Let us assume a situation where a woman is subjected to something graver than molestation but not actually raped. The Indian judiciary is uncertain about how to distinguish between such cases that lie in the grey area between an 'attempt to rape' (punishable under § 376 read with § 511) and sexual assault/molestation that *outrages the modesty of a woman* (punishable under § 354).

The test for distinguishing between an attempt to rape and sexual assault/molestation, which *outrages the modesty of a woman* was laid down in *Rameshwar v. State of Haryana,*[27] as follows,

> *"…every criminal act of rape or an attempt thereof does involve an indecent assault* (under § 354). *In order to amount to an attempt to commit an offence, the act of the accused must have proceeded beyond the stage of preparation. If the act of the accused does not constitute anything beyond preparation and falls short of an attempt, he may escape the liability under § 376/511 I.P.C. and may be liable to be convicted only for an offence amounting to indecent assault."*

Thus, in a nutshell, if a man attempts to penetrate a woman, it amounts to an 'attempt to rape' punishable under § 376/511. But if he sexually assaults a woman without attempting to penetrate, the said offence invokes § 354, for *outraging the modesty of woman.*

It is worth mentioning that though this test is suitable for academic discussions on the said proposition, it clearly eludes practical application. For instance, let us assume that a man attempts to penetrate a woman without her consent. Thus, theoretically he should be charged for an 'attempt to rape' under § 376/511, because his act has clearly

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[27] (1984) Crim. L.J. (P&H) 786 (Feb. 14, 1983); *see also S*ulekhan Singh & Ors v. State, (1999) Crim. L.J. (Raj) 3798 (Mar. 8, 1999).

proceeded beyond the stage of preparation. But according to the women's rights lawyer and writer, Flavia Agnes, the problem in practically applying this test arises when the victim has to satisfy the court beyond reasonable doubt that the accused had attempted to penetrate her. [28] In most cases the victims fail to discharge the high burden of proof of establishing an attempt to penetrate.[29] Consequently, the courts blindly rely upon the technicality of absence of penetration to rule out attempt, and arraign the accused for *outraging the modesty of a woman* under § 354.[30] Thus, it is fair to conclude that the offence of 'attempt to rape' is precariously perched between successful penetration and 'beyond the stage of preparation', which is extremely difficult to prove.

Let us now discuss the difference in the quantum of punishment between an 'attempt to rape' and sexual assault/ molestation that *outrages the modesty of a woman*. An 'attempt to rape' under § 376/511 invokes a stringent punishment, i.e. one-half of the imprisonment of life or one-half of the longest term of imprisonment. Moreover, it is a non-bailable offence and the trial is conducted by a Sessions Court.[31] On the contrary, sexual assault/molestation that *outrages the modesty of a woman* under § 354, is punishable with imprisonment for a maximum of only two years. Further, it is a bailable trial and hence is conducted by a magistrate's court.[32] Thus, in most cases the accused escapes the rigors of the strict punishment for an 'attempt to rape', and is meted with an inadequate punishment of merely two years of imprisonment under § 354.

The Supreme Court's judgment in *Tarkeshwar Sahu v. State of Bihar* [33] highlights this apathetic position. In this case, Sahu, had lured

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[28] *See* Flavia Agnes, *Violence against women: Review of recent enactments*, *in* IN THE NAME OF JUSTICE: WOMEN AND LAW IN SOCIETY 81-116 (Swapna Mukhopadhyay ed., 1998).

[29] *Id.*

[30] *See* Tarkeshwar Sahu v. State of Bihar, (2006) 8 S.C.C. 560; Bisheshwar Murmu v. State of Bihar, (2004) Crim. L.J. (Jhar) 326 (June 30, 2003).

[31] *See generally,* Tara Dutt, *supra* note 21.

[32] *See generally,* Tara Dutt, *supra* note 21.

[33] (2006) 8 S.C.C. 560.

the victim into his hut and attempted to rape her after having disrobed himself. During the trial, the victim failed to establish that the accused had attempted to penetrate her. Thus, the court refused to apply § 511 to the instant case as the defendant had not proceeded beyond the stage of preparation. Eventually, Sahu was convicted for *outraging the modesty of a woman* under § 354, which calls for a minor punishment of two years imprisonment. According to R. Kaul, a member of the National Commission for Women, the court's erroneous decision in the case was in all probability attributable to the lack of a precise litmus-test for determining whether or not the accused had attempted to penetrate the victim.[34] The said query is contingent upon the probative force of the evidence adduced by the victim and the subjectivity of the court. Thus, the courts are usually unable to conclusively decide if the act of the accused proceeded beyond the stage of preparation, thereby excluding the application of § 511.[35]

A similar position was adopted by the Delhi High Court in *Jai Chand v. the State.*[36] The accused, a hospital orderly, had forcibly laid the complainant nurse on the bed and broken the strap of her trousers. But the court held that the accused had not gone beyond the stage of preparation, as he did not attempt to penetrate the victim. Therefore, the Delhi High Court overturned the conviction of 'attempt to rape' pronounced by the trial court, and reduced it to molestation under § 354. To substantiate its findings, the Delhi High Court substantially relied on the 19th century decision in *Empress v. Shankar;*[37] wherein Melvill J., had observed as follows,

> *"We believe that in this country indecent assaults are often magnified into attempts at rape, and even more often into rape itself; and we think that conviction of an attempt at rape ought not to be arrived at unless the Court be satisfied that the*

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34 R. Kaul, *Outraging not just modesty*, INDIAN EXPRESS.COM, Mar. 23, 2007, http://www.indianexpress.com/story_mobile.php?storyid=26415.

35 *Id.*

36 1996 Crim. L.J. (Del) 203 (Feb. 2, 1996).

37 I.L.R. 5 (Bom.) 403.

conduct of the accused indicated a determination to gratify his passions at all events, and in spite of all resistance." [38]

According to Bhattacharjee, the aforementioned principle underlying the ratio in *Emperor v. Shankar* is also appreciably flawed.[39] According to her, in most cases the prosecution fails to establish that the accused had acted with the sole intention of gratifying his passions. The judicial trend in India is therefore to grant the accused the benefit of the doubt. Hence, the courts convict them of *indecent assault* under § 354, rather than awarding him with the harsher punishment for the 'attempt to rape'.[40]

c. *A gender biased phraseology of sexual offences under § 375, § 354 and § 509*

Another aspect of § 375, § 354 and § 509, which is subject to intense criticism, is the use of gender-biased phraseology. § 375, § 354 and § 509 have been drafted on the general presumption that sexual offences can only be perpetrated by the members of the male gender and that only females can be classified as the victims of a sexual offence.[41] The gender-biased nature of rape laws in India has been justified on the ground that the brutality and the number of instances of sexual violence against women is far more intense than that against men.[42] Thus, it is believed that the deterrence value associated with the offence of 'rape' would diminish in view of its gender-neutral nature."[43]

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[38] *See also* Ankariya v. State of Madhya Pradesh (1991) Crim. L.J. (M.P.) 751 (July 21, 1989); Kandarpa Thakuria v. State of Assam (1992) Crim. L.J. (Ass.) 3084 (Jan. 30, 1992).

[39] *See* S. Bhattacharjee, A Unique Crime: Understanding Rape in India 70 (2008).

[40] *Id.*

[41] *A Gender-Neutral Law on Sexual Violence- A Stringent law is welcome but will the Police and Judicial Machinery Pitch In*? 40 Econ. & Pol. Wkly 9,27 (1992).

[42] *Id.*

[43] *Activists Oppose Making Rape Gender-Neutral,* The Times of India, Jul 20, 2012, http://articles.timesofindia.indiatimes.com/2012-07-20/india/32763268_1_gender-sexual-violence-crpc.

In order to establish the flaw underlying the aforementioned reasoning, let us consider whether the term 'victim of a sexual-offence' should only be applicable to the female gender. According to Flavia Agnes this category of victims should not just be limited to women as it may also include a wide group of vulnerable communities, particularly the transgenders, MSMs (men who have sex with men) and other categories of vulnerable men like the disabled, the institutionalized etc.[44] These groups are vulnerable to both penetrative and non-penetrative sexual violence, specially the latter, by perpetrators of either sex.

Furthermore, the gender biased provisions of the I.P.C. have lead to erroneous decisions in even the past. For instance, in *Priya Patel v. State of M.P.*[45] the Supreme Court had held that a woman could not be held guilty of gang rape. The court reasoned that per *Explanation 1* to § 376 'common intention'[46] is a *sine qua non* in cases of gang rape. Since a bare reading of § 375 makes the position clear that rape can only be committed by a man; therefore, a woman cannot be said to have an intention to commit rape. But the position under English law is identically opposite to the one in India, as they conform to the view that a female can aid and abet rape,[47] in cases where she encourages or assists a man to penetrate a woman without consent.[48]

It is submitted that there is a possibility that a female has sexual intercourse with a man in such a way as to fall within the ambit of a sexual offence. For instance, a man might feel forced to engage in sexual intercourse because he has been threatened with violence or has been unlawfully detained to perform the physical action necessary

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[44] *See* F. Agnes, *Law, Ideology and Female Sexuality: Gender Neutrality in Rape Law,* 37 Econ. & Pol. Wkly 844, 54 (2002).

[45] (2006) 6 S.C.C. 263; *see also* State of Rajasthan v. Hemraj & Anr., Cri. App. 847 of 2009 (Supreme Court) (Unreported).

[46] *See* I.P.C., § 34.

[47] *See* R. v. Ram and Ram (1893) 17 Cox C.C. 609; Lord Baltimore's Case (1768) 96 Eng. Rep. 376 (K.B.).

[48] *See* R. v. Cogan and Leak [1976] Q.B. 217.

for sexual intercourse.[49] Equally, men who are unable to communicate consent due to physical disability or intoxication may also have the reactions necessary for sexual intercourse.[50] It is imperative to note that in all these cases, lack of consent is presumed for a female victim. However, if the victim is male, and the defendant female, there can be no offence of rape established, due to the necessity of male penetration of the victim contained in the definition of 'rape' under § 375.[51]

The irrationality underlying the said classification finds credence in the fact that the emotional responses to non-consensual sexual intercourse of a male victim are akin to that of a female victim.[52] Thus, two wrongs causing similar reactions in their victims should not be treated differently, merely because of the victim's gender.

Moreover, to assert that the same action, if committed by a man, will be classified as 'rape', but if committed by a woman, will be not be classified as an offence, certainly amounts to reverse gender bias against men.[53] Furthermore, retaining a penetrative definition of 'rape', seems to reinforce a stereotypical view that women are weaker and also in need of greater protection than men.[54]

Thus, to extend the definition of 'rape' to include all forms of non-consensual sexual intercourse, irrespective of whether it is perpetrated by a man or a woman, would not undermine the offence

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49 P. Rumney, *Male Rape in the Courtroom: Issues and Concerns*, Crim. L. Rev. 205, 1302 (2001).

