

## MARITAL RAPE AND THE CRIMINALIZATION OF SEXUAL ASSAULT WITHIN MARRIAGE IN INDIA: LEGAL CHALLENGES AND REMEDIES

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Saumya Pandey\*

### ABSTRACT

*Marital rape is one of the forms of violence that is recognized in marriage but tends to be overlooked and has the potential to seek even more remedies in the scope of the Indian feminist discourse. However, this progressive legal trend contradicts an attitude that still permits a husband to have sex with his wife without her consent without being punished by the law. The Manuscript attempts to evaluate the legal context and debates around the issue of making marital rape an offence in India, considering the existing socio-cultural perspectives and their impact on people's opinions on becoming legal. It appraises the current position of the law where the gaps that infringe on the safety and security of women against the consummation of marriage in the form of sexual violence. For example, it outlines reasons why there has been resistance to enacting the law against marital rape, such as social constructionism, economic and political structures, and the institution of marriage. The article also sketches what can be described as plausible solutions to the abuse and discrimination of women, including legal measures, changes in the court system and mobilization of society towards equality. This article demonstrates why the denial of recognition of marital rape as a crime is a primary legal and social backwardness that endangers the rights of young women in marriage relationships in India.*

### INTRODUCTION

Under the laws of India, confidential chastity in marriage is a factor that is bound to the intersection of law, human rights and even social custom. However, this view mostly quashes the rights and freedom of women. According to the Indian Penal Code and, in particular, Section 375, rape is defined as any non-consensual intercourse. Nevertheless, there is a sad exception in India, it is not possible to prosecute a man for raping his wife unless she is 18 or younger. This legal mule for husbands affirms the popularly held view that once married, men

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\*BA LLB, FIRST YEAR, DEEN DAYAL UPADHYAY GORAKHPUR UNIVERSITY.

and women's rights have been advocating penalization of marriage rape in the country and, as such, progression against other punitive sides towards sexual abuse. However Indian cultural and religious tend to temper such transformation of the law through the legal system.

None of these instruments takes into account what will prove even more difficult is the fact that marriage, in this case, is also dependent on highly patriarchal social norms; stigmatization indeed will look at assault as held on in Marriage. This article aims at understanding how the issue of marital rape law in India is so difficult to be made into a part of the Indian law with the other reasons that pertain to and has social concern.

It also details how existing legal barriers such as systems of patriarchy, social norms and perceptions and the conceptualization of marriage as a private domain are herculean obstacles to the advocacy for law reform. Similarly, the article will propose some possible solutions that the courts & society, and approximately the legal system, could provide in terms of protecting married women's rights and dignity and improving the overall legal order in the context of marital violence.

## **HISTORICAL BACKGROUND OF MARITAL RAPE IN INDIA**

Within the Indian context, the subject of marital rape has historical as well as contemporary dimensions. Because of this, marital rape has been obscured under domestic violence. Immunity for marital rape was coined during the British rule when colonial Indian law was consolidated through the Indian Penal Code (IPC) in 1860. Throughout this time, Victorian notions of marriage and gender were foisted into Indian society, destroying the already existing patriarchal systems that allowed husbands to consider wives as their property after marriage.

**Colonial Inheritance and the IPC of 1860<sup>1</sup>:** The Law about marital rape exemption in India has its roots in the marriage laws of England as they were practised by people like Sir Hale. In 1620, Hale was quoted saying, "The husband cannot be called a rapist when he rapes his wife because of the consensual union of and contract the wife has mended this way to the husband and irreversible restraint". This particular statement set a strong precedent regarding marital rape would become a non-offence in England, and when the British set out to formulate laws in India, this aspect was replicated in the Indian penal code.

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<sup>1</sup> IPC 1860

The IPC drafted by Thomas Babington Macaulay provides for a specific exemption of marital rape under Section 375, which defines rape. According to this act, sexual intercourse by a man with his wife is not considered rape, so long as the wife is above ten years of age (later increased to 12, and then 15, and finally 18 years). This exemption reflects the simultaneous influence of both Victorian conceptions of marriage as a contract that entitled the husband to demand sexual intercourse without regard to his wife's consent and Indian social norms that place the female body under male control.

### **Post-Colonial Era and Legal Continuity:**

After gaining independence in 1947, the new democratic government kept much of the colonial legal system, including the provisions in the IPC on rape and marriage, and though there have been important legal reforms in other areas, the exemption for marital rape has not been altered. This relates to the sturdy underplay of traditional Indian views surrounding marriage, where a woman is, without doubt, meant to play a role under her husband and fulfil all his needs, including sexual ones.

Throughout most of the history of independent India, marriage has been sacrosanct, with the male partner as the head of the household. In many societies, marriage is perceived as a contractual transaction whereby a man acquires sexual rights over a woman. This customary perception of marriage underpins and reinforces the notion that a wife's consent is irrelevant post-marriage because sexual relations constitute her onus toward her husband.

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### **Societal Attitudes and Religious Norms:**

Marriage as a sacrosanct establishment is taken to be a solid obligation of the spouse towards his better half in Hindu religious messages, which are likewise perceived for the most part as the authority religion in India. The contract perspective is something similar that is common to most other religions found in India, including Islam, where marriage is viewed as an agreement giving the spouse explicitly established rights over his better half.

The Cultural and religious norms over time created a situation wherein Indian society the concept of marital rape was almost unimaginable. The most widely adopted perception was that the woman accepted the main role of marriage by mothering children and meeting her husband's sexual needs with very scant respect for her autonomy or consent. Therefore, even

criminalizing sexual violence within marriage was perceived as challenging the order of the social setup.

### **Legal Developments and Shifts in Attitudes:**

While legal immunity for marital rape was still in place, shifts in societal attitudes towards sexual violence, gender roles and marriage were beginning to change by the latter half of the 20th century. Organized feminist movements have sought to transform both the public and private values of traditional marriages on the assumption that there is a connection between marriages and the gender equality of women, as pointed out by feminists both in India and overseas who tried to protect female rights, highlighted bodily autonomy alongside defence against all forms of violence (including within marriage) for women. Such movements were instrumental in bringing the issue of violence within Indian homes, especially domestic violence and sexual assault to light, thus making marital rape part of an understood category of gender-based violence.

The problem began to be addressed in the 1980s and 1990s with legal reforms related to violence against women.

In any case, the sort of changes that came forth focused on bodily abuse, dowry harassment, and female infanticide with marital rape getting ignored. In 2005, the Protection of Women from Domestic Violence Act (PWDVA) made a big advancement by acknowledging different forms of domestic abuse including sexual abuse, while still omitting marital rape as a criminal offence that could be prosecuted by the husband under Indian criminal law.

### **Recent Judicial Interventions and Ongoing Debates:**

There has been debate in recent years, however, about the constitutionality of the marital rape exemption. The Supreme Court of India, in the landmark case *Independent Thought v. Union of India* (2017), ruled that sexual intercourse promotes physical abuse with a Wife who is below 18 years of statutory offence, even within a marriage relationship. Although this decision had the effect of raising the minimum age of marriageable consent from 16 to 18 years, it failed to resolve the larger problem of marital rape in adult women.

Also in 2022, the Delhi High Court gave a split judgement on a plea that had challenged the constitutionality of exception provisions to marital rape. One of the judges declared in favour

that the exemption should be abolished as it violated women's fundamental rights under the Indian constitution, and yet, another judge opined that the exemption should persist on account of family dynamic disruption harmful effect that criminalizing marital rape can produce. Now, the case is in Supreme Court, which might finally change the law on marital rape in India.

The historical context of Marital Rape in India