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## Marital Rape in India and Its Impact

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*The paper provides an overview of the system of marital rape in India, its effects, and its constitutional provisions. What constitutes marital rape and whether it warrants criminal prosecution are the topics of discussion in today's society. The term "marriage" refers to a married couple's or an individual's marital connection. Rape is when a man or woman is coerced into having intercourse with another individual. After marriage, does a man or a woman lose their sexual freedom? The Right to "No" (sex) after Marriage was contested on the initiative of the Hon'ble Justice DY Chandrachud. Contrary to popular belief, marital rape was not tolerated in ancient India, where it is often believed that one spouse should attest to the validity of another's sexual interactions. The primary justification for this notion was the patriarchal structure of Indian society, where women were viewed as their husbands' "property" or "conversation." However, in modern India, courts accept cases based on this issue despite the fact that India is one of the 36 nations that, in contrast to the other 150, have not criminalized marital rape. Marital rape is the act of sexual intercourse with one's spouse without her consent. The lack of consent is the essential element and need not involve physical violence. Marital rape is considered a form of domestic violence and sexual abuse. Further, the article will give a brief about it.*

**Keywords:** *rape, marital rape, sexual abuse.*

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## INTRODUCTION

*"The term "marital rape" implies having sex with one's spouse against their will. Rape is committed by anyone who tries to force their spouse into having intercourse against their will using force, violence, threats, or other means, exactly as if the act had occurred between unmarried individuals."*<sup>1</sup>

According to a report published by the National Coalition Against Domestic Violence (NCADV), about 10% – 14% of married women are raped by their husbands in the United States, and at least one-third of all women have reported having been subjected to 'unwanted sex' by their intimate partners. These estimates are roughly the same throughout the world, including India. In comparison, some countries, such as the USA, have criminalized the offence of marital rape and charged the accused with the same penalty as they would be charged with rape. However, India does not recognize marital rape as a penal offence. Exception 2 of section 375 in the Indian Penal Code states that "*sexual intercourse by a man with his wife, the wife not being under 18, is not rape.*" In short, rape is an offence under the Indian Penal Code, but as mentioned earlier, the exception to section 375<sup>2</sup> has decriminalized marital rape.

Marital rape is a sensitive topic of national concern, especially in India, where a substantial number of instances of sexual violence go unreported. According to a National Family Health Survey conducted by the Government of India, approximately 30% of women have experienced marital violence by their spouses. An average Indian woman is at least 17 times more likely to face sexual violence from her husband than any other woman in the world. The situation in our country concerning the issue of marital rape is alarming, and steps need to be taken toward positive developments for the protection of women against marital rape.

The infamous case of Nirbhaya led to various developments for the protection of women and the prevention of such inhumane acts against women. Police departments across the country have gotten immensely careful after this incident, and rape convicts are now being awarded longer and harsher sentences. However, a massive grey area concerning rape within marriages

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<sup>1</sup> Rebecca Pirius, 'Marital Rape Laws' (*CriminalDefenseLawyer*)

<<https://www.criminaldefenselawyer.com/marital-rape-laws.html>> accessed 19 December 2022

<sup>2</sup> Indian Penal Code 1860, s 375

still exists. The Indian Penal Code does not recognize non-consensual sex between two married partners as rape because this aspect has been exempted under Exception 2 of the Indian Penal Code. The underlying problem in this framework is that, despite satisfying all the essential elements of rape, a husband is legally immune against any liability arising from any acts of non-consensual sex. This is not in sync with our country's women's empowerment and welfare objectives.

Currently, the Supreme Court of India only recognizes marital rape when it is for abortion. The Medical Termination of Pregnancy Act includes marital rape under the ambit of rape.<sup>3</sup> According to many, the husband does not need consent to have sex with his wife because that is how our society has been shaped, a community that has believed in and followed various patriarchal values. This is not just a matter of choice but also of equal rights. Indian society is divided into two segments over the issue of marital rape; one group feels that criminalizing marital rape will lead to the collapse of the institution of marriage, and the other half thinks that marital rape is rape in all its essence and merely being married does not grant an absolute right over an intimate partner. The contention is that if a husband can be held accountable for domestic violence, he must also be held responsible for non-consensual sex in a marriage.

