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## Marital Rape: A Civil Wrong or A Crime

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*In the era of growing feminist trends and reformistic considerations, one of the most important legal debates is on the legal and moral uprightness of the exception to marital rape as a crime. Incidentally, no such word occurs anywhere in the Indian Penal Code or any other legal text of the nation but being outlawed in nearly all major nations and under attack from the liberal faction in the nation this topic deserves a holistic discussion. This article deals with the basic concepts of marital rape and why or why not should it be criminalized. A holistic view has been given taking into consideration all possible social, economic, and, most importantly, legal factors. The major problem regarding this issue is the differentiation between it being a civil wrong or a crime. This article tries to make that demarcation and give substantiations so as to how this is a civil problem and should be treated. Solutions have been presented as to how the issue can be accommodated in the present legal systems without any disruptions. It is imperative to understand the government's stance on the matter and for the reason which an analysis has been done which facilitates further understanding of the conclusion presented.*

**Keywords:** marital rape, civil wrong, crime, 498A, PWDVA.

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### INTRODUCTION

*“I don't think marital rape should be regarded as an offence in India, because it will cause absolute anarchy in families.”*

*Hon'ble Justice Dipak Mishra, Former CJI*

Marital rape has been a contentious issue for the past decade or so. There have been petitions for it and then protests to quash those petitions. The courts in the nations haven't pronounced any verdict regarding the same and neither has the legislature made any venture to clarify its position on the matter. First, we need to understand that the issue is not of "criminalising" or "decriminalising" marital rape but of removing the exception of marriage under **Sec 375<sup>1</sup> IPC**. The matter of marital rape is of utmost importance in this era of growing women empowerment and the feminist wave which is covering all aspects of human life. Prima facie when we see the term "Marital Rape" we frame the image of a tremendously wrong act which should be criminalised this instant without any further ado, but as we dive deeper into the intricacies of the issue, we start taking out the layers of the issue we see that the problem is not so superficial and needs further deliberation. We see a need to analyse the issue holistically and not exclusively from the viewpoint of the women. We need to take into account what societal consequences will this act have before we jump the gun. We need to evaluate the effects this act will have on our nation and not just blindly follow the western nations. We as a nation need to have an individualistic approach and not get swayed by whatever is happening on the global front. In this paper, we will try to analyse the notion of Marital Rape critically and holistically taking into account both the perspectives of the women and the men and analysing whether the offence is a civil one or a criminal one. We will also analyse the status of "Marital Rape" laws in various nations and different provisions they have in place and how or how not should India take inspiration from them. Another point of deliberation will be that if the marital rape is impliedly undertaken in the "sexual abuse" subsection of the Domestic Violence Act then why is there a need for separate criminalisation. In the latter part of the paper, we will also look into the matter that whether or not there is a need for making gender-neutral laws, and if yes then what steps need to be taken in that direction. Marital rape is a touchy topic and hence has to be dealt with immense care so that while protecting the sovereignty of the women no injustice is meted out to the other gender.

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<sup>1</sup> Indian Penal Code, 1860, s 375

## DEFINING MARITAL RAPE

Marital rape is a simple term is the rape of a woman by her husband, we use the term husband and woman and not gender-neutral words because the laws in the nation are not gender-neutral. So, in theory, the sexual act committed against a **wife** by her **husband** against her consent constitutes marital rape. The said act is not a separate offence under the **Indian Penal Code, 1860** as it has been kept as an exception to **Section 375** of the code of **1860**. **Section 375** encapsulates all the different forms of non-consensual sexual intercourses with women and defines them as rape but **Exception 2** of the Section says that “Sexual intercourse or the sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.” Thus, we can infer from the given except that it immunizes all men from accusations of rape from their wives granting them a blanket immunity. The law of the land in today’s world assumes that a woman gives a perpetual consent to sexual intercourse or sexual act after entering into wedlock. This act of unwilling sexual intercourse is a crime in various nations of the world which we will talk about in the next pages of the paper. Our country, India is one of thirty-six nations that have not criminalised marital rape.<sup>2</sup> Another point worth noting is that in many cultures marriage is seen as an instrument of a sexual act. Likewise, in countries where no consent is required to get married, they also pay no heed to consent during sexual intercourse. Additionally, in places where bride money is common to have the notion that they have bought the right to have sexual intercourse with their wives once they have paid the amount.<sup>3</sup>