50 P. Powlesland, *Male rape and the quest for gender-neutrality in the Sexual Offences Act, 2003*, 1 Cambridge Student L. Rev. 11, 532 (2005).

51 *See Activists Oppose Making Rape Gender-Neutral, supra* note 43.

52 U.K. Home Office, Setting the Boundaries: Reforming the law on Sex Offences, Vol. I, (2000), http://webarchive.nationalarchives.gov.uk/+/http://www.homeoffice. gov.uk/documents/vol1main.pdf?view=Binary.

53 David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. Crim. L. & Criminology 1194, 1384 (1997).

54 *Id.*

of rape, but in fact strengthen it, by removing an obvious anomaly.[55] In view of the arguments advanced, it is submitted that the rape laws in India should be drafted in a gender-neutral terminology, which would facilitate the redressal of sexual-offences without discriminating between males, females and other sexual minorities in our society.[56]

d. *Sexual abuse of minors under § 375, § 354 and § 377*

The final drawback in the I.P.C. is with respect to the provisions pertaining to the sexual abuse of minors. It is pertinent to note that the provisions and procedures pertaining to the sexual abuse of minors are scattered across various statutes (namely the I.P.C., 1860,[57] the Indian Evidence Act, 1872,[58] the Code of Criminal Procedure, 1973,[59] the Indecent Representation of Women (Prevention) Act, 1986[60] and the Information Technology Act, 2000).[61] The article shall restrict itself to the provisions of the I.P.C. in order to establish how the current practice

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55 P.M. Sarrel & W.H. Masters, *Sexual Molestation of Men by Women*, 11 ARCHIVES OF SEXUAL BEHAV. 117, 76 (1982).

56 *See* , PRESS INFORMATION BUREAU, *supra* note 8 (The Criminal Law (Amendment) Bill, 2012 has also proposed to make rape a gender-neutral offence. The Bill seeks to replace the word 'rape' by the phrase 'sexual assault'; thereby, enabling both men and women to invoke its provisions).

57 *See* I.P.C., §§ 375, 376, 354, 509, 377.

58 *See* the Indian Evidence Act, 1872, § 114(A) (providing that in cases of custodial rape, rape of a pregnant woman, and gang rape if the woman states before the court that she did not consent, the court shall presume that she did not consent.); *see also* Indian Evidence Act, § 146 (stating that it is not permissible to put questions in cross-examination of the prosecutrix about her general moral character).

59 *See* CODE CRIM. PROC. (Amendment) Act, 2005, No. 25, Acts of Parliament, 2005, § 164(A) (for medical examination of victims of rape); *see also Id.* § 53(A) (for medical examination of accused of rape) and § 176(1A)(a)(b) (for investigation by judicial magistrates of custodial rape and deaths.); *see also* CODE CRIM. PROC. (Amendment) Act, 2008, No. 5, Acts of Parliament, 2009, § 357(A) (providing for victim compensation scheme).

60 *See* the Indecent Representation of Women (Prevention) Act, No. 60 of 1986, § 3 and § 4 (pertaining to the prohibition of advertisements, books or posts containing indecent representation of women).

of framing charges under §§ 354, 375 and 377, is incapable of addressing the problem of sexual violence against minors in India.[62]

According to the 156th Report of the Law Commission of India,[63] sexual offences against a child below twelve years of age[64] may be committed in various forms such as sexual intercourse, carnal intercourse and sexual assault. First, the cases involving penile penetration into the vagina of the child-victim are covered under the offence of 'rape' under § 375/376.[65] Second, the instances of penile oral penetration and penile penetration into the anus of the child-victim, amount to *unnatural sexual intercourse against the order of nature* under § 377.[66] Third, acts involving the penetration of a finger or any inanimate object, into the vagina or anus of the child-victim are classified as offences *outraging the modesty of the victim* under § 354.[67]

In *Sakshi v. Union of India,*[68] the Supreme Court of India had agreed with the petitioners contentions regarding the flaws in the existing bifurcation of offences governing the sexual abuse of children

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61 *See* the Information Technology Act, No. 21 of 2000, INDIA CODE (2000), § 67 (it provides that publication and transmission of pornography through the internet is an offence).

62 LOVELEEN KACKER ET AL., MINISTRY OF WOMEN AND CHILD DEVELOPMENT, A STUDY ON CHILD ABUSE INDIA, 221 (2007), *available at* http://wcd.nic.in/childabuse.pdf. (stating that in India 150 million girls and 73 million boys under eighteen have experienced forced sexual intercourse).

63 *See* 172nd Law Commission of India Report, *supra* note 4, ¶ 9.59.

64 *See* I.P.C., § 376(2)(f). (treating the rape on a child below twelve years of age as an aggravated offence punishable with a minimum of 10 years of rigorous imprisonment).

65 *See* I.P.C., § 375 and § 376.

66 *See* I.P.C., § 377 (explaining unnatural offences, i.e., carnal intercourse against the order of nature with any man, woman or animal). (Under the present scheme of the I.P.C., § 377 essentially criminalizes two categories of sexual-offences. Firstly, it penalizes private, consensual same-sex conduct and secondly it is invoked in cases of sexual-offences against minors. The arguments in favour of de-criminalizing private consensual same-sex conduct in India are beyond the scope of this article).

67 *See* I.P.C., § 354.

68 Sakshi v. Union of India, A.I.R. 2004 S.C. 3566.

in India. Subsequently, the said contentions were reaffirmed by the 172nd Report of the Law Commission of India.[69]

Firstly, the court in the *Sakshi case* had criticized the existing trend of treating sexual violence, other than penile/vaginal penetration (covered under § 375), as lesser offences falling either under § 377 or § 354.[70] For instance, an offence of penile oral penetration is an equally traumatic experience for a child-victim as penile/vaginal penetration; yet the former is categorized as a milder offence under § 377 while the latter fits into the conventional definition of *'rape'* under § 375/376.

Secondly, the basis of determining whether an offence falls under § 377 or § 354, is the type of penetration, i.e., penile oral or anal penetration is covered under § 377, while penetration with a finger or any inanimate object invokes § 354. In this regard, the court has opined that a vulnerable child is not capable of accurately discerning the degree of difference in terms of which her orifice is penetrated.[71] So determining if the offence falls under § 377 or § 354 is practically impossible. Thus, the 172nd Law Commission Report had stated that the physical and psychological impact of the sexual-offence on the child should be the basis for making out an offence under the I.P.C., rather than scrutinizing the *type* of penetration.[72]

Thirdly, the court held that it is wrong to treat any non-consensual penetration of a child as an offence under § 377, at par with certain forms of consensual penetration (such as consensual homosexual sex) where a consenting party can be held liable as an abettor or otherwise.[73]

In view of the aforementioned arguments, the legislature passed the Protection of Children from Sexual Offences Act, 2012,[74]

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69 *See* 172nd Law Commission of India Report, *supra* note 5.

70 *See* Sakshi, *supra* note 68, ¶ 9 (a).

71 Sakshi*, supra* note 68, ¶ 9 (d).

72 *See* 172nd Law Commission of India Report,*supra* note 4, ¶ 1.2.2 note 3 (a).

73 *See* Sakshi*, supra* note 68, ¶ 9(f).

74 Protection of Children from Sexual Offences Act, No. 32 of 2012, INDIA CODE (2012) [hereinafter PCSOA] (Passed by the Lok Sabha on 22 May, 2012).

which must be wholeheartedly welcomed for filling a glaring lacuna in the law. It is pertinent to note that now an aggrieved child-victim can no longer file a case under § 375, § 354 or § 377 of the I.P.C., but instead is required to invoke the Protection of Children from Sexual Offences Act, 2012 (PCSOA) to seek justice.

While 'rape' is a serious criminal offence under the I.P.C., the law was hopelessly deficient in dealing with a range of sexual crimes against minors such as groping and harassment, covered by weak and imprecise provisions such as *outraging the modesty of a woman* (§ 354) or *unnatural sexual intercourse against the order of nature* (§ 377). Against this context, the PCSOA, 2012, a gender-neutral legislation, has graded sexual offences into the broad heads of penetrative and non-penetrative sexual assault, sexual harassment and pornography. This law offers adequate and fair remedies for all sexual crimes committed against minor children.[75] The Act does not employ the subjective and inappropriate standard of *outraging the modesty of a woman* (§ 354) or *unnatural sexual intercourse against the order of nature* (§ 377), when dealing with the sexual abuse of minors.[76] Further, by replacing the offence of 'rape' (§ 375) with that of 'sexual assault', the Act has clearly forestalled the ramifications of the inconsistent penile-penetration rule,[77] an issue that shall be comprehensively analyzed under Part III.

Another noteworthy feature of the PCSOA, 2012 is apropos of shifting the burden of proof from the victim to the accused in cases pertaining to penetrative and non-penetrative sexual assault; [78] which is clearly an advance over the existent practice under the I.P.C.,

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[75] *Id.*, § 3 (Penetrative Sexual Assault); § 5 (Aggravated Penetrative Sexual Assault); § 7 (Sexual Assault); § 9 (Aggravated Sexual Assault); § 11 (Sexual Harassment of child); § 13 (Use of child for pornographic purposes).

[76] Editorial, *Good Act, Bad Provision,* THE HINDU (May 26, 2012), http://www.thehindu.com/opinion/editorial/article3456804.ece.

[77] *The Law has too Long a Way to go,* THE HINDU (Jun 26, 2012), http://www.thehindu.com/news/cities/bangalore/article3572152.ece.

[78] *Id.* §§. 3 to 10 (Nevertheless, to prevent the misuse of law, punishment has been provided for making a false complaint); *see also* PCSOA, *supra* note 74, § 22(1).

wherein the burden of proving the crime beyond reasonable doubt is on the victim.[79] There is also a provision to constitute special courts, which shall provide the institutional mechanism for enforcing the provisions of the Act, making the proceedings child friendly and assist in the speedy and just disposal of cases. It is submitted that the said courts shall have the powers of a Court of Session, which includes the power to impose punishment up to life imprisonment.[80] Further, the special courts will endeavor to complete the recording of the evidence of the child within one month and complete the trial of the offences within a period of one year.[81] In a nutshell, the Protection of Children from Sexual Offences Act, 2012 has consolidated all the provisions and procedures related to the sexual abuse of minors into a single piece of legislation.[82]

III. Proposals to Reform the I.P.C. With Respect to Sexual Offences

Part II of the article has conclusively established that the random distribution of sexual-offences under the current scheme of

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79 *See supra* Part II, Section B (2) for a detailed discussion on how as per the I.P.C. the burden of proof is on the victim to establish the absence of consent in order to frame an offence under § 375, § 354 and § 509, I.P.C.

80 *See* PCSOA, *supra* note 74, § 28.

81 *See* PCSOA, *supra* note 74, § 35.