## MARITAL RAPE

*"A married woman's right to bring the violating husband to court should be recognized."*

- Justice Rajiv Shakhder<sup>4</sup>

Rape is defined as a violation of a woman's sexual rights that happens without the permission of a male partner and can be motivated by physical force, the threat of bodily damage, or the offender's manipulative behaviour. Rape perpetrated by a foreign national is a criminal offence in India under sections 375<sup>5</sup> and 376<sup>6</sup> of the Indian Penal Code. Surprisingly, it eliminates the

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<sup>3</sup> Medical Pregnancy Termination Act 1971

<sup>4</sup> 'Wife has the right to bring offending husband to justice' (*The Times of India*, 12 May 2022)

<<https://timesofindia.indiatimes.com/india/marital-rape-wife-has-the-right-to-bring-offending-husband-to-justice/articleshow/91518452.cms>> accessed 19 December 2022

<sup>5</sup> Indian Penal Code 1860, s 375

<sup>6</sup> Indian Penal Code 1860, s 376

prospect of a rape conviction against a husband. A spouse commits marital rape if they engage in sexual contact with their partner without permission or under coercion or threat. The Indian concept of marital rape is the archetypal example of what we in the West call "implied consent." In this case, marriage between a man and a woman means that both individuals have decided to have sexual intercourse, which cannot be anything else.

Women have long been considered the property of their male guardian or significant other under the patriarchal structure that controls Indian families. As a result, rape was considered both female theft and a violation committed against a husband or guardian. This religious system has encouraged our legislators to overlook the crime of raping a spouse by giving protection in the shape of the spouse's wedding right. Furthermore, they are passively condoning the assumption that women are nothing more than a protest for their lovers' sexual enjoyment and that they have little control over their libido. This insight has established the female right to equality and workplace homogeneity.

The **Queen Empress v Haree Mohan Maiti**<sup>7</sup> case of 1890 involved child marriage and marital rape in 1889, which resulted in the death of a 10-year-old girl, Phulmani Das. The husband was sentenced to only 12 months of hard labour since the age of consent at the time was 10, and intercourse with the wife is not rape under Section 375<sup>8</sup> of the Indian Penal Code's exemption clause (which defines rape).

The Delhi High Court concluded in the 1984 case of **Harvinder Kaur v Harmander Singh**<sup>9</sup> that the Constitution could not intervene in a family because it would damage the institution of marriage. "Neither Article 21<sup>10</sup> [No one shall be deprived of his life or personal liberty except by a procedure established by law] nor Article 14<sup>11</sup> [The State shall not deny any person equality before the law or equal protection of the laws within the territory of India] have any place in the privacy of the home and married life," the court said.

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<sup>7</sup> *Queen Empress v Haree Mythee* (1891) ILR 18 Cal 49

<sup>8</sup> Indian Penal Code 1860, s 375

<sup>9</sup> *Harvinder Kaur v Harmander Singh* AIR (1984) Del 66

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

<sup>11</sup> Constitution of India 1950, art. 14

Rape is a significant breach of a person's fundamental right to life and autonomy and a barbaric act against women. A relationship between the victim and the criminal does not affect the circumstance. In this sense, it is incorrect to suppose that having sexual contact with one's spouse is a privilege given to the husband by marriage. Marital rape is stigmatized in society because it limits a woman's ability to speak out against her husband, who uses his superior position to violate her trust and individual dependence. Rape inside a marriage is more traumatic and has longer-lasting repercussions, both physically and mentally. As a result, marital antagonism to the spouse has been reduced in a few nations. Because it has decriminalized rape against a spouse, our state is failing to live up to its responsibility to offer sex equity, which includes protection against wrongdoing and manhandling.

At the current time, several nations have either criminalized rape inside marriages, abolished exclusions for rape within marriages, or implemented laws that make no distinction between ordinary rape and rape within marriages. This demonstrates that rape committed within marriage is now considered a violation of human rights. It was discovered in 2006 that at least one hundred nations have criminal legislation that makes rape within a marriage a punishable offence. However, India is not one of these countries.<sup>12</sup> According to the strategy's creators, although many laws have been passed and institutions established in India regarding brutality against women in their own homes, such as laws against female child murder and abusive behaviour at home, marital rape has failed to gain recognition as wrongdoing. Rape that occurs during a marriage is veiled in India by the belief that matrimony is holy.