## THE HISTORY OF MARITAL RAPE

Traditionally, rape was considered a felony or robbery of a spouse or father's property, as per Jonathan Herring in *Family Law* (2014)<sup>4</sup>. Property damage implied that the offence was done against the victim's spouse or father rather than the victim herself. As a result, a man also

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<sup>2</sup> Anusha Agrawal, ‘Only 36 Countries Have Not Criminalised Marital Rape, India Is One of Them’ (*The Leaflet*, 2 November 2020) <<https://www.theleaflet.in/only-36-countries-have-not-criminalised-marital-rape-india-is-one-of-them/>> accessed 0 February 2022

<sup>3</sup> Kersti Yllö and M. Gabriela Torres, *Marital Rape: Consent, Marriage and Social Change in Global Perspective* (Oxford University Press 2016)

<sup>4</sup> Jonathan Herring, *Family Law* (9<sup>th</sup> ed., Pearson 2019)

couldn't rape his wife by default because she was deemed his property. Also, until the twentieth century, the legal philosophy in American and English law was one of coverture that indicated that when a woman married, her constitutional protections were absorbed by those of her man. In an article, Jennifer Koshan<sup>5</sup>, a law lecturer at Calgary University, contends that men's historical exemption for marital rape is due to a number of factors. The implicit assent idea holds that when a lady marries her spouse, she immediately gives permission. The second argument, as previously established, holds that a lady is her husband's property, making marital rape a contradiction. Other arguments, as per Koshan, included the difficulty of attempting to prove non-consensual sexual relations within a marital relationship, the alleged proclivity of ladies to make false claims about being sexually assaulted in order to obtain an advantage in the divorce process, the significance of maintaining matrimony's dignity, and the assertion that marital rape is less severe than other types of rape and that the victims have other forms of reliefs rather than criminalisation.

The views given above began changing rapidly with the advent of feminism and the related ideologies in the 19<sup>th</sup>. Lucy Stone took the lead in talking about the rights of women and their sexual autonomy. By the 1960s a number of western nations had either criminalised marital rape or removed the exception granting statutory refuge to the perpetrators. The Soviet Union was the very first government to prohibit marital rape in 1922, while the United Kingdom and the United States were some of the last Developed democracies to do so. In the instance of *R v R*, the judges in the United Kingdom threw down a part of the law that exempted husbands from rape accusations. Provinces in the United States were allowed to enact their respective legislation on the subject, with a few deeming it a crime only when coercion is used and others imposing a lower limitation period than that which pertains to rapes beyond the wedlock. These laws have changed through time, and South Carolina is now the only place in the United States that demands evidence of unnecessary force in cases of marital rape.

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<sup>5</sup> Professor Jennifer Koshan, 'The Legal Treatment of Marital Rape and Women's Equality' (*The Equality Effect*) <<http://thequalityeffect.org/pdfs/maritalrapecanadexperience.pdf>> accessed 03 February 2022

## THE LEGAL STATUS OF MARITAL RAPE AROUND THE WORLD

As of 2019, 150 nations have made marital rape illegal. Forcing intercourse inside a marital relationship is not called rape in several countries, particularly those that acquired the 1860 "Indian Penal Code" (like Singapore, India, Bangladesh, and Sri Lanka). In other nations, such as Bangladesh and India, marital rape is only legal if the woman is over a specific age. In certain countries, such as Sri Lanka, marital rape is only illegal if the couples are officially divorced. There are some caveats in most nations that do not prosecute marital rape, and the assumption is although domestic abuse should be prohibited, forced sexual activity just shouldn't.<sup>6</sup>

## ARGUMENTS IN FAVOUR OF THE CRIMINALISATION OF MARITAL RAPE

There have been several statements that have been given in favour of the criminalisation of Marital Rape. When we analyse these statements, we see that all these statements lack the scent of social welfare and disregard society, and focus only on the legality of the provisions. Given below are some of the reasons propounded by the support of the criminalisation of the said Act:

- **Lack of criminalisation is a violation of fundamental rights:** It is said that when the courts and the legislature don't criminalise the said act, they are implicitly turning a blind eye towards the violation of articles **14 and 21**<sup>7</sup> of the constitution of India and creating a fake private sphere in which the rights of the women are neglected.
- **It is an attack on the privacy of the wife:** The theorists claim that marital rape is an attack on the privacy of the wife in a relationship as propounded in the *K.S. Puttaswamy v Union of India*<sup>8</sup>. They say that when the husband intercourses with the wife against her will he infringes upon the private space of the wife hence a violation of privacy.

