

# Journal of Multi-Disciplinary Legal Research

## Criminalizing Marital Rape in India

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**ABSTRACT**

The IPC, 1860, does not acknowledge that it is an offence for a man to rape his lady, hence marital rape is not an offence in India. The reasons for this are numerous, as evidenced by multiple investigations, legislative discussions, as well as judicial rulings. The factors range from preserving the sanctity of the marriage institution to the availability of legal alternatives. We contend that the Indian Penal Code, 1860's marital rape exception clause is illegal in its entirety. Furthermore, we are concerned by the absence of other remedies available to a woman who has been raped by her husband. We end by emphasizing the need of criminalizing marital rape and mention all the appeals drawn towards the same.

**Keywords-** Indian Penal Code, 1860, marital, rape, criminalizing, appeals.



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## INTRODUCTION

“The quality of a nation’s civilization can be largely measured by the methods it uses in the enforcement of its criminal law.”<sup>1</sup> If one were to inquire about the golden era for a lady within the marriage institution, where she was considered above the male partner or even as equals, there would be no responses from time immemorial to the present predicament. To be specific, women were treated as totally owned subsidiary rather as independent persons or things. "Marriage, in its truest sense, is a partnership of equals", according to Gordon B. Hinckley (an American religious leader), "with neither partner exercising dominion over the other, but rather with each encouraging and assisting the other in whatever responsibilities and aspirations he or she may have."

This crime is not a very bad element of women's distress in Indian society, but the individual who commits this horrific deed is without a doubt the worse. In its broadest definition, access to justice refers to the right to seek legal redress for any act that violates legal principles in any way. However, marital rape is not illegal under our law, allowing a husband to rape his lady without fear of facing criminal charges. This is a section of the Indian justice system that is unavailable to Indian spouses, and there is an urgent need for a set of regulations on the subject. The law can no longer afford to be static. The rule of law should be followed.

## RESEARCH PROBLEM

With the rise in literacy and the ease with which women can connect to the rest of the world, they have gradually become more aware of their rights and how they are being violated. This is the time for the Legislature and the Judiciary to join forces and take a step toward making this inaccessible area of the judicial system accessible to those victimized women who have never had the opportunity to speak up against a crime that has left a permanent scar on their psyche. Nonetheless, now is the moment for the entire country to agree that without criminalizing marital rape, women's empowerment and gender equality will be impossible to achieve.

## RESEARCH AIM

- To study the judicial view on marital rape and the remedies that exist in India.
- To analyse the appeals to criminalize marital rape in India.

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<sup>1</sup> *State (NCT of Delhi) v. Navjot Sandhu*, (2005) 11 SCC 600.

- To suggest means to effectively criminalize marital rape in India.

## RESEARCH QUESTIONS

- What is the judicial view on marital rape and the remedies that exist in India?
- What are the appeals to criminalize marital rape in India and suggestions to effectively implement them?

## LITERATURE REVIEW

An article by Preeti Choudhry talks about marital rape and how marriage doesn't give irrevocable consent. The best our country's top court has done is determine in 2017 that sex with a minor wife constitutes rape. It weakened the exemption to section 375 of the IPC, which stated that coitus between a man and his lady who is not under the age of 15 does not constitute rape. The Indian courts has only increased the age limit from 15 to 18. If your wife is 18, you effectively have a pass for spousal rape.

Another article by a lawyer by Bar and Bench wrote about penalizing marital rape in India. While various non-governmental organizations and marital rape victims have consistently called for the closure of loopholes in our criminal justice system, there is still more to be done. A substantial number of women continue to put up with coercive sexual behaviour, which simply makes them more vulnerable to various psychological and physical problems. However, not everything is lost. The Indian Supreme Court, in Justice K.S. Puttuswamy (Retd.) V. Union of India (2017) 10 SCC 1, emphasises personal autonomy and affirms that a person is entirely entitled to make intimate decisions, including marriage and procreation. As a result, if a person, spouse or not, does not consent to an intimate relationship, it should be accepted and agreed upon. Another article printed by the Hindustan Times says that spousal rape under law will put family under stress. Maneka Gandhi sparked outrage last year when she claimed in Parliament that there couldn't be a section barring spousal rape since it is a "sacrament." The article mentions the committees which initiated criminalizing marital rape in India.