In India, a woman's right to protect her body when in an abusive relationship with her spouse or even in the judicial system may be infringed if she marries or if there is a conflict in her family, which is seen as a personal issue of the family in which the individual resides. She then becomes a victim of domestic violence. After a woman marries, she becomes more vulnerable to several sorts of abuse, including physical violence, emotional abuse, and mental abuse, one of which is domestic violence. The unfortunate element of such horrible deeds perpetrated against a woman

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<sup>12</sup> 'SC's Observations 'Welcome' But Marital Rape Still Not Illegal In India, Here Are Countries Where It Is' (*Outlook*, 30 September 2022) <<https://www.outlookindia.com/national/sc-observations-welcome-but-omarital-rape-still-not-illegal-in-india-here-are-countries-where-it-is-news-226913>> accessed 19 December 2022

is that, even though her family knows the situation and advises her to remain put, no one steps forward to report the occurrence. As a result, we regularly lose the lives of innocent people. All of these scenarios are detrimental to a woman's mental health because she has to cope with agony day and night for weeks or months, and society will condemn her if she attempts to stop it or appears to be going against her spouse.

## EFFECTS OF MARITAL RAPE

Not all survivors of marital rape select to oppose, and the individuals who do now and again utilize verbal instead of an actual method for doing as such. For different reasons, including the discernment that they would be defenseless to safeguard themselves, feeling of dread toward hurt, connection to the possibility of "wifely obligation," and stress over how their activities might impact their relationship with their assailants, survivors of marital rape may not help it. It is vital to remember that an individual's capacity to battle marital rape does not the slightest bit mirrors the seriousness of the wrongdoing. Notwithstanding casualties' endeavours to oppose it, marital rape genuinely affects them. Despite victims' efforts to resist, marital rape has profound psychological and physical impacts on them.

Intimate partner physical violence is a common occurrence for many women who report marital rape, and these women frequently describe their sexual aggression violation as part of a more extensive history of abuse. The proportional impacts of these two abuse types are challenging to differentiate. The effects of marital rape also differ depending on the frequency, degree, type of force employed, and the kind of sexual act performed. Physical health is significantly impacted by the period during which the victimization happened, such as during an illness or right after surgery.

According to research, the victims' psychological and physical health is significantly impacted by marital rape.<sup>13</sup> In the years following a marital rape, it has been discovered that depression, shame, rage, somatic symptoms, low self-esteem, disliking of men in general, and issues with

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<sup>13</sup> Nancy M. Shields & Christine R. Hanneke, 'Comparing the Psychological Impact of Battering, Marital Rape and Stranger Rape' (1992) 10(1) <<https://digitalcommons.wayne.edu/csr/vol10/iss1/15/>> accessed 19 December 2022

sexual functioning are all very prevalent aftermath of the act. According to a rape assessment published in a magazine, victims of marital rape experience more severe psychological reactions than victims of rape by a stranger. According to this study, women who have been raped by husbands or lovers are far more likely to have sexual dysfunction than women who have been assaulted by dates or strangers. Additionally, they had a higher likelihood of having lost respect for themselves.

Three thousand one hundred eighty-seven female students at 32 colleges and universities completed a self-report questionnaire. The results revealed that 489 of them had been raped, and 44 had been raped by their husbands. There were disparities between marital rape victims and acquaintance rape victims. Compared to acquaintance rape, victims of marital rape evaluated themselves as more furious and unhappy. Additionally, they perceived their abusers as being more violent and held themselves less accountable for being victims. The results also showed that marital rape was frequently repeated. Marital rape was found to be strongly linked to higher degrees of fearfulness in a study of 356 women from the National Family Violence Survey of the USA.<sup>14</sup>

On the other hand, there are reasons to believe that victims of marital rape will react more violently than victims of stranger rape from a societal perspective. This assertion that people define their own identities in terms of ongoing social relationships serves as the foundation for this prediction. Marriage plays a unique role in our culture because it serves as a 'master status,' which people use to structure and define how they view others. Therefore, the act of marital rape may significantly affect the relationship between the perpetrator and the victim. It raises concerns about the victim's capacity to trust her husband, issues of dominance and authority, and the definition of marital sex, to name a few. Additionally, the victim is likely to continue to interact with the offender regularly and experience repeated, frequently harsh mistreatment.