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<sup>6</sup> Kersti Yllo, 'Marital rape in a global context: from 17th century to today' (*OUP Blog*, 13 November 2017)

<<https://blog.oup.com/2017/11/marital-rape-global-context/>> accessed 08 February 2022

<sup>7</sup> Constitution of India, 1950, art.14 and art.21

<sup>8</sup> *K.S. Puttaswamy v Union of India* (2017) 10 SCC 1

- **The question of Individual autonomy:** Another pressing issue being raised is individual autonomy. Privacy cannot clearly cut indicate the boundaries hence Martha Nussbaum<sup>9</sup> who is a noted feminist gave the notion that instead of going down the privacy line of discussion we should focus more on the integration and development of the rights of women regarding their freedom and choice and life.
- **Question of constitutionality:** Another major question that comes up is that of the constitutionality of **Exception 2** of Section **375** of the **Indian Penal Code, 1860**. The theory is that if rape in a normal sense is a violation of Article 21<sup>10</sup> and if exception 2 legally allows one to rape then why is **Exception 2** not anti-constitutional.

In the points made above, we have seen the statements in favour of the criminalisation of marital rape and they do make a substantive claim of what they advocate. Marital rape has been something that has plagued the nation and the country at large but are the reasons and claims mentioned here-in-above sufficient to declare some acts as a crime? We need to further deliberate upon the definition of crime which is “An act deemed by law to be harmful to the society in general, even though its immediate victim might be an individual”<sup>11</sup> or “commission of an act which is specifically forbidden by mandated laws”<sup>12</sup>. Here we need to focus on the first definition of crime as given herein. We need to see whether this act affects society at large?

Whether the implications of the said act grave enough to create a dent in the social fabric and make it eligible to be declared a crime? We will further deliberate on the flip side of the equation below.

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<sup>9</sup> Martha C. Nussbaum, ‘Is Privacy Bad for Women?’ (Boston Review, 1 April 2000)

<<http://bostonreview.net/world/martha-c-nussbaum-privacy-bad-women>> accessed 01 January 2018

<sup>10</sup> Constitution of India, 1950, art.21

<sup>11</sup> *P.S.R. Sadhanantham v Arunachalam* (1980), AIR 856 (862)

<sup>12</sup> *T.K. Gopal v State of Karnataka* (2000) 6 SCC 168

## ARGUMENTS AGAINST CRIMINALIZATION AND IN SUPPORT OF MARITAL RAPE BEING A CIVIL WRONG

On researching, it has been found that there are a lot of minute layers in this problem that we face today. It is not as shallow as it seems. We have to deal with the question of societal fabric, family as an institution, the definition of a crime<sup>13</sup>, and the problem of prosecution of the marital rape trials in the Indian context.

- **Pre-existing sections of the Indian Penal Code, 1860 and the Protection of women from domestic violence act, 2005 are enough:** When we see the act which is being portrayed as “marital rape” we see an eerie similarity between it and some of the sections of the IPC and the PWDVA, and we find that the aggrieved party could have very well-found solutions in the said act.

**Section 498A<sup>14</sup>:** The first major section which has the capability to encapsulate the act of marital rape is this act which says that “whosoever being the husband or the relative of the husband subjects the wife to cruelty shall be punished”. The section goes on to define cruelty which says: “For the purposes of this part, “cruelty” means any wilful conduct that is likely to drive a woman to commit suicide or cause grave injury or danger to her life, limb, or health (whether mental or physical); or harassment of a woman with the intent of coercing her or any person related to her to meet any unlawful demand for any property or valuable security or on account of her or any person related to her failure to meet any unlawful demand for any property or valuable security” We see that the act of marital rape can very well be encapsulated within the domain of “wilful conduct which causes grave danger to the women’s mental or physical health”. If there exists this section that has the ability to deal with the said act then creating a separate offence under the same Penal Code seems superfluous.

**Protection of Women from Domestic Violence Act, 2005:** This act grants sweeping reliefs to the women who are aggrieved under the provisions mentioned in the said act. The definition of domestic abuse in this act, specifically in **Chapter 2, Point 3, Subpoint a**, mentions “sexual

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<sup>13</sup> *Ibid*

<sup>14</sup> Indian Penal Code, 1860, s 498A

abuse” as a form of domestic violence, hence including marital rape impliedly. Under this act monetary compensations and awards may be given to the aggrieved party which again substantiates my point made above that if statutory laws and penal sections are present to deal with a wrongful act then why is there a pressure to obtain a specific type of punishment for the same.

**Section 354 and Section 354A of IPC:** According to section 354<sup>15</sup> of IPC “Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.” While Section 354A<sup>16</sup> also states the situations in which the sexual assault will take place can be invoked against the husband in case he tries to force himself against the will of the wife.

**Miscellaneous sections of the IPC:** Just like some specific sections quoted above, there is a miscellaneous section of the IPC that can be invoked against the husband in case of the commitment of marital rape which includes **Section 376B, Section 503, Section 509**<sup>17</sup> can also be invoked although not completely in tandem to the sexual nature of offences.

**The question of marriage and family as an institution:** One of the most important things that we need to deliberate upon is what effect this act of criminalisation has on the family as an institution and is the very nature of marriage in derogation of this in essence. In India marriage is not governed by a single law but by a variety of them<sup>18</sup>. In Hindus, while marriage is a sacrament, in Muslims it is a contract and in Christians, it is neither wholly a contract nor a sacrament. If we see it logically, in the Hindu religion the definition of marriage as given by R.N. Sharma is “a religious sacrament in which a man and a woman are bound in permanent relationship for the physical, social and spiritual purposes of dharma, procreation and sexual pleasure.” Hence if we expunge the sexual pleasure part then are we defeating one of the

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<sup>15</sup> Indian Penal Code, 1860, s 354

<sup>16</sup> Indian Penal Code, 1860, s 354A

<sup>17</sup> Indian Penal Code, 1860, ss 376B, 503, and 509

<sup>18</sup> Ashley Crossman, ‘The Definition of Marriage in Sociology’ (*ThoughtCo.*, 1 November 2019)

<<https://www.thoughtco.com/marriage-3026396>> accessed 08 February 2022



purposes of marriage? When we look at it from an Islamic point of view, then even if the contract of marriage is void if the husband forces himself on the wife, then is giving a penal punishment and criminalising an act which is in essence a breach of contract logical and justifiable? We also need to see that when we are criminalising the act, we are not just giving it a penal sanction but also removing any scope of compromise between the parties as the offence given under **Section 375 of the IPC** is non-compoundable and it is not up to the parties to decide whether or not they would like to settle. Here by making it an offence under **Section 375** we effectively remove the option of compromise in a marital set-up which can in most cases be the most effective form of dispute resolution. A marital relationship cannot be treated at par with every other relationship unlike what is said by the **Hon'ble Delhi High Court**. The High Court was quite erroneous in equating the relationship of a wife to that of a sex worker which is quite worrisome. The relationship between a husband and a wife is not just a sexual relationship but sexual relationships are an inextricable part of it and this cannot be denied. Hence, treating the relationship of a wife and her husband through an ordinary lens is a gross mistake, this is a special relationship and should be treated as one. Marriage is a civil act and the act done in a marriage that directly relates to marriage and the concept of marriage can only be a civil wrong as it affects that party alone and does not affect the society at large as it is a private relationship hence does not fall under the definition of a crime.

**Impediments in judicial administration and the issue of false cases:** As the said act has been committed (in most cases) in the bedrooms of the people engaged we have no external proof, or eyewitnesses to prove that the crime did take place. We only have the said perpetrator and the said victim. Now giving the absolute power in the hands of the women to classify which sexual activity was consensual and which was not or at which point the consent was revoked does gross injustice to the men as the supreme court in *Phool Singh v State of Madhya Pradesh*,<sup>19</sup> has said that **only the testimony of the victim is enough to convict an accused in a rape case**. We can see the graveness of the situation at hand in which the wife can coerce and extract monetary and emotional gains from the husband only on the basis of her testimony alone. This will cause severe havoc in the society and will lead to an absurd increase in the

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<sup>19</sup> *Phool Singh v State of Madhya Pradesh* LL 2021 SC 696

number of fake trials and malicious prosecutions and it will flood the gates of the already flooding courts. This is not being arbitrarily but we see a similar trend in the other sections where this power to women is given viz-a-viz **498A and the Dowry Prohibition Act of 1961** in which we have seen a high number of cases being filed and the conviction rates<sup>20</sup> being as low as **12.1%** in **498A** and **15%** in cases of Dowry. When we have a trend of such low conviction rates can we not make an estimate of how much havoc this criminalisation will cause because then all these fake cases being filed for 498A and dowry will be shifted directly to a penal section of **375**. Hence there is an immediate need to think on this front too and not just be blind-sighted and criminalize marital rape without thinking of the consequences. We cannot put CCTV cameras in the places where such acts occur, so how will the court come to a conclusion that whether the plaintiff is speaking the truth or the defendant. It is one of the crimes which are un-prosecutable. Likewise, even if there are some injuries or marks which are used to prove the act then the aggrieved person can seek relief in the above-mentioned sections and the act.

**Restitution of Conjugal Rights:** This is an interesting facet of the **Hindu Marriage Act, 1955** in which it has been mentioned in **Section 9** that “When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the district court, for restitution of conjugal rights”. This section says that the courts can force spouses to cohabit together even against their wills. We see an analogy here, that if such a law is constitutional in nature, then how can **Exception 2** be unconstitutional? If the Hon’ble Supreme Court were to strike down the exception given in Section 375 then it would also have to do away with the concept of **RCR** because they both seem paradoxical.

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<sup>20</sup> Deeptiman Tiwary, ‘Section 498A, dowry: Most FIRs, least convictions’ (*The Indian Express*, 6 December 2017) <<https://indianexpress.com/article/india/section-498a-dowry-most-firs-least-convictions-4969913/>> accessed 08 February 2022

## **ANALYSIS OF THE STANCE OF THE CENTRAL AND THE DELHI GOVERNMENT ON THE LEGAL STATUS**

The testimony referenced the 172nd recommendation of the Law Commission, entitled "Review of Rape Laws and the Department of Justice". Marital rape does not need to be criminalised, according to the 162nd report of the "Parliamentary Standing Committee on Home Affairs"<sup>21</sup>. The government also referenced the Justice J.S. Verma report on the "Amendments to criminal law" and said that although the report suggested to criminalise marital rape and also gave the caveat that there needs to be social upheaval in perception towards the marital rape and the common people need to be educated about it. There also is an imminent need to refresh the mindsets of the prosecutors, the police, and the people at large. The centre is also right in saying that India shouldn't criminalise marital rape just because the western nations have done as so as India has a plethora of other problems such as illiteracy, and economic issues which are not common to the developed economies, hence following the other nations in criminalisation while not taking into account the unique problems faced by our nation would be a humongous mistake. Just deleting exception 2 of section 375 would not serve any purpose, a larger social change needs to take place.

## **CONCLUSION**

In the pages hereinabove we have done a detailed deliberation over the status of marital rape, including the fact whether it is a civil wrong or a criminal offence. This matter is not a shallow one and has a number of layers that we can unravel once we understand the issue at hand. Through the points made above it has been clearly stated and now being reiterated that the said act of marital rape would fall under the purview of being a civil wrong and not an offence because primarily it affects an individual and has a very minute effect if any on the society at large and hence does not fall under the definition of a crime which has also been stated above.

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<sup>21</sup> 'Criminalising marital rape may destabilise institution of marriage, Centre tells HC' (The Hindu, 19 August 2017) <<http://www.thehindu.com/news/national/criminalising-marital-rape-will-destabilise-marriage-govt-tells-hc/article19581512.ece>> accessed 8 February 2022

We have also talked about other problems like falling conviction rates, and the issue that how difficult it will be to prosecute a case of marital rape as it most probably happens in a closed setting and where no eyewitness can be found. We all agree that this is a major problem for any nation and we need to deal with this with iron hands, but the issue of contention here is that criminalisation is not the key to solving the issue. One more solution to this can be to include marital rape as a ground for divorce so that the wife can separate from the husband if the husband is forcing her to copulate. This also can be open to misuse but the rate of misuse will not be that high and this can be a price that we as a nation are willing to pay. I will reiterate that the criminalisation of marital rape will only lead to chaos, flooding of the gates of courts, breakage of families, and mental trauma to the husbands while proving little relief to the wives. We also keep in mind that the main function of law and punishment is to create deterrence, in this case, due to the lack of legal awareness in the nation the law even if made a criminal offence won't serve any purpose. The law when made should be on the lines of public welfare and policy and should not just oppose it on whims. Here I would also like to quote an example that sometimes a few rights have to give up in order to prevent the society from collapsing. There may be some demands from certain groups which can be legally feasible but not socially acceptable. So, when making a law we need to look that it is socially acceptable and legally feasible. If any of those are not present then the law is destined to fail. Hence concluding, I would like to say that the act of marital rape is and should also be a civil wrong as it does not come under the definition of crime and also encompasses a number of problems in criminalising.