82 *See* PCSOA, *supra* note 74, § 69, Chapter V, VI, VII, VIII and IX; *see also* Dr. K.P. Malik, *Remarks on the Protection of Children from Sexual Offences Bill, 2011*, *available at* http://www.scribd.com/doc/50843554/Dr-KP-Malik-Remarks-on-teh-protection-of-children-from-sexual-offences-1; see for instance PCSOA, 2012, *supra* note 76, § 25 (mandating the police officer to not be in uniform while recording the statement of the child; *see also Id.* § 24(2) (providing for the statement of the child to be recorded as spoken by the child); *see also Id.* § 24(2), Proviso (providing for assistance of an interpreter or translator or an expert as per the need of the child); *see also Id.* § 38(2) (providing for assistance of special educator or any person familiar with the manner of communication of the child in case child is disabled; *see also Id.* § 41 (providing for medical examination of the child to be conducted in the presence of the parent of the child or any other person in whom the child has trust or confidence; *see also Id.* § 33(5) (providing for the child not to be called repeatedly to testify); *see also Id.* § 33(6) (ensuring no aggressive questioning or character assassination of the child); *see also Id.* § 37 (providing for in-camera trial of cases).

the I.P.C. is incapable of properly dispensing justice to victims of sexual crimes and offences committed. To remedy the current situation, it is suggested that all sexual-offences under the I.P.C. should be graded as per their severity into 5 broad categories in a gender neutral terminology, in accordance with the U.K. Sexual Offences Act, 2003. The author shall also examine the necessity of expressly defining what constitutes consent to a sexual offence, in view of the *doctrine of coercive circumstances*.

A. Grading of Sexual-Offences, on the Lines of the U.K. Sexual Offences Act, 2003

On account of the anomalous consequences arising from the penile penetration rule, it is suggested that the offence of 'rape' under the I.P.C. must be replaced with that of 'sexual assault'. To take the discussion forward, this section shall analyze the proposed suggestion of grading the sexual-offences.

a. *Grade I: Penetrative sexual assault*

The most severe grade of sexual-offences shall be that of 'penetrative sexual assault'. It is submitted that sexual-offences under this category shall not just be limited to non-consensual penile-vaginal penetration but would include *instances of non-consensual penetration of a person's vagina, anus or mouth with a penis, body part or any foreign object*.

The objective behind the introduction of Grade I as a category is to remedy the present variation in the quantum of punishment between penile and non-penile penetrative offences. Grade I seeks to replace the offence of 'rape' with that of 'penetrative sexual assault'. Thus, its ambit is not only limited to penile-vaginal penetration, but also extends to other forms of penetration, whether perpetrated through an orifice or a foreign object.

Let us now examine how the offence of 'penetrative sexual assault' overcomes the problem of lack of gender-neutrality prevailing under the current definition of 'rape'. It is imperative to reiterate that the proposed offence covers instances of *non-consensual penetration of*

a person's vagina, anus or mouth. Thus, Grade I uses the term 'person' in order to describe the victim of a sexual-offence, as against the gender specific term 'woman' that is used in the current definition of 'rape'. This makes the offence of 'penetrative sexual assault' gender-neutral because the word 'person' is an all-encompassing term that includes not just females but also males and other sexual minorities.

In other words, Grade I is drafted on the premise that the person penetrating the orifice could also be the victim, if the sexual intercourse was performed against his consent. Thus, the offence of 'penetrative sexual assault' would also include instances of non-consensual sexual intercourse by females against males within its fold. In view of the foregoing, it is submitted that this new definition, far from being removed from conventional ideas about 'rape', would in fact move us closer towards the goal of gender-neutrality, thereby reflecting the current trends of gender equality in this important area of law.

Furthermore, an offence under this grade would attract the strictest punishment. It is suggested that the punishment for 'penetrative sexual assault' should be imprisonment of either description for a term which shall not be less than seven years but which may extend to imprisonment for life, and the levying of a fine. It is further proposed that the punishment for *aggravated* 'penetrative sexual assault' should be rigorous imprisonment which shall not be less than 10 years but which may extend to imprisonment for life and also the levying of a fine.

In view of the discussion at hand, it is also imperative to answer as to why touching or other forms of corporeal assault should be perceived to be of a lesser category of injury/sexual assault than 'penetrative sexual assault'. It is submitted that the offence of 'penetrative sexual assault' has a restricted definition because it carries with it the risk of pregnancy and disease transmission and hence should necessarily be treated separately from other forms of 'non-penetrative sexual assaults'.[83]

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[83] WHO/UNAIDS, Sexually Transmitted Diseases: Policies and Principles for Prevention and Care, (2011); *available at* http://www.unaids.org/en/media/unaids/contentassets/dataimport/publications/irc-pub04/una97-6_en.pdf (explaining that non-penetrative sexual assaults may lead to the following sexually

b. Grade *II: Sexual contact without penetration, i.e. sexual assault*

The next grade of sexual-offences is sexual contact without penetration i.e. 'sexual assault'. 'Sexual assault' shall include any act with sexual intent which involves physical contact without penetration. Some examples to this effect are- touching the vagina, penis, anus or breast of the victim or making the victim touch the vagina, penis, anus or breast of another person.

Furthermore, since the gravity of the sexual-offences punishable under Grade II is lesser than that of Grade I, they shall attract a comparatively milder punishment. The punishment proposed for the said offence is imprisonment of either description for a term which shall not be less than three years but which may extend to five years, and shall also be liable to fine. This would be followed by a section on 'aggravated sexual assault'. The proposed punishment for the said offence would be imprisonment of either description, which shall not be less than five years but which may extend to seven years, and shall also be liable to fine.

To take the discussion forward, the author shall now highlight how the offence of 'sexual assault' under the proposed Grade II is more effective than the existent § 354. A close perusal of the current § 354 reveals that it was drafted to address sexual assault/molestation *that outrages the modesty of a woman*. The term 'modesty' has not been defined anywhere in the I.P.C, though its interpretation can be gathered from existent body of case-laws.[84] In *State of Punjab vs. Major Singh*[85] a question arose whether a female child of seven and a half months could be said to be possessed of 'modesty' which could be outraged. In answering the above question, Mudholkar J., who along with Bachawat J. spoke for the majority, held that *"when any act done to or in*

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transmitted diseases- Bacterial Vaginosis, Chalamydia, Syphilis, HIV/AIDS, Hepatitis, Pelvic Inflammatory Disease, Gonorrhea, Trichomoniasis, Yeast Infection, Cervical cancer, Adenoviruses, Kaposi's sarcoma and Non-gonococcal urethritis).

84 R.A. Nelson, Indian Penal Code 3495 (S.K. Sarvaria ed., 10th ed., 2008).

85 A.I.R. 1967 S.C. 63.

the presence of a woman is clearly suggestive of sex according to the common notions of mankind that must fall within the mischief of § 354 I.P.C."[86] Further, in *RD Prasad v. KPS Gill*,[87] the Supreme Court had defined 'modesty' as "*an attribute which is peculiar to a woman as a virtue that attaches to a female on account of her sex*".

Nevertheless, even such an interpretation of 'modesty' is highly subjective and stands on inconclusive grounds. It depends on factors like morality and the prevalent customs of the society. In fact, according to Ratanlal & Dhirajlal's commentary on the Indian Penal Code:

> *"No particular yardstick of universal application can be made for measuring the amplitude of modesty of women; it may vary from country to country and society to society".*[88]

Thus, it is fair to conclude that the interpretation of the term 'modesty' is subject to the personal bias of the judges hearing a particular case. According to Flavia Agnes, a certain bench may consider the act of pulling a woman as *outraging her modesty* under § 354, but another bench might not deem so.[89] Consequently, this leads to inconsistency in what may actually be classified as *outraging the modesty of a woman*.

To substantiate this point, Flavia Agnes has highlighted the incorrect approach of the Himachal Pradesh High Court in *Divender Singh v. Hari Ram*.[90] In the instant case, two men had dragged a girl and physically abused her. The session's court had convicted them under § 354 for outraging the modesty of the victim. But the High Court reversed the Sessions Courts order on the grounds that the accused had neither the knowledge nor the intention to outrage the victim's modesty. Thus, the High Court's predicament as regards the application of §

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86 *Id.* ¶ 17.

87 (1995) Supp. (II) S.C.C. 724.

88 *See* RATANLAL & DHIRAJLAL, THE I.P.C. 1913 (33rd ed. reprt. 2012).

89 *See* Agnes, *supra note* 28, at 61.

90 (1990) Crim. L.J. (H.P.) 1845 (Nov. 23, 1989).

354, was due to the prevailing confusion about what constitutes the 'modesty' of a victim and when this 'modesty' stands *outraged.*

It is submitted that the offence of 'sexual assault' under Grade II, is more expansive than the erroneous standard of *outraging the modesty of a woman,* employed under § 354. The definition of 'sexual assault' under Grade II does not rely on the subjective standard of 'modesty'. It categorically defines 'sexual assault' as "*any act with sexual intent which involves physical contact without penetration"*, and also illustrates certain examples to this effect. Thus, the offence of 'sexual assault' under Grade II forestalls the excessive discretion in the hands of the court, in determining whether or not the victim's 'modesty' was outraged.

c. *Grade III: Non-contact sexual offences, i.e. sexual harassment*

The third grade of sexual-offences is non-contact sexual offences, i.e. 'sexual harassment'. The Supreme Court has defined the term 'sexual harassment' in *Vishakha v. State of Rajasthan,*[91] to include such unwelcome sexually determined behavior, whether directly or by implication as:

a) A demand or request for sexual favors;

b) Sexually colored remarks;

c) Showing pornography;

d) Any other unwelcome physical, verbal or non-verbal conduct of sexual nature.

A similar definition should be incorporated to delineate the offence of 'sexual harassment' under Grade III. The punishment proposed for the said offence is imprisonment of either description which may extend to three years and shall also be liable to fine.

Under the present mandate, instances of 'sexual harassment' are covered under § 509, which deals with any *word, gesture or act intended to insult the modesty of a woman.* It is pertinent to note that the offence

[91] A.I.R. 1997 S.C. 3011.

of 'sexual harassment' under Grade III, is an advance over § 509 I.P.C. Like § 354, even § 509 employs the subjective standard of *insulting the modesty of a woman.* As explained before, the incorporation of the term 'modesty' while defining a sexual-offence renders it vulnerable to the personal bias of the judges. On the contrary, the definition of 'sexual harassment' under Grade III precludes such an outcome by not relying on the inconsistent standard of *insulting the modesty of a woman and* expressly defining the four instances that shall amount to 'sexual harassment'. It is worth mentioning that the judiciary in its wisdom may expand the definition of 'sexual harassment' beyond the four grounds contained in the definition, in order to preserve the ends of justice.

d. *Grade IV: Attempt to commit a sexual offence*

The fourth grade of offences shall include the attempt to commit any sexual-offence mentioned under Grade I, II and III.

According to § 511 I.P.C., the punishment for attempting to commit certain offences is imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence, or with such fine as is provided for the offence, or with both.[92] Taking a cue from § 511, a similar provision must be incorporated to deal with an *attempt* to commit any sexual-offence mentioned under Grade I, II and III.

In order to assess the relevance of Grade IV, it is necessary to recall the discussion regarding the overlapping of offences between § 376/511 for an 'attempt to rape' and § 354 for sexual assault/ molestation that *outrages the modesty of a woman.* The reason for the said overlap is that the I.P.C. does not expressly define what constitutes an 'attempt to rape' (§ 376/511) and what amounts to *outraging the modesty of a woman* (§ 354). As a result, the courts cannot conclusively classify an offence as an 'attempt to rape' (§ 376/511) or as one *outraging the modesty of a woman* (§ 354).

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[92] *Id.* § 509.

It is believed that grading the sexual-offences in the aforementioned manner will resolve this conflict. Earlier in the absence of a precise understanding of what constituted the modesty of a woman, the courts invariably classified even an attempt to commit 'rape' as 'outraging the modesty of a woman'. But under the proposed grading system, the definition of 'sexual assault' no longer employs the subjective standard of 'modesty'. Thus, any act towards the commission of a sexual offence shall now be classified under Grade IV for an attempt to commit the sexual offence, rather than being incorrectly classified as 'sexual assault' under Grade II. Consequently, the chances of an offence lying in the grey area between Grade II and Grade IV become negligible.

e. *Grade V: Abetting a sexual offence*

The fifth grade of offences shall include the abetment of any sexual-offence mentioned under Grade I, II and III.

Taking a cue from § 107 I.P.C., a person can be charged for abetting a sexual-offence under the following circumstances-*First,* on instigating another person to do that thing. *Second*, on engaging with one or more persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing. *Third,* on any act or illegal omission that intentionally aids the commitment of an offence.[93] It is further submitted that an abetment of a sexual-offence should be punished with imprisonment of either description which may extend to one year or with fine or with both.

f. *Demarcations-'sexual nature' and 'sexual intent'*

In pursuance of the ongoing discussion, the author discusses how the courts ascertain whether or not a sexual-offence has been committed. First and foremost, the courts look into the nature of the act, i.e. whether the act is sexual or non-sexual in nature. Let us assume a situation where a woman's clothes have caught fire and a man removes the same, solely with the intention of rescuing her. This clearly amounts

[93] *See* I.P.C., § 107.

to non-sexual contact and cannot be punished for 'sexual assault' under Grade II. On the contrary, in the absence of fire, the act of removing a woman's clothes would certainly amount to sexual contact, and would attract the punishment for 'sexual assault' under Grade II.[94]

In view of the aforementioned example, a pertinent question that arises is- how the courts distinguish between sexual and non-sexual contact? A proper understanding of what amounts to sexual contact is essential to answer this query. The U.K. Sexual Offences Act, 2003 has defined *sexual contact* as:

> *"Penetration, touching or any other activity is sexual if a 'reasonable person' would consider that-*
>
> *a) Whatever its circumstances or any person's purpose in relation to it, it is because of its nature is sexual, or*
>
> *b) Because of its nature it may be sexual and because of its circumstances or the purpose of any person in relation to it (or both) it is sexual."*[95]

Relying on the aforesaid analysis of the U.K. Sexual Offences Act, it is fitting to conclude that the offences drafted under Grade I, II and III must be accompanied by demarcations like 'sexual nature' and 'sexual intent'. The said demarcations would facilitate a proper differentiation between sexual contact and non-sexual contact.

The term 'sexual nature', is analogous to the first limb of the definition of sexual contact under the U.K. Sexual Offences Act, 2003. It entails acts that are unambiguously sexual,[96] i.e. the activity is sexual irrespective of the defendant's purpose. For example, if proof is administered to the effect that the accused had oral sex

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[94] I. Bantekas, *Can Touching Always be Sexual When There Is No Sexual Intent,* 72 J. CRIM. L. 251 (2008).

[95] *See* the Sexual Offences Act, 2003, c. 42, § 78 (Eng.); s*ee also* G. Williams, *The Meaning of Indecency*, LEGAL STUD. 20(1990).

[96] *See* Regina v. Navid Tabassum, [2000] EWCA (Crim) 90, [2000] 2 Crim. App. 328.

with the victim, then his act would be considered sexual; irrespective of the accused's intentions.

The term 'sexual intent', is analogous to the second limb of the definition of sexual contact under the U.K. Sexual Offences Act, because it takes into consideration the purpose of the accused in relation to the sexual intercourse. It would apply in cases where the nature of an activity is ambiguous; therefore it is necessary to determine the intention of the defendant. This further leads to another point of contention. What should be the standard of proof to establish the 'sexual intent' for committing an offence? It was laid down in the cases of *Vishakha v. State of Rajasthani*[97] and *R.D. Prasad v. K.P.S. Gill*[98] that an objective standard of a *reasonable man* or the contemporary societal standard should be the basis for determining the intention behind any sexual-offence. In 2009, the judgment in *Shekara v. State of Karnataka*[99] further filled the void in this regard, by holding that, "*the existence of intention or knowledge has to be culled out from various circumstances in which …the alleged offence is alleged to have been committed.*"

Thus, the abovementioned analysis regarding the reach and sweep of the demarcations 'sexual nature' and 'sexual intent', establishes their indispensability for distinguishing between sexual and non-sexual contact.

B. Re-defining the term 'Consent' and examining the Legal Age of Consent under the Newly Graded Sexual Offences

In light of the earlier discussion on grading sexual-offences, it is imperative to consider what constitutes 'consent' to sexual intercourse and what should be the legal age of consent in India. Only in the absence of a victim's 'consent', would an offence be framed under any of the graded sexual offences. Thus, 'consent' forms the

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97 (1997) 6 S.C.C. 241.

98 (1995) Supp. (II) S.C.C. 724.

99 Shekara v State of Karnataka, Cri. App.479 of 2002 (Supreme Court, Feb 18, 2009), *available at* http://indiankanoon.org/doc/1156490/.

common thread that runs through all the five grades of sexual-offences. To take the discussion forward, this section shall highlight the flaws in the current understanding of 'consent' under the I.P.C., and also propose an alternative definition of 'consent'. Further, the author shall examine the possibility of replicating the 'age proximity principle' for determining the legal age of consent in India.

a. *What constitutes 'consent' to sexual intercourse?*

Currently, though § 375 relies heavily on 'consent', yet there is no statutory definition of the same. Further, the I.P.C. is silent on whether consent to sexual intercourse includes *passive submission*. It is imperative to note that there is a difference between 'consent' and *passive submission*. Consent involves submission but the converse does not always follow and a mere act of submission does not necessarily involve consent.[100] This distinction was considered at length in *Rao Harnarain Singh* v. *the State*.[101] The Court sought to define 'consent' in the following terms:

> *"Consent, on the part of a woman as a defense to an allegation of rape, requires voluntary participation, not only after the exercise of intelligence, based on the knowledge, of the significance and moral quality of the act, but after having freely exercised a choice between resistance and assent."*[102]

In the same case, the term *passive submission* was analyzed as,

> *"A mere act of helpless resignation in the face of inevitable compulsion, quiescence, non-resistance, or passive giving in, when volitional faculty is either clouded by fear or vitiated by duress, cannot be deemed to be "consent" as understood in law."*[103]

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100 *See* RATANLAL & DHIRAJLAL, *supra* note 88, at 652.

101 A.I.R. 1958 Punj. 123.

102 *See also* Kalilur Rahman v. Emperor, 1933 Rang 98, 101 (FB).

103 *See also* Uday v. State of Karnataka, (2003) 4 S.C.C. 46.

In the absence of a precise definition of consent under § 375, there is a fair possibility of taking *passive submission* to mean 'consent', which in reality may not be the case. In this regard, Prof. P Rumney has highlighted the dubious nature of the term 'consent' by stating:[104]

> *"Consent often involves verbal and non-verbal messages [which] can be mistaken and where an assumption about what is and is not appropriate can lead to significant misunderstanding."*

It is further submitted that non-resistance by the victim should not be equated with consent. For instance in *Tukaram v State of Maharashtra*[105] and *Mohd. Habib v State*,[106] the courts observed that the absence of injury marks on the victim's person or the penis of the accused indicated that the victim did not resist the sexual intercourse. In the instant case, the corollary of the said proposition was that the victim had consented to the sexual intercourse. According to the renowned author, Upendra Baxi, the courts cannot rely solely on the absence of injury marks on the person of the victim or the accused to deduce that the victim did not resist the forced sexual intercourse. Moreover, the said deduction cannot be the basis to make an affirmative presumption regarding the victim's consent.[107]

In pursuance of the discussion at hand, the author recommends that a precise definition of 'consent' to engage in sexual activity must be incorporated in the criminal justice legislation. The Protection of Children from Sexual Offences Act, 2012, provides a fitting definition of 'consent',[108] as "*the unequivocal voluntary agreement where the person has by words, gestures, or any form of non-verbal communication, communicated willingness to participate in the act"*. It is submitted that the said definition

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[104] *See generally* P. Rumney, *The Review of Sex Offences and Rape Law Reform: Another False Dawn*, 64 MOD. L. REV. 890 (2001).

[105] A.I.R. 1979 SC 185.

[106] (1989) Crim. L.J. (Del.) 137 (May 12, 1988).

[107] Upendra Baxi et al., *An Open Letter to the Chief Justice of India*, in WOMEN'S STUDIES IN INDIA (Mary E. John ed., 2008).

[108] *See* PCSOA, *supra* note 74, §§ 3, 7, Explanation I.

should be made applicable to all the five grades of sexual-offences, in order to effectively determine the existence of 'consent' to engage in a sexual act.[109]

Moreover, the definition of 'consent' must explicitly state that the victim's character would not be determinative of her consent. This recommendation mirrors the verdict of the Supreme Court in *State of Punjab v. Gurmit Singh,*[110] which held:

> *"Even if the prosecutrix…has been promiscuous in her sexual behavior earlier, she has a right to refuse to submit herself to sexual intercourse to anyone and everyone because she is not a vulnerable object or prey for being sexually assaulted by anyone and everyone."*[111]

It is submitted that as per the current understanding of the term 'consent', the burden of proving non consent rests on the victim. Thus, under the prevalent practice the onus is on the victim to establish how the consent to engage in a sexual act was actually obtained under duress. In order to remedy such a situation, it is necessary that the definition of 'consent' must evolve, whereby, any quantum of coercion applied without affirmative consent should be sufficient to constitute a sexual offence.[112] Such a modification in the understanding of 'consent' would shift the burden of proof on the circumstances of the sexual encounter much more than an 'individual's psychic space'.[113]

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[109] The offences of penetrative and non-penetrative sexual assault mentioned under Grade I and II should be read in consonance with § 114A of the Indian Evidence Act, 1872 which provides that in cases where the victim states in her evidence before the court that she did not consent to the sexual intercourse , the court shall presume that she did not consent.

[110] A.I.R. 1996 S.C. 1393, 1403; *see also* State of Maharashtra v. Madhukar N. Mardikar, (1991) 1 S.C.C. 57.

[111] In view of this recommendation, § 155(4) of the Indian Evidence Act, 1872, which permits a man prosecuted for rape or an attempt to rape, to show that the prosecutrix was of generally immoral character, should be deleted.

[112] In the Interest of M.T.S., 609 A.2D 1266 (1992).

[113] C.A. MacKinnon, *Defining Rape Internationally: A Comment on Akayesu*, 44 COLUM. J. TRANSNAT'L L. 940,956-58 (2006).

In other words, instead of expecting the victim to entirely discharge the burden of proof, the courts can also infer the absence of consent from the coercive circumstances surrounding the sexual encounter. To further the argument and the discussion, it may be noteworthy to analyze the *doctrine of coercive environment.*

According to McGlynn and Munro, the *doctrine of coercive environment* deals with the existence of coercive circumstances overwhelming the will of the victim.[114] Coercion is widely understood as the actions or circumstances that remove the ability of a reasonable person to choose.[115] According to the third clause of § 375, I.P.C. when consent to engage in sexual intercourse has been obtained by putting the victim in fear of death or hurt either to herself or to one she is interested in, it is rape.[116] Further, § 90, I.P.C. repudiates any consent provided under coercion by providing:

> *"A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception,."*[117]

The object of § 90 is to provide that where the consent of the person may afford a defense to a criminal charge such consent must be real consent not vitiated by immaturity, fear or fraud.[118]In rape law

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[114] V.E. Munro, *From Consent to Coercion: Evaluating International and Domestic Frameworks for the Criminalization of Rape*, *in* Rethinking Rape Law: International and Comparative Perspectives 17,19 (C. McGlynn & V.E. Munro eds., 2010).

[115] *See* Webster's Unabridged Dictionary, *supra* note 17 ('Coercion' is defined as "compulsion by physical force or threat of physical force").

[116] *See* I.P.C., § 375 (clause 'thirdly' states "[W]ith her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt").

[117] *See* I.P.C., § 90 (it states "[A] consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact…").

[118] Khalilur Rahman v. Emperor, A.I.R. 1933 Rang. 98.

this means that a reasonable person feels obliged to submit to the sexual desires of another.[119] Consent as a standard puts the onus on the victim, while a standard of coercion would shift the burden of proof on the coercive circumstances.[120]

The controversial nature of this doctrine arises not from the aforesaid principle, but from its application. For instance, what circumstances create an inherent presumption that no genuine consent can be proffered? For a coercive environment to exist a criminal actor must present the victim with a stark choice, i.e., either to acquiesce to the perpetrator's desires or face serious consequences; whether those are criminal, cause reputational damage, or simply bring about governmental action or inaction that would not have occurred otherwise.[121] According to McGlynn and Munro, the salient factors determining the existence of a coercive environment include the number of individuals effectively supporting the sexual encounter; whether the incident immediately followed a situation involving combat and the brandishing and/or use of weaponry.[122]

Moreover, while defining a coercive environment, it is imperative to exclude instances that lack a certain compelling quality. For example, if a criminal actor uses the promise of property, status, or favour to extract sex in something akin to sexual extortion, would the *doctrine of coercive environment* still be evoked?[123] In the United States, the *Model Penal Code, 1962, in an attempted synthesis of the U.S. law,* has addressed this concern by noting that such kind of sexual transactions, which

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[119] *See generally,* M. Burman, *Rethinking Rape Law in Sweden: Coercion, Consent or Non-voluntariness? in* RETHINKING RAPE LAW: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 196 (C. MCGLYNN & V.E. MUNRO EDS., 2010).

[120] Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 688 (Sept. 2, 1998).

[121] Sean Lowe, *Discerning a Coercive Environment: What Circumstances of Mass Rape generate Inherent Compulsion,* SANELA DIANA JENKINS HUMAN RIGHTS PROJECT (July 6, 2012, 2:20 AM), http://uclalawforum.com/forum/permalink/77/1021.

[122] *See* Munro, *supra* note 114, at 32.

[123] *See generally,* M.J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 985 (1998).

only provide *'an unattractive choice to avoid some unwanted alternative'*,[124] do not possess a '*compulsion overwhelming the will of [a] victim*'.[125] Thus, under such circumstances the consent of the victim is presumed to exist, as the coercive environment lacks a certain compelling quality.

The Model Penal Code, 1962 provides an illustrative understanding of how the *doctrine of coercive environment* may take shape into substantive law in India, by defining criminal coercion as follows:

> *'(1) Criminal Coercion:*
>
> *A person is guilty of criminal coercion if, with purpose unlawfully to restrict another's freedom of action to his detriment, he threatens to:*
>
> *a) commit any criminal offense; or …*
>
> *c) expose any secret tending to subject any person to hatred, contempt, or ridicule, or to impair his credit or business repute; or*
>
> *d) take or withhold action as an official, or cause an official to take or withhold action.'* [126]

Further, the International Criminal Tribunal has also affirmed the said doctrine in response to sexual offences committed in former Yugoslavia, Rwanda and Sierra Leone,[127] by stating:

> *'Rape occurs where it is accomplished against a person's will by means of force, violence, duress, menace or fear of immediate and unlawful bodily injury on the person or another.'*

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[124] *See* the MODEL PEN. CODE, 1962, § 213.1.

[125] *Id.*

[126] *Id.* § 212.5.

[127] Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 688 (Sept. 2, 1998); Prosecutor v. Delalic et al., Case No. IT-96-21-T, Judgment, ¶¶ 478-79 (Nov. 16, 1998); Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶ 185 (Dec. 10, 1998).

In view of these arguments, it is proposed that the understanding of 'consent' in India must reflect the *doctrine of coercive environment* in order to take cognizance of the instances where the consent of the victim has been obtained under duress.

b. *What should be the legal age of consent in India?*

The final inquiry under this section examines whether there is a need to alter the legal age of consent in India. The author argues for the retention of the legal age of consent at sixteen years, as provided under the § 375, I.P.C.[128] as well as for the implementation of the 'age proximity principle' in India.

Let us examine the global trend on the legal age for consensual sex.[129] According to Prof. M. Higdon, the age of consent in most developed countries is sixteen years. It is believed that raising the age of consent to eighteen years would intensify the moral policing of a young adult's sexual preferences, which is unacceptable keeping in mind the necessity of a progressive society that understands the reality of sexual experimentation among teenagers.[130]

Consequently, countries like the USA follow the 'age proximity principle', which is often termed as 'close in age exceptions' or 'Romeo

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[128] *See* I.P.C., § 375 (clause 'sixthly': "[W]ith or without her consent, when she is under sixteen years of age").

[129] Sexual Offences Act, *supra* note 95, cl. 42 (Eng.) (providing that the legal age of consent is 13 years, but if the child is between 13 to 16 years the prosecution has to prove that the accused did not reasonably believe that the child was over 16 years; STRAFGESETZBUCH [StGB] [PENAL CODE] May 15, 1871, BUNDESGESETZBLATT [BGBL] 3322, as amended, (providing that the legal age of consent is 14 years, though it may increase to 16 years if the accused is a person responsible for the child's upbringing, education or care); *see also* CODE PÉNAL [C. PÉN] (Fr. 1791) and THE SWEDISH PENAL CODE, 1962 (providing that the legal age of consent is 15 years); THE CHILD ACT, 2001 (MALAYSIA) (The legal age of consent is 16 years); *see also* Criminal Code, R.S.C. 1985, c. C-46 (Can.) and [Criminal Law of China] promulgated by National People's Congress, Mar. 14 1997, effective Jan. 10, 1997, 1997 (it provides that the legal age of consent is 14 years).

[130] M.J. Higdon, *Queer Teens and Legislative Bullies: The Cruel and Invidious Discrimination Behind Heterosexist Statutory Rape Laws*, 42 U.C. DAVIS L. REV. 195, 198 (2008).

and Juliet laws'.[131] The Model Penal Code, which assists the American legislature in standardizing their penal laws, has incorporated the 'age proximity principle', to decriminalize peer-on-peer underage sexual activity.[132] The Model Penal Code provides that, "*willing oral or vaginal sex by a person under sixteen years of age with a person within four years of the minor should not be the basis of criminal liability.*"[133] It is pertinent to note that most State legislations in the USA do not explicate any basic minimum age of consent as regards the application of the 'age proximity principle'.[134] In other words, oral copulation by a fifteen year old actor with a consenting eleven year old participant will not invoke any criminal liability in the States of Alaska, Colorado or California. However, the legislations governing Hawaii and Illinois have provided the basic minimum age of consent for the application of the 'age proximity principle' as fourteen and thirteen years respectively.[135] The commentary to the Model Penal Code reasons that criminal law should not target "*sexual experimentation among social contemporaries*" since "*it will be rare that the comparably aged actor who obtains the consent of an underage person to sexual conduct… will be an experienced*

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[131] J.S. Markman, *Community Notification and the Perils of Mandatory Juvenile Sex Offender Registration: The Dangers Faced by Children and Their Families*, 32 SETON HALL LEGIS. J. 275, 111(2008).

[132] C.L. Carpenter, *The Constitutionality of Strict Liability in Sex Offender Registration Laws,* 86 B.U.L. REV. 295, 313 (2006).

[133] *See* MODEL PEN. CODE, *supra* note 124, § 213.3(1)(a).

[134] *See, e.g.*, COLORADO REVISED STATUTE (2002) §§ 18-3-402, 18-3-405 (teens guilty of sexual assault for oral sex only if "the victim is less than fifteen years of age and the actor is at least four years older than the victim"); D.C. CODE (1995) § 22-3009 (no crime for oral sex between teenagers if the defendant is not more than four years older than the under sixteen-year-old victim); ALASKA STATUTES, TITLE 11, CRIMINAL LAW (2006) § 11.41.436 (seventeen-year-old offender must be more than four years older than victim to be guilty); ARKANSAN'S CODE (2009) § 5-14-127(a)(2) (oral sex with a person under sixteen years old is a crime only when the defendant is twenty years of age or older); CALIFORNIA PENAL CODE (2010) § 288a (defendant must be at least twenty-one to obtain a conviction for oral copulation).

[135] HAWAII PENAL CODE (2008) § 707-730 (1)(c) (2008) (no crime if defendant is less than five years older than fourteen and fifteen year-old participant); CRIMINAL CODE OF ILLINOIS (2012) § 5/12-15(c) (no crime if defendant is less than five years older than a participant who is between thirteen and seventeen years-old).

exploiter of immaturity," and that the "*more likely case is that both parties will be willing participants and that the assignment of culpability only to one will be perceived as unfair"*.[136] It is submitted that engaging in sexual experimentation is what comes naturally to adolescents. Therefore, criminalizing the same may deter children from seeking advice and assistance about their sexual development or about contraception, pregnancy and sexually transmitted diseases.[137] Moreover, a blanket criminalization of consensual sexual activity amongst participants under sixteen years is potentially unjust, especially when that activity can simply consist of kissing or cuddling, or of A causing B to look at a pornographic video for A's sexual gratification.[138]

In the United Kingdom, the Crown Prosecution Service (CPS) has published guidelines designed to ensure that criminal law is not invoked inappropriately for penalizing instances such as two 12 year olds kissing lustily in public.[139] The CPS Guidelines provide that it is not in public interest to prosecute children of similar age (assuming that there was no coercion involved) and that would almost certainly dispose of the example of two 12 year olds kissing.[140] By way of some recognition of the above arguments, § 13 (read with § 9) of the UK Sexual Offences Act, 2003 provides that where the defendant to a charge involving sexual activity with someone under the age of sixteen is himself under eighteen years of age, a lesser offence is committed than in the case of a defendant aged eighteen or above.[141]

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[136] A similar position has been adopted by Bill C-22 that was passed by the Canadian Parliament in 2007 *See* Bill C-22, *An Act to amend the Criminal Code (Age of Protection) and to make consequential amendments to the Criminal Records Act*, LS-550E (2007).

[137] *See* Richard Card, Card Cross and Jones: Criminal Law 765 (19th ed., 2010).

[138] *See* Andrew Ashworth, Principles of Criminal Law 1001 (6th ed., 2010).

[139] The Crown Prosecution Service, http://www.cps.gov.uk.

[140] *See* Card, *supra* note 137.

[141] *See* U.K. Sexual Offences Act, 2003, *supra* note 95, § 13(1) (it provides: '*A person under 18 commits an offence if he does anything which would be an offence under any of section 9 to 12 if he were aged 18*.' An offence under § 13(1) is punishable with maximum of five years' imprisonment on conviction).

As far as the position in India is concerned, the Ministry of Women and Child Development, while drafting the Protection of Children from Sexual Offences Bill, 2011, had argued for the retention of the legal age of consent at sixteen years (as provided under § 375, I.P.C.), rather than raising the same to eighteen. It was believed that retaining the legal age of consent at sixteen years would de-criminalize consensual sexual acts amongst children in the age group of sixteen to eighteen years.[142] The Committee reasoned that non-exploitative sexual experimentation among teenagers aged sixteen to eighteen years should not be criminalized in an evolving society.

The Parliamentary Standing Committee on Human Resource Development disagreed on the issue and in December, 2011 while reviewing the provisions of the Protection of Children from Sexual Offences Bill, 2011, sought to raise the legal age of consent form sixteen to eighteen years.[143] This amounted to a blanket criminalization of any consensual sexual activity with participants below eighteen years of age. It specifically included child actors in the age bracket of sixteen to eighteen years, who were clearly absolved of any criminal liability under the I.P.C. that stipulated the age of consent as sixteen.

The Standing Committee was of the opinion that child victims in the age bracket of sixteen to eighteen years needed as much protection of the laws against coercion, exploitation, abuse or sexual harassment, as victims below the age of sixteen. Therefore, once the law had defined everyone up to the age of eighteen as children, the element of consent would be treated as irrelevant, even with respect to participants in the age group of sixteen to eighteen years.[144] The Standing Committee further reasoned that if sexual activity involving child actors aged sixteen to eighteen years was

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142 *See* PCSOA, *supra* note 74, proviso to § 3 and § 7.

143 *See* Department Related Parliamentary Standing Committee on Human Resource Development, 214th on the Protection of Children from Sexual Offences Bill, 2011, ¶ 6.6, Rajya Sabha Secretariat, New Delhi (2011); *see also* PCSOA, *supra* note 76.

144 *See* Department Related Parliamentary Standing Committee on Human Resource Development, *id.,* ¶ 6.8.

de-criminalized, the onus would lie on the child-victim to prove that he/she did not consent to the sexual intercourse. Consequently, the child-victim would be exposed to lengthy cross examination on issues of consent, thereby leading to re-victimization or secondary victimization.[145]Accordingly, the Protection of Children from Sexual Offences Act, 2012 raised the legal age of consent to eighteen years; thereby, criminalizing any consensual sexual experimentation amongst children below eighteen years.

It is pertinent to question whether the application of the 'age proximity principle' in India would lead to undesirable social hazards. Scholars in the legal circles favouring the application of the said principle have lambasted the new law for being insensitive to modern social realities. They argue that raising the legal age of consensual sex to eighteen years is regressive as it strictly criminalizes consensual sexual activities among teenagers. Moreover, such a provision is also vulnerable to abuse by the police, as most adolescents are not aware of the law when they engage in the aforesaid sexual activities.[146]

In this regard, a 2010 study by the International Institute for Population Studies (IIPS) and the Population Council conducted in Andhra Pradesh, Bihar, Jharkhand, Maharashtra, Rajasthan and Tamil Nadu reveals the contemporary trend.[147] The study was conducted among the youth in the age group of fifteen to twenty-four years. It indicated that while a minority of young men and women had made or received a 'proposal' for a romantic relationship (21-23 per cent), smaller percentages reported that they had been involved in romantic partnerships (19 per cent and nine per cent respectively of young

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[145] *See* Department Related Parliamentary Standing Committee on Human Resource Development, *id.,* ¶ 6.9.

[146] Editorial, *Good Act Bad Provision*, THE HINDU (May 26, 2012), http://www.thehindu.com/opinion/editorial/article3456804.ece.

[147] *Youth in India: Situation and Needs Study*, POPULATION COUNCIL (2010), http://www.popcouncil.org/projects/101_YouthInIndiaNeedsStudy.asp (last visited Nov 1, 2012).

men and women).[148] Patterns of pre-marital romantic partnerships suggested that they were initiated at an early age and were usually hidden from parents but not from peers.[149]

There was a clear progression in reported physical intimacy and sexual experience with romantic partners: while eighty-eight per cent of young men had held hands with a romantic partner, nearly forty-two per cent had had sex with their partner. Amongst young women,[150] three-quarters had held hands with a romantic partner, while nearly one in four (twenty-six per cent) had engaged in sexual relations.[151] In a nutshell, the study concluded that sexual contact in India typically begins between the ages of twelve and fourteen with intercourse starting in the age-bracket of fifteen to eighteen.[152] Keeping the above mentioned statistics in mind, it is fair to state that the approach of the PCSOA, 2012 with respect to underage sexual activity is woefully inadequate. Raising the legal age of consent to eighteen years is a denial of the current reality and in fact seeks to alter the sexual behaviour of teenagers aged sixteen to eighteen years. The legislature should not impose an orthodox notion of morality by criminalizing sexual experimentation among social contemporaries. Doing so, may cause a spike in honor killings and suicides in India. Moreover, it could lead to minors using more dangerous ways of experimenting or result in more young people eloping.[153] Thus, the legal age of consent in India should not be raised to eighteen years, rather it should be retained at sixteen years as provided under § 375, I.P.C.[154]

The next issue pertains to the legality of consensual sexual exploration among children below the age of sixteen years. It is submitted that in such cases the 'age proximity principle' must be

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148 *Id.*

149 *Id.*

150 *Id.*

151 *Id.*

152 *Id.*

153 *See* ANDREW ASHWORTH, *supra* note 138.

154 *See* I.P.C., § 375 (clause 'sixthly').

applied as a model for legislation, as is done in other jurisdictions like the USA and UK. Accordingly, any non-exploitative and consensual sexual activity involving an actor who is less than four years older than a participant under sixteen years of age should be de-criminalized.

However, any *penetrative sexual intercourse* between a consenting participant under sixteen years and a close-in-age actor should be treated as an exception to the 'age proximity principle' and thereby invoke criminal liability - on account of the serious nature and consequences of the sexual act. In other words, *instances of consensual penetration of a child's vagina, anus or mouth with a penis, body part or any foreign object by a close-in-age defendant* should qualify as an offence. This is because uninformed penetrative sexual activity among children below sixteen years carries the risk of unwanted pregnancies and sexually transmitted diseases.[155] Therefore, the unlikelihood of the courts to prosecute such serious sexual offences may make children under the age of sixteen years think that law can be ignored with impunity.[156]

In a nutshell, the proposals made with regard to the discussion at hand can be summarized as follows: *Firstly*, the legal age of consent in India should be retained at sixteen years. Raising the same to eighteen years will lead to the criminalization of sexual exploration among adolescents in the age group of sixteen to eighteen years, which is unacceptable in an evolving society. *Secondly*, cases of sexual experimentation involving children under the age of sixteen years should be addressed by incorporating the 'age proximity principle'. However, as an exception to the said principle, instances of *penetrative sexual intercourse* between a child under the age of sixteen and a close-in-age actor should invoke criminal liability. This will act as a deterrent against adolescents engaging in uninformed penetrative sexual intercourse.

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155 *See* ANDREW ASHWORTH, note 138 at 654.

156 *See* RICHARD CARD, *supra* note 137 at 1221.

C. The Differences between the Proposed Model and the U.K. Sexual Offences Act, 2003

The proposed model of grading sexual offences is principally modeled on the U.K. Sexual Offences Act, 2003.[157] However, it significantly departs from the English statute in certain aspects. Per the general scheme of the SOA (2003), there are a total of 80 sections that set out the many new offences, and these often contain numerous sub-categories of offences.[158] Criticism attaches to the fact that the new offences are too many and suffer from needless obscurity and "legislative overkill".[159] The author shall now explore the complexities induced by the new Act by discussing two chief criticisms leveled against certain features of the SOA (2003).

Firstly, according to Smith and Hogan, the maximum sentences under the current U.K. legislation vary according to the factual ingredients proved. Consequently, substantive problems arise when there are too many charging options. It produces confusion and inhibits optimal development of case law, with no guarantee that the courts will treat similar conduct consistently.[160]

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157 Sexual Offences Act, *supra* note 97, c. 42, (Eng.).

158 §§ 1- 4 of the Act create newly-defined offences of rape, assault by penetration, sexual assault and causing sexual activity. All these offences turn on the absence of consent. §§ 5-8 create parallel offences in respect of child victims under the age of 13, and to those offences consent is irrelevant. §§ 9-15 create a number of sexual offences against children under 16. §§ 16-24 contain various 'abuse of trust' offences, committed against persons under 18 by those in a position of trust. The new act contains a number of reformulated familial sex offences, in §§ 25-29 and 64-65. §§ 30-44 create a range of offences, committed against persons with mental disorder by others. §§ 45-51 amend the law to protect children against indecent photographs, pornography and prostitution. §§ 52-60 alter the law relating to prostitution and trafficking for sexual exploitation. §§ 66-71 contain offences of exposure, voyeurism, sexual penetration of a corpse and sexual activity in a public lavatory.

159 C. Whelan, *The Sexual Offences Act, 2003- Is Jersey Falling Behind*, 8 Jersey L. Rev. 284 (2004).

160 Smith & Hogan's Criminal Law 595 (David Ormerod ed., 2005).

In order to analyze the aforementioned criticism better, the author shall seek to examine the overlapping provisions in the SOA (2003) for penalizing the offence of sexual intercourse with a child under the age of thirteen. On the one hand, § 5 of the SOA (2003) makes sexual intercourse with a child under the age of thirteen a crime of strict liability irrespective of the age of the defendant and calls it rape[161], punishable with imprisonment for life.. On the other hand, § 13 of the same Act, read with § 9, in partial recognition of the 'age proximity principle' makes it an offence for a person under eighteen years to have consensual sexual intercourse with a child under thirteen. But unlike § 5, it does not attach the label of rape to this offence, which is punishable with imprisonment for a term not exceeding five years. [162]

Thus, the prosecutor can exercise his discretion to punish underage sexual activity either as rape under § 5 (which stipulates life imprisonment) or apply the 'age proximity principle' enshrined under § 13 read with § 9 (which stipulates imprisonment for a term not exceeding five years). For instance in *R. v. G,* a fifteen year old boy had sexual intercourse with a twelve year old girl. [163] The prosecution had the choice to charge G either under § 5 or § 13 read with § 9. The majority of the House of Lords allowed the conviction under § 5 to stand. In this regard, Prof. J. Spencer, a renowned legal scholar, poses the following pertinent questions:

> *"To what extent is it is reasonable to leave it to the police and other authorities to decide when to prosecute and, where there is a choice, for which offence? What behavior then should the criminal law prohibit, and what should it not?...*(Further) *the 'legislative overkill' point is that the child sex offences cover*

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[161] R v. G [2008] UKHL 37, [2009] 1 A.C. 92.

[162] *Id.*; *see also* R v. Director of Public Prosecution, [2009] UKHL 45, *available at* http://www.publications.parliament.uk/pa/ld200809/ldjudgmt/jd090730/rvpurdy.pdf (Opinion of the Lords of Appeal for the judgment in the Cause *R v. G,* Lord Hope of Craighead).

[163] *See* R v. G [2008] UKHL 37.

> *not only consensual sexual acts between children and adults, but all forms of sexual behavior between consenting children. The result is to render criminal a range of sexual acts, some of which are usually thought to be normal and proper, and others at least not seriously wrong."*[164]

Secondly, many provisions in the SOA (2003), attempt to give detailed descriptions of the relevant elements of the offences mentioned therein. This creates confusion in the legislation, rendering it less accessible than it ought to be.[165] As the Joint Parliamentary Committee on Human Rights in U.K. observed in their *Twelfth Report:*

> *'Creating catch all offences and then relying on the prosecutor's discretion to sort things out satisfactorily undermines [the rule of law]. It leaves prosecutors to do the job that the Parliament should be doing, and gives them discretion to prosecute (or not to prosecute) people who ought never to have been within the scope of criminal liability in the first place.'*[166]

It is submitted that the proposed model to be replicated in India is chiefly based on the cardinal principle underlying the SOA (2003), which is to grade the sexual offences into four broad categories, based on their severity. Notwithstanding this, it is imperative to note that the proposed Indian model does not incorporate the voluminous offences or the cumbersome drafting, associated with the UK Sexual Offences Act. Thus, the negative ramifications arising out of the unreasonably detailed provisions of the SOA (2003) should be consciously avoided in the proposed model, so as to suit the Indian situation.

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[164] J.R. Spencer, *The Sexual Offences Act 2003: (2) Child and Family Offences* 2004 CRIM. L. REV. 328 (2004).

[165] *See* R. CARD ET AL., CRIMINAL LAW 303 (19th ed., 2010).

[166] JOINT PARLIAMENTARY COMMITTEE ON HUMAN RIGHTS, LEGISLATIVE SCRUTINY: ARMED FORCES BILL, UK (May 17, 2011).

IV. Should the Marital Rape Exemption be Retained?

Part IV of the article discusses the position regarding marital rape in India. In the following sections, the author shall draw a comparison with the position of marital rape in the U.K., to argue against the retention of the marital rape exemption in India.

A. The Marital Rape Exemption in India

The Black's Law Dictionary defines 'marital rape' as *"a husband's sexual intercourse with his wife by force or without her consent"*.[167] The call for criminalizing marital rape gained momentum in the 19th century, when for the first time the advocates of the feminist movement refused to draw any distinction between rape outside of, and within marriage.[168] Thereafter in 1993, the United Nation's Declaration on the Elimination of Violence against Women, recognized marital rape as a violation of human rights.[169] By 2006, the UN Secretary General found that marital rape had been criminalized in nearly 104 States. Of these, 32 had created a specific criminal offence of marital rape, while the remaining 74 did not exempt it from general rape provisions.[170]

As far as the position in India is concerned, marital rape is a form of non-criminal domestic violence. The I.P.C. does not classify marital rape as a criminal offence.[171] Further, the Protection

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[167] *See* Shorter Oxford English Dictionary, *supra* note 13, at 1374.

[168] C.H. Palczewski, *Voltairine de Cleyre: Sexual Slavery and Sexual Pleasure in the Nineteenth Century,* 7 NWSA J. 54 (1995).

[169] *See* United Nation's Declaration on the Elimination of Violence against Women, G.A. Res. 48/104, U.N. Doc. A/RES/48/104, at Art. 2, (Dec 20, 1993). (In June, 1993, India had accepted and ratified the United Nation's Declaration on the Elimination of Violence against Women, 1993).

[170] *See* United Nations Secretary General, Report of the Secretary-General, *In-Depth Study on all forms of Violence against Women*, U.N. Doc. A/61/122/Add. (Jul 6, 2006).

[171] Vasudha Dhagamwar, Law, Power and Justice: Protection of Personal Rights Under the I.P.C. 113 (2nd ed., 1998).

of Women from Domestic Violence Act, 2005 has only created a civil remedy for marital rape, without criminalizing the same.[172] This section shall bring to light the hesitation of both the Indian judiciary and the legislature to criminalize marital rape in India. To begin with, the author shall examine the legislative framework in India pertaining to the legality of marital rape. Thereafter, an inquiry shall be made into the anti-criminalization approach adopted by the various Law Commission Reports and the Indian judiciary, on the issue of marital rape.

The *Exception* to § 375, I.P.C. provides for the marital rape exemption in India. It states that sexual intercourse by a man with his wife, the wife not being under fifteen years of age, is not rape. Thus, a man cannot be guilty of raping his wife, when she is over the age of fifteen years on account of the matrimonial consent she has given which she cannot retract.[173] But if a husband has sexual intercourse with his wife, who is under fifteen years of age, whether with or without her consent, he is guilty of rape. [174]

In *Queen Empress v. Hurree Mohan Mythee*[175], the court had defended the marital rape exemption on the ground that it aims at the preservation of family as an institution by ruling out the possibility of false, fabricated and motivated complaints of 'rape' by the wife against her 'husband'. Further, in *Bodhisattwa Gautam v. Subhra Chakraborthy,*[176] the Supreme Court while interpreting the *exception* to § 375 refused to recognize marital rape as a criminal offence. According to Prof. Vibhute, the ratio in the judgment was based on the mutual matrimonial contract, which denied a wife the right to retract her marital-consent to engage in sexual intercourse with her husband.[177]

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[172] *See* the Protection of Women from Domestic Violence Act, 2005,§ 3.

[173] Queen Empress v. Hurree Mohan Mythee, (1890) 18 Cal. 49.

[174] Kartick Kundu v State, (1967) Crim. L.J. (Cal)1411 (Feb. 23, 1966).

[175] Queen Empress, *supra* note 173.

[176] (1996) 1 S.C.C. 490.

[177] *See* K. Vibhute, *Rape within Marriage in India: Revisited*, 27 Indian Bar Rev. 167,71 (2000).

This is because the legal existence of the wife is suspended during marriage, and the husband and wife are deemed to be one person in law.[178] The Supreme Court again relied on the aforementioned *theory of coverture*[179] in *Sakshi v. Union of India,*[180] and refused to criminalize marital rape by refusing to uphold the House of Lords decision in *R v. R*[181] (which criminalized marital rape in U.K.). The court was of the opinion that foreign precedents could not be relied upon to alter the fifty year old law regarding marital rape in India.

According to Kalpana Kannabiran, the above stated approach of the Indian judiciary reflected a patriarchal mindset and was also in conflict with the modern notions of womanhood.[182] She argued that granting the husband an absolute immunity solely on the basis of the matrimonial consent was against the tenets of gender-neutrality.[183] After all, the dismal effects of marital rape ranged from injuries to private organs and bladder infections to miscarriages and infertility.[184]

It is further submitted that there exists a glaring discrepancy in the I.P.C., as regards the severity of punishment in cases of marital rape when the wife's age is twelve years and when it is between twelve to fifteen years. According to § 376(2)(f), the rape committed by a man on his wife who is under twelve years of age shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine. But when the age of the wife so raped is between twelve to fifteen years,

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178 *See* W. Blackstone, Commentaries on the Laws of England 430 (1966).

179 Sir William Blackstone, Commentaries on the Laws of England (1765). (The *theory of coverture* states that "[B]y marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage").

180 A.I.R. 2004 S.C. 3566.

181 [1991] 3 W.L.R. 767.

182 K. Kannabiran, *Sexual Assault and the Law*, *in* Challenging the Rule(s) of Law: Colonialism, Criminology and Human Rights in India 78,38 (K. Kannabiran & R. Singh eds., 2008)

183 *See* State v. Smith, 426 A.2d 38, 44 (N.J.1981).

184 *See* Kannabiran , *supra* note 182, at 32.

then the punishment so prescribed by § 376(1) is imprisonment of either description for a term, which may extend to two years or with fine or with both.[185] The grounds for considering the marital rape of a wife within the age bracket of twelve to fifteen years, as that of a milder category, certainly defy reasonability especially, given that the legal age of marriage for women in India is 18 years.

> *"Naturally the prosecutions for this offence are very rare. We think it would be desirable to take this offence altogether out of the ambit of § 375 and not to call it rape even in a technical sense. The punishment for the offence may also be provided in a separate section."*

But subsequently, the 84th Law Commission Report[189] disagreed with the restructuring suggested by the 42nd Report. It was felt that such an arrangement would *"produce uncertainty and distortion*" and hence § 375 should "*retain its present logical and coherent structure."*[190] With regard to the legal age for marital sex, however, the report sought to increase the same to 18 years. In their words,[191]

> *"the minimum age of marriage now laid down by law (after 1978) is eighteen years in the case of females and the relevant clause of § 375 should reflect this changed attitude. Since marriage with a girl below eighteen years is prohibited (though this is not void as a matter of personal law) sexual intercourse with a girl below eighteen years should also be prohibited."*

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185 *See* I.P.C., § 376.

186 *See* 42nd Law Commission of India Report, *supra* note 2; 84th Law Commission of India Report, *supra* note 3; 172nd Law Commission of India Report, *supra* note 5.

187 *See* 42nd Law Commission of India Report, *supra* note 2.

188 *See* 42nd Law Commission of India Report, *supra* note 2, ¶ 16.115.

189 *See* 84th Law Commission of India Report, *Rape and Allied Offences: Some Questions of Substantive Law, Procedure and Evidence* (1980), *available at* http://lawcommissionofindia.nic.in/51-100/Report84.pdf.

190 *Id. at* ¶ 2.21.

191 *Id. at* ¶ 2.20.

Thereafter, the 172nd Law Commission Report[192] and the Criminal Law Amendment Bill, 2012, also adhered to the earlier position of not recognizing *"rape within the bonds of marriage",* to prevent *"excessive interference with the marital relationship."*[193] As regards the legal age for marital sex, the Criminal Law Amendment Bill, 2012 seeks to raise the same to sixteen years (as against fifteen years in the I.P.C.), but not to eighteen, as proposed by the 84th Law Commission Report.

Thus, an analysis of the Law Commission Reports reveals the disinclination of the government to criminalize marital rape in India. The only constructive recommendation that was implemented by the introduction of § 376A, based on the report of the Joint Committee on the Indian Penal Code (Amendment) Bill, 1972[194] and the 42nd Law Commission Report.[195] According to § 376A, any form of sexual intercourse between a judicially separated couple, without the consent of the wife, is punishable with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.[196] As held in *R v. Clarke,*[197] the rationale behind this provision is that a decree of judicial separation essentially revokes the consent of the wife given at the time of marriage. Hence, any sexual intercourse by the husband without the wife's consent would result in the offence of rape. However, § 376A is only a piecemeal legislation and much more needs to be done by the Parliament on the issue of marital rape.[198]

B. The Gradual Criminalization of Marital Rape in the United Kingdom

It may be relevant to examine the legislative advances in the United Kingdom regarding the offence of marital rape. Subsequently,

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192 *See* 172nd Law Commission of India Report, *supra* note 5.

193 172nd Law Commission of India Report, *supra* note 5, ¶ 27.

194 Y. Sharma, Rajya Sabha Secretariat, The Indian Penal Code (Amendment) Bill, 1972: Report of the Joint Committee presented on 29 January 1976 (1976).

195 *See* 42nd Law Commission of India Report, *supra* note 2.

196 *See* I.P.C., § 376A.

197 R v. Clarke [1949] 2 All. E.R. 448.

198 *See* Bhattacharjee, *supra* note 39, at 78.

in the course of this section, the author shall argue how the progressive change in the U.K., from retaining the marital rape exemption to eventually criminalizing it, can be an ideal prototype for India to follow.

The origin of the marital rape exemption in U.K. can be traced to the *theory of implied consent*, propounded by Hale, the Chief Justice in England, during the 1600s:[199]

> "*The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife hath given herself in kind unto the husband, whom she cannot retract.*"

Thereafter, the courts in England and Wales relied on the *theory of implied consent* in a number of cases to justify the marital rape exemption. For instance, in *R v. Kowalski*,[200] the Court of Appeal in the UK held that although a man cannot be found guilty of raping his wife because of the implied consent to sexual intercourse arising from marriage, he could be found guilty of *indecent assault* for forcing his wife to perform an act of fellatio. Further, in *R v. Miller*,[201] Justice Lynskey observed, in obiter, that a petition for divorce did not revoke the marital consent to sexual intercourse and therefore no charge for rape could result; though the accused could be charged for an *indecent assault*.[202] One may also consider the 1991 judgment of *R v. J*,[203] wherein the argument was based on statutory interpretation. The wording of § 1(1) of the Sexual Offences (Amendment) Act 1976 provided that *"a man commits rape if he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it."* It was contended that the Act of 1976 provided a statutory definition of rape and that the

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199 *See* Sir M. Hale, The History of the Pleas of the Crown 629 (P.R. Glazebrook ed., 1971).

200 [1988] 86 Crim. App. 339.

201 [1954] 2 QB 282.

202 *See also* R v. Sharples (1990) Crim. L.R. 198.

203 [1991] 1 All E.R. 759.

only possible meaning which could be ascribed to the word *"unlawful"* was *"illicit"*, effectively meaning outside the bounds of matrimony. Consequently, the court held that the Parliament's intention was to preserve the husband's immunity.

In certain cases, the courts were impelled to perform contortions to avoid the application of the marital rape exemption, thereby indicating the absurdity of this rule. For instance, in *R v. Clarke*,[204] while keeping silent on the legality of the marital rape exemption, the court held that consent to marital sex in that case had been revoked by an order of the court for non-cohabitation. Twenty years later in *R. v. O'Brien*,[205] Justice Park extended the legal separation theory by holding that a decree nisi effectively terminates marriage and concurrently revokes consent to marital intercourse. Furthermore, in *R v. Steele*[206], Lord Justice Geoffrey Lane stated that where a husband and wife are living apart and the husband has made an undertaking to the court not to molest his wife, then it is in effect equivalent to the grant of an injunction and eliminates the wife's implied consent to sexual intercourse.

Finally in 1991, the House of Lords criminalized marital rape in *R v. R.*[207] Lord Keith stated that the fiction of *implied consent* did not reflect the true position under the English Law. The House of Lords unanimously noted that '*nowadays it cannot seriously be maintained that by marriage a wife submits herself irrevocably to sexual intercourse in all circumstances'*.[208] They further held that marital rape exemptions '*no longer form part of the law of England since a husband and wife are now… regarded as equal partners in marriage'*.[209] Thereafter, the Parliament enacted the Criminal Justice and Public Order Act of 1994[210] and eliminated the marital rape exemption altogether. The watershed

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[204] [1949] 2 All E.R. 448.

[205] [1974] 3 All E.R. 663.

[206] [1976] 65 Crim. App. 22.

[207] [1991] 3 W.L.R. 767.

[208] *See R v. R* [1991] 3 W.L.R. 767.

[209] *Id.*

judgment R *v.* R forms the basis of the current position in U.K. Prof. Dr. R. Blanpain, has summarized the same as follows: [211]

> *"The liability of a husband for rape does not depend on there having been any termination of consortium and a prosecution may be brought even though the parties were living under the same roof at the time and even though there may have been a history of sexual relations between them."*

Thus, the paradigm changes in the United Kingdom, as regards the gradual criminalization of marital rape highlight the jurisprudential flaws in the *implied consent theory,* which forms the basis of the marital rape exemption. The rationale behind the said theory can be rebutted by the US Court judgment in *People v. Liberta,*[212] on the ground that the bodily integrity of the wife must outweigh the husband's right of marital privacy. Another argument against the retention of the marital rape exemption is in the US Supreme Court's verdict in *Trammel v. U.S.A.,*[213] which stated:

> *"[n]owhere in...modern society...is a woman regarded as chattel or demeaned by denial of a separate legal identity and the dignity associated with recognition as a whole human being."*

According to Theresa Fus, it was the judiciary that took the lead in denouncing the *implied consent theory* in the United Kingdom, and thereafter their legislature criminalized marital rape.[214] It is imperative to criminalize marital rape in India as well; though it remains to be seen whether the legislature or the judiciary would take the first step in that direction. Ideally, both the organs of the government should recognize the urgency of denouncing the *implied consent theory*

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[210] Criminal Justice and Public Order Act, 1994, c. 33 (Eng.).

[211] *See* INTERNATIONAL ENCYCLOPEDIA OF LAWS 136-37 (Dr. R. Blanpain ed., 2010).

[212] 474 N.E.2d 567, 573 (N.Y.1984).

[213] 445 U.S. 40 (1980).

[214] *See* Theresa Fus, *Criminalizing marital rape: A Comparison of Judicial and Legislative Approaches*, 39 VAND. J. TRANSNAT'L L. 481, 543 (2006).

and thereafter work in consonance to strictly criminalize marital rape in India.

V. Conclusion

The central premise of this paper was to scrutinize the primary issues emanating from India's archaic provisions regarding sexual-offences. To further this premise, the author proposed pragmatic reforms to the I.P.C., in order to safeguard the interests of the victims suffering under the laxity of the present mandate.

The fundamental inquiry pertains to the narrow definition of 'rape' under the I.P.C., which is only limited to sexual offences involving penile-vaginal penetration. On the contrary, other grave offences like *fellatio* or sexual assault are treated as offences of a milder category, solely due to absence of penile-vaginal penetration. Thus, to tackle the stark discrepancy in the quantum of punishment between penile and non-penile sexual-offences, it is imperative to grade the sexual-offences, as per their severity into: (1) penetrative sexual assault; (2) non-penetrative sexual assault; (3) sexual harassment and (4) abetment to commit a sexual-offence (5) attempt to commit a sexual-offence. This would ensure that sexual offences other than those involving penile/vaginal penetration are treated with as much severity as the current offence of rape is. In furtherance of this model, it is also suggested that the proposed gradation be drafted in gender-neutral terminology. This would facilitate the redressal of sexual-offences without discriminating between males, females and the transgender communities of our society.

Thereafter, the author examines the jurisprudential flaws in treating the sexual abuse of minors as an unnatural offence under § 377. Consequently, the author has commended the enactment of the Protection of Children from Sexual Offences Act, 2012, to exclusively deal with the sexual abuse of minors in India.

Further, the paper has comprehensively analyzed the need to incorporate a precise definition of 'consent', which reflects the doctrine of coercive circumstances. This would ensure that the general character

of the victim or any form of passive submission of the victim is not equated with the victim's consent to engage in a sexual intercourse. In pursuance of this inquiry, the article also evaluates the prospect of raising the legal age of consent to eighteen years as well as implementing the 'age proximity principle' in India. The final query pertains to the retention of the marital rape exemption in India. The author discusses the hesitation of both the judiciary and the legislature to criminalize marital rape in India. It is argued that India's stand as regards legalizing marital rape is discriminatory towards married women. It reinforces the outmoded notion of male dominance in a matrimonial relationship. Thus, it is proposed that the criminalization of marital rape in the United Kingdom by denouncing the *implied matrimonial consent theory* would be an apt model for India to follow.

It is rightly said that sexual abuse casts a shadow the length of a lifetime. Thus, the government must be conscious of the need to reform the legal framework pertaining to sexual-offences in India. Eventually, the success of the proposed reforms will depend upon the willingness of the Parliament to enact them at the earliest. Post-enactment, the onus would be on the law enforcement machinery to effectively implement the proposed reforms. It is hoped that the objective underlying this paper will soon transform into reality, and the misery of the victims scarred by sexual abuse will be alleviated.