While most women leave violent relationships, some do not, and the majority need time to do so. Bergen (1996) discovered that most women in her sample did not decide to leave their

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<sup>14</sup> 'The National Intimate Partner and Sexual Violence Survey (NISVS)' (CDC) <<https://www.cdc.gov/about/index.html>> accessed 19 December 2022

husbands or seek assistance until they observed a shift in the frequency or intensity of the sexual abuse and feared their husbands might harm someone else or themselves. Numerous variables, including the fear of retaliation, powerlessness, shame, self-blame, and the conviction that marital rape is not a severe issue, influence the decision to seek help. These beliefs influence the decisions of marital rape victims to seek help as well as the sources of that help.

A study looked at the adverse effects of marital rape on mental health. The study's primary outcomes were depression, including prenatal and postnatal depression, and post-traumatic stress disorder (PTSD). Since studies included in the research examined suicidality as a secondary outcome, several results on this topic were accidentally discovered. The most frequent result in the studies that were included was depression.

As per the research guidelines, "All the studies controlled for the previous diagnosis of mental disorders and patients diagnosed with psychotic disorders but did not control for the presence of abuse by anybody other than the spouse." A thorough analysis of the data revealed a little body of work examining the effects of spousal sexual abuse on mental health, as well as many gaps in the literature. While most of the research did not focus solely on marital rape and its effects on the victims, they did show links between spousal violence and PTSD and depression.<sup>15</sup>

As a result, nearly all studies that included depression discovered that spousal IPV [Intimate Partner Violence] was significantly related to depression. The least often examined topics were PTSD, suicidality, and psychiatric distress. When women recognized domestic abuse as a widespread problem and sought treatment, one study in this review found that they were more likely to experience chronic PTSD with severe symptomatology. Beyond these Indian results, data from other LMICs demonstrates that there is a link between IPV and poor mental health outcomes. According to the WorldSafe study conducted in four nations (Chile, India, the Philippines, and Egypt), domestic violence victims are likely to experience despair and suicidality.

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<sup>15</sup>Nandini Agarwal et al., 'Marital rape and its impact on the mental health of women in India: A systematic review' (2022) 2(6) PLOS Global Public Health <<https://doi.org/10.1371/journal.pgph.0000601>> accessed 19 December 2022



## LEGAL POSITION ON MARITAL RAPE IN INDIA

Spousal violence is a topic of global importance because countries across the world have understood its detrimental effects, such as harming the physical, psychological, and reproductive health of women. Despite that, the law fails to recognize marital rape as an offence. The sociological and cultural aspects of matrimony are one of the major influential factors of marital violence in India. The role of family and marriage life is emphasized with the tradition of guaranteeing a special status or validation to a married woman in India. The concept of arranged marriages is exceptionally prevalent in India, and as a result, the bride and the bridegroom do not get enough time to know each other before marriage. Moreover, according to some studies, 86% of women report that their parents do not consider their marriage opinion. Historically, India has been a society that reflects male dominance and exhibits features of gender inequality, and even though these beliefs are gradually changing now, instances of marital violence still exist. According to the author, a common stereotypical mindset in India reflects that rape cannot occur within marriage. Section 375 of The Indian Penal Code has created an exception for marital rape, leading to a grey area or a loophole. These loopholes in the legal system significantly contribute to the number of cases related to marital rape.<sup>16</sup>

As of 2022, it is not illegal for a husband to have non-consensual sex with his wife. And this is provided by exception 2 of section 375, which reads, “Sexual intercourse or sexual acts by a man with his wife, the wife not being under fifteen years of age, is not rape.” In the case **Queen Empress v Haree Mythee**<sup>17</sup>, it was held that when there is a marital relationship between two persons, and the wife is not under the age of fifteen, then the husband cannot be held liable for marital rape. But the husband was held liable under section 338 of the Indian Penal Code for severely injuring the vagina of his 11-year-old wife, which led to her death.

In the English case **R v R**<sup>18</sup>, it was held that if a husband has non-consensual sex with his wife, it will be a criminal offence. It was also noted that the exemption for marital rape in the offence

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<sup>16</sup> Meghna Bhat & Sarah E. Ullman, 'Examining Marital Violence in India' (2014) 15(1)

<<https://www.jstor.org/stable/26638333>> accessed 20 December 2022

<sup>17</sup> *Queen Empress v Haree Mythee* (1891) ILR 18 Cal 49

<sup>18</sup> *R v R* [1992] 1 AC 599

of rape does not exist in English Law. The husband forced his wife to have sex with him without her consent, and he was accordingly charged with rape. In the case **Emperor v Shahu Mehrab**<sup>19</sup>, the husband caused severe injuries to his minor wife while having sexual intercourse. He was found guilty under section 304A of the Indian Penal Code for his rash and negligent act.

In the case **Saretha v T. Venkata Subbaih**<sup>20</sup>, it was held that enforcing an order of restoration of conjugal rights neither violates the sanctity of the subject's body and mind and their integrity nor invades their marital privacy and domestic intimacies. In the **State of Maharashtra v Madhukar Narayan Mardikar**<sup>21</sup>, it was held by the Supreme Court that every person has the right to privacy over their body. All prostitutes and sex workers have the right to refuse sexual activity. If a stranger commits rape against a woman, then it is considered to be an offence, but it is not an offence if the husband commits the same act. This reflects that all women, apart from wives, have the right to privacy over their bodies, indicating that wives do not have the right to withhold consent and refuse to engage in sexual intercourse with their husbands. If the societal construct of matrimony is sacred, a marriage is supposed to be a relationship that inhibits and facilitates the growth of mutual respect and trust. In that case, it is not fair for the wife to only fulfil the sexual demands of the husband. It is far more traumatic being a victim of rape by somebody familiar, a friend, and worse, having to cohabit with him.

## INTERNATIONAL PERSPECTIVE OF MARITAL RAPE

The United Nations adopted the international treaty of Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1979 and it was authorised by 189 states. The CEDAW Convention defines discrimination against women as *“any distinction, exclusion or restriction made based on sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any*

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<sup>19</sup> *Emperor v Shahu Mehrab* AIR (1917) Sind 42

<sup>20</sup> *Saretha v T. Venkata Subbaih* AIR (1983) AP 356

<sup>21</sup> *State of Maharashtra v Madhukar Narayan Mardikar* AIR (1991) SC 207

*other field.*"<sup>22</sup> Being one of the parties to this treaty, India is in a complex position, where on one hand it has to promote anti-discriminatory practices against women, and on the other hand, it discriminates against women by differentiating them according to their marital status and not recognizing non-consensual sex within a matrimonial relationship as rape. The origin of the exception of marital rape dates back to the 18<sup>th</sup> century when Matthew Hale propounded the theory of Implied Consent. This theory states that a husband cannot be held guilty of rape since there exists a mutual matrimonial consent that cannot be withdrawn by the wife. The Common Law system of Britain and most of its colonies was influenced by this theory and marital rape was decriminalized.

**R v R**<sup>23</sup> in 1991 was the landmark case that resulted in marital rape being criminalised in the United Kingdom. However, it was Poland that was the first country to recognize marital rape as an offence in the year 1932. Owing to the strong feminist waves during the 1970s in Australia, reforms were passed to criminalise marital rape, becoming the first common-law country to do so. In 1984, the marital immunity exception was repealed and marital rape was recognized as an offence in all 50 states in the United States of America.

Since India refuses to recognise marital rape as rape and thereby fails to protect women irrespective of their marital status, this is a violation of the Convention on the Elimination of All Forms of Discrimination against Women and the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights.

## RECOMMENDATIONS

As of 2019, 150 countries have already criminalized marital rape, but India is still debating whether to criminalize such an unconstitutional deed. Marital rape has always been a highly complicated issue in India, where numerous laws and court rulings have been passed down over the years yet have not changed. A husband cannot be guilty of committing rape in the sight

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<sup>22</sup> 'UN Convention (CEDAW) – Summary' (Council of Europe) <[<sup>23</sup> \*R v R\* \[1992\] 1 AC 599](https://www.coe.int/en/web/gender-matters/convention-on-the-elimination-of-all-forms-of-discrimination-against-women-cedaw#:~:text=Definition%20of%20discrimination%20against%20women,on%20equal%20footing%20with%20men.> accessed 20 December 2022</a></p>
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of his lawful wife. The courts in India have received several requests to make marital rape a crime, but the majority of these cases have been either dropped or dragged out for years without producing a conclusive decision. The Indian judiciary has frequently seen the criminalization of marital rape as a means of undermining the institution of marriage. However, an amendment from 2013 made raping females between the ages of 12 and 15 a felony that was subject to legal punishment. Still, it ignored the severe suffering done to victims who were older or already married. The UN Committee on the Elimination of Discrimination against Women also encouraged the Indian government to criminalize marital rape.

Many argue that issues related to couples can be verified in the Protection of women from Domestic Violence Act of 2005, and no such special law is required to cover marital rape. Section 375 of the IPC deals with rape and criminalizes the act, but it makes an "exception." However, as "sexual abuse" is mentioned as one of the acts or behaviours that comprise "domestic violence," one could argue that the Domestic Violence Act also covers the crime of marital rape.

However, this act has two issues that make it insufficient to address cases of marital rape. Although "sexual abuse" is included, the definition of "rape" in section 375 of the IPC is not clearly stated in the act. Because the Domestic Violence Act has been deemed by the courts to be a "civil law," the accused is not required to go to jail. Therefore, a legal loophole allows husbands who rape their wives to escape punishment. Women do have the option to divorce, as the Delhi government acknowledged, but this is far from sufficient to address the issue of rape. Civil law is also intrinsically insufficient and unable to adequately address a severe problem like rape, even within the context of marriage. A woman who is being raped by her husband cannot file a criminal complaint against him under the current legal system. It is assumed that the wife gives her husband full consent before marriage. Additionally, the notion is that a woman cannot simply withdraw her consent to her husband at the time of marriage. As was previously said, this concept was based on colonial-era rules that, to a large extent, serve as the foundation for modern laws, bringing with it all of that era's undesirable characteristics. The alternative claim is that because there is a reasonable expectation of sex in a marriage, a wife is responsible for fulfilling her husband's reasonable expectation of having sex. Problematic for women who are

in abusive relationships where rape is a technique of torture used by the husband is the idea that there is consent in perpetuity and, as a result, the woman can even be compelled to have sex. Marriage requires intercourse, which neither spouse is allowed to withhold from the other. The primary rationale for abolishing the marital rape exception is that it violates the fundamental rights guaranteed by the Indian Constitution. Article 21 of the Constitution, which was also interpreted to encompass the right to live with dignity, has seen a significant expansion in its application thanks to the courts. Because it blatantly infringes on a woman's right to live in dignity, the marital rape exception permitted under Section 375 of the IPC contravenes Article 21 of the Constitution. Furthermore, everyone inside the borders of India is guaranteed equality before the law and equal protection of the laws under Article 14 of the Constitution. However, exception 2 under Section 375 of the IPC is essential since it discriminates against the wife in terms of being protected against rape because the Supreme Court has not given any explanation for such a classification.

## CONCLUSION

It is suggested that the criminalization of marital rape in India is necessary because it may be accomplished by treating violence against women as an issue of individual rights. However, marital rape has not yet been fully criminalised. Indian women's organisations have succeeded in raising public awareness and passing legislation on domestic abuse. If rape is considered a crime against a woman, her person, her bodily integrity, and her humanity by reformers, then marital rape and its penalty would be justified. If rape is considered a crime against a woman, her person, her bodily integrity, and her humanity reformers, then marital rape and its penalty would be legal.

India is making progress in improving the legal status of women generally, but more work has to be done to achieve both legal and social reform. The goal of this would be to change the underlying cultural presumptions about women in marriage and criminalise marital rape. The Protection of Women from Domestic Violence Act gives most Indian women a sense of security. The Act has many flaws because it does not explicitly condemn marital rape. The State must defend a woman's right to her body even though it has no role in marriage and only serves as

an arbitrator during a divorce. By treating a woman like a piece of property and granting permission for legal, reluctant sex, her value as a person is completely negated.