Another article written by Anirudh Pratap Singh talks about the impunity of marital rape. It has been outlawed in over a hundred nations today, but this country is still one of the few countries where spousal rape is not criminalised. Regardless of the accused's identity or the victim's age, it should be termed as rape. A lady who is raped by a stranger has the remembrance of a horrifying incident with her; a lady who is raped by her own carries the

image of it with her. Even after several years of freedom, our legislation, which were passed down from the British, have largely stayed unchanged. However, English laws have been changed, and they have made it unlawful in 1991. None of our government has, however, thus far demonstrated an active interest in rectifying this problem.

An article written by Flavia Agnes talks about how proving marital rape is not easy. Cruelty is defined in the Domestic Violence Act in a variety of ways, including economic abuse, such as refusing to give cash to the wife, domestic violence, such as beatings, and emotional violence, such as degrading her body or her family. Then there's the matter of sexual violence. Domestic violence is an offence that allows you to seek redress. Women can seek protection and maintenance from their husbands, as well as a restraining order.

### JUDICIAL VIEW ON MARITAL RAPE

It has been suggested that exemption 2 of Section 375 of the Indian Penal Code, which decriminalizes marital rape of women over the age of 18, be repealed. On the other hand, there have been instances in which the government has attempted to avoid declaring marital rape a crime. The central government stated in an affidavit filed in August 2017 in response to multiple petitions addressing the deletion of exception 2 of Section 375 of the IPC, "It must be ensured that marital rape does not become a regular phenomenon as it will destabilize the institution of marriage and can also be used by women to harass their innocent husbands."<sup>2</sup>

As a result, the government claims that criminalizing spousal rape will lead to false charges, with many individuals suffering as a result. This is only a getaway for the government not to criminalize the offence because, rather than investing effort into appropriate investigation in such cases, the legislation prefers not to criminalise what is genuinely wrong in the country.<sup>3</sup> Also, Maneka Gandhi stated that "Unlike other countries the concept of marital rape cannot be applied to India because of various reasons like poverty, alarming illiteracy rate, and the level of education we have here."<sup>4</sup>

<sup>2</sup> *Criminalising Marital Rape Will Destabilise Institution Of Marriage: Government Tells Delhi HC*, OUTLOOK INDIA (Nov 09, 2021, 00:49 AM), <https://www.outlookindia.com/website/story/criminalising-marital-rape-will-destabilise-institution-of-marriage-government-t/300948>.

<sup>3</sup> Aahna Rajan, *India's marital rape problem*, INTERNATIONAL POLICY DIGEST (Nov 09, 2021, 01:02 AM), <https://intpolicydigest.org/india-s-marital-rape-problem/>.

<sup>4</sup> Rajyasree Sen, *Maneka Gandhi tells us marital rape isn't rape after all*, LIVE MINT (Nov 09, 2021, 00: 47 AM), <https://www.livemint.com/Opinion/jdWYjEBWesSGEP17aDgMbJ/Maneka-Gandhi-tells-us-marital-rape-isnt-rape-after-all.html>.

Shashi Tharoor, on the other hand, holds a different viewpoint, and he off lately submitted a private bill in the Lok Sabha focusing on female's sexual rights. It also suggests that spousal rape be become a felony, as well as the repeal of IPC exception 2, which stipulates that coitus between a man and his lady is not rape if she is beyond the age of 18. This bill also proposes that a clause be included after the proviso to explanation 2 that says "Provided that the women's ethnicity, religion, caste, education, profession, clothing preference, entertainment preference, social circle, personal opinion, past sexual conduct or any other related grounds shall not be a reason to presume her consent to the sexual activity."

### REMEDIES THAT EXIST FOR MARITAL RAPE

498A of the IPC is the most pertinent clause that is frequently used as a potential alternative to criminalization. 498A was included to the International Criminal Code to address situations of cruelty to females/. However, we believe this is insufficient for two reasons. The first argument is that there is a clear distinction between cruelty and rape. Rape is distinct from a cruelty offence because of its nature and behaviour. The second issue is that this part is insufficient for dealing with rape cases. The need of recognising rape as a separate crime has long been recognised in feminist writing. Aside from that, the offence of rape is distinct due to the nature of the crime. It is, without a doubt, a sort of cruelty; nonetheless, it is distinct from physical and emotional violence. It is surrounded by intricate patriarchal and power structures. This is evidenced by the fact that rape is treated as a separate crime in criminal statutes from serious bodily harm or assault. A change in the law regarding rape is also a sign of progress for women in society. Rape also has its own set of legal standards in terms of evidence. The amount and type of evidence that can be presented depends on the nature of the offence. The goal of criminalising marital rape is to ensure that the culprit is not simply 'placed in jail,' but also prosecuted in court for the crime committed. When the real procedure is constitutionally mandated, it is needless to reduce the debate over female's rights to seeking justice. In terms of practical terms, it is true that a victim of spousal rape may have other options, but this has no influence on the need to criminalise the crime of spousal rape.<sup>5</sup>

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<sup>5</sup> Rebecca Whisnant, *Feminist Perspectives on Rape*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Nov 08, 2021, 22:33 PM), <https://plato.stanford.edu/entries/feminism-rape/>.

We acknowledge that some feminists believe that separating rape from cruelty reinforces the patriarchal view of a woman's chastity.<sup>6</sup>

To begin, there is no one-size-fits-all definition of cruelty. The definition of 'cruelty' is given in the explanation to 498. What constitutes cruelty, on the other hand, is solely a matter of fact that varies from instance to case.<sup>7</sup> Certain aspects, including as the husband and wife's marriage relationship, their cultural and temperamental standing in life, their health, and their communication, are pertinent in defining cruelty.<sup>8</sup> Furthermore, mental cruelty differs from individual to individual, relying on the degree of sensitivity and the fortitude or endurance required to bear it. To put it another way, each case must be concluded on its own facts in order to determine whether mental cruelty was proven. Even though the courts have not given a particular definition of cruelty in order to keep it broad, it is nevertheless hard and challenging to pursue rape cases under this provision. We make this claim based on our three-part reasoning.

The first reason is that the bar for being found guilty of cruelty is exorbitant. It is not sufficient that the victim's behaviour is wilfully and offensively unfair to a lady; it is also essential that the degree of severity of the accused's unfair activity is such that it is likely to push the lady to commit harm to themselves or inflict grave injury or risk to their health.<sup>9</sup>

Second, the action must be continued or over a long period of time in order to be convicted under 498A. As a result, when forced sexual intercourse occurs only once or twice, it is impossible to convict. It must be continued for an extended period of time, which is clearly detrimental.<sup>10</sup>

Third, the maximum penalty under Section 498A is just three years in prison, with or without a fine. Rape has a potential sentence of life in prison. This significant disparity in punishment demonstrates that the concept of cruelty is incapable of dealing with a case of marital rape in any way.

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<sup>6</sup> Flavia Agnes, *Proving marital rape is not easy; it would be a challenge for the woman*, BUSINESS STANDARD (Nov 08, 2021, 22:36 PM), [https://www.business-standard.com/article/current-affairs/proving-marital-rape-is-not-easy-it-would-be-a-challenge-for-the-woman-flavia-agnes-116042300710\\_1.html](https://www.business-standard.com/article/current-affairs/proving-marital-rape-is-not-easy-it-would-be-a-challenge-for-the-woman-flavia-agnes-116042300710_1.html).

<sup>7</sup> *Mohd Hoshan v. State of Andhra Pradesh*, 2002 CrLJ 4124 (SC).

<sup>8</sup> *Sarojakshan Shankarah Nayar and Ors v. State of Maharashtra* 1995 CrLJ 340 (Bom).

<sup>9</sup> *Bomma Ilaiah v. State of Andhra Pradesh*, 2003 CrLJ 2439.

<sup>10</sup> *Samar Ghosh v. Jaya Ghosh*, (2007) 4 SCC 511.

## **APPEALS TO CRIMINALIZE MARITAL RAPE**

Sexual violence is existing and proves it in a variety of manners in all aspects of one's life, including the family, which is the most trustable and reliable part of any individual's life.

Albeit several countries have previously made spousal rape illegal, India is one of the few countries that has yet to do so.<sup>11</sup>

In a landmark case in the U.K., *R v. R*, a husband argued that marriage granted irrevocable permission to the "conviction for attempted rape". His claim was not approved, and the court found him guilty since the exception to spousal rape is a "legal fiction under common law."

The court stated that the relationship between the two parties is not at all pertinent in determining whether or not a person is guilty of rape. Many petitions have been filed in Indian courts seeking to make this a criminal offence. They have all been silenced, unfortunately.<sup>12</sup>

In 2015, a lady's petition to the Supreme Court was dismissed on the grounds that the legislation would not alter for a single lady. In *Arnesh Kumar v. State of Bihar*, the SC stated that criminalising marital rape will result in the destruction of society and familial systems, despite previously existing biased legislation.<sup>13</sup> Criminalizing marital rape, according to the Indian government, will destabilise the institution of marriage. This argument is frequently made in opposition to the claim that Section 498A has been abused.<sup>14</sup>

The Verma Committee Report suggested that the exception for spousal rape be discarded from the act. Wedding is not an irrevocable permission to sexual intercourse, according to the findings. As a result, the relationship between the offender and the victim should be irrelevant in order for him to be charged with the crime.<sup>15</sup> The UN Committee on the Elimination of

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<sup>11</sup> *Supreme Court turns down plea seeking directions on registration of marital rape cases*, THE LEAFLET (Nov 08, 2021, 22:34 PM), <https://www.theleaflet.in/supreme-court-turns-down-plea-seeking-directions-on-registration-of-marital-rape-cases/>.

<sup>12</sup> *Women and Justice*, CORNELL LAW SCHOOL (Nov 08, 2021, 22:37 PM), [https://www.law.cornell.edu/women-and-justice/resource/r\\_v\\_r](https://www.law.cornell.edu/women-and-justice/resource/r_v_r).

<sup>13</sup> Y. Mahajan, *Opposing criminalization of marital rape in I.P.C.*, CHANGE ORG (Nov 08, 2021, 22:39 PM), <https://www.change.org/p/law-commission-of-india-opposing-marital-rape-law>.

<sup>14</sup> Jessica Judge, *Criminalise marital rape in India*, CHANGE ORG (Nov 08, 2021, 22:38 PM), <https://www.change.org/p/criminalize-marital-rape-in-india>.

<sup>15</sup> *Justice Verma Committee Report Summary*, PRS LEGISLATIVE RESEARCH (Nov 08, 2021, 22:41 PM), <https://prsindia.org/policy/report-summaries/justice-verma-committee-report-summary>.



Discrimination Against Women also recommended that spousal rapes be made illegal in India.<sup>16</sup>

In 2013, an amendment was passed that makes rape of women between the ages of 12 and 15 punishable under the statute. However, the modification is criticised because it does not result in a significant shift in the position of crime victims. Although S.375 creates an exception to spousal rape, the apex court declared in *Independent Thought v. Union of India* that sexual activity with a girl under the age of 18 constitutes rape irrespective of whether she is wedded or not. "The exception carved out in the IPC creates a needless and arbitrary distinction between a married girl kid and an unmarried girl child and has no rational nexus with any specific goal attempted to be attained," the court concluded.<sup>17</sup>

Due to factors such as poverty, illiteracy, social customs, religious beliefs, and the 'sanctimony of marriage,' the government told the Rajya Sabha in 2016 that the idea of marital rape was a foreign one that could not be implemented in the Indian context due to factors such as impoverishment, lack of education, social customs, beliefs, and the 'sanctimony of marriage.' In 2018, Congress MP Shashi Tharoor introduced the Women's Sexual, Reproductive, and Menstrual Rights Bill, 2018 in the Lok Sabha, with the goal of criminalising marital rape. After failing to gain government backing, the bill lapsed.<sup>18</sup>

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### FINDINGS

Rape is defined as "non-consensual sexual intercourse with a woman" under S. 375 of the IPC. It does, however, exclude the husband from any criminal penalties if he forces sexual relations on his lady without her consent if she is over the age of 15. The Supreme Court reduced the 15-year sentence to 18 years. In India, marriage is defined by the law as an irrevocable implicit consent.

<sup>16</sup> 'Marital rape brought under law will put family system under stress', HINDUSTAN TIMES (Nov 08, 2021, 22:43 PM), <https://www.hindustantimes.com/india-news/marital-rape-brought-under-law-will-put-family-system-under-stress/story-9IX7c5KoFPgbzFot5DK1iL.html>.

<sup>17</sup> Anusha Agrawal, *Only 36 Countries Have Not Criminalised Marital Rape, India Is One of Them*, THE LEAFLET (Nov 08, 2021, 22:47 PM), <https://www.theleaflet.in/only-36-countries-have-not-criminalised-marital-rape-india-is-one-of-them/>.

<sup>18</sup> Preeti Choudhry, *Marital rape: Marriage can't mean irrevocable implied consent*, INDIA TODAY (Nov 08, 2021, 23:04 PM), <https://www.indiatoday.in/opinion-columns/story/marital-rape-marriage-cannot-mean-irrevocable-implied-consent-1846631-2021-08-29>.

Surprisingly, Indian High Courts have frequently disagreed on the legitimacy and definition of marital rape. The Kerala High Court has declared that, despite the fact that spousal rape is not a criminal offence, it can nonetheless be used as a basis for divorce as a kind of cruelty. According to the Kerala High Court, "Marital rape occurs when a husband treats his wife's body as if it belongs to him and commits a sexual act against her will. Bodily integrity is included in the right to respect for one's physical and mental integrity, and any disrespect or violation of bodily integrity is a breach of one's autonomy."

While one would expect the Supreme Court would have provided more clarity and waded into the sexist quagmire of misogyny by providing legal protection to women, this is not the case. Over decades, the Supreme Court has turned a blind eye and failed miserably to protect women's rights. Over 5,000 women's rights activists in India signed an open letter in March this year, demanding then-chief judge SA Bobde to resign and apologise.

### SUGGESTIONS

The most fundamental thing that has to be done is to educate men and women that they are equals and that none of them is superior to another. Women require both moral and legal assistance in order to achieve the status that they deserve. They will be trained to speak up against the injustices that are being perpetrated on them, and marital rape is one of these injustices. Why are there two yardsticks for measuring the same offence that has the same effect on the sufferer? First, an Indian law book punishes strangers who rape a female, but acquits or punishes the same individual when he is wedded to the victim for different sympathy offences (as compared to rape). The victim's body is unquestionably hers to own, and she is not obligated to give it up until she is confident that she can do it willingly and affectionately. In our society, a female is instructed that after being wedded, her husband owns her; she is considered inhuman, but as a property, a commodity that her family has given to the husband's sole proprietorship. She will never be able to leave her marriage because she was being sexually abused on a regular basis by her husband after the wedding.

As a result, the need of the hour is to criminalize this societal scourge. Enough speaking, raising voices against it, joining as females leaving aside the identity of mother or sister, and enforcing a severe legislation are all that is required to end spousal rape. It will be the women who must stand up and fight for their rights, joining hands with one another. Forced marital intercourse should be classified as rape under IPC. An association between the perpetrator

and the sufferer, whether marital or otherwise, should not be considered a valid defence or a mitigating circumstance justifying a lesser rape punishment.

## CONCLUSION

Marital rape is de facto, not de jure, in India. The NFHS information reveals the high prevalence of marital rape in India. In the case of marital rape, the Indian judiciary is taking a step behind by claiming that law-making is the province of the government, which has addressed the issue and clarified that marital rape is not a criminal matter in India. The government, on the other hand, believes that criminalising this offence will undermine the institution of marriage. It is important to recognise that a lady is not the husband's property and that she has the right to privacy as well as personal liberty. Any individual has the right to say "no" if they do not want to engage in sexual activity, and if the husband forces or uses violence to pressurise her into doing so, it does not come under the purview of free consent but rather termed as coercion which should not be safeguarded under any legal provision. Compelling the spouse to engage in sexual activity without their free consent is rape, and it is no different than other types of offences in which the victim is not married. In view of the Justice Verma committee's proposal, the exclusion provision that covers husbands' actions should be removed. Since the 1980s, countries such as Israel, South Africa, Ghana, Ireland, Malaysia, Canada, New Zealand, and the United States have made marital rape illegal.

If we expect that after the exception for spouses is gone, the crime of marital rape would be addressed, we will be deceived. How can we modify society's patriarchal norms, which is a much greater and more crucial question, goes unanswered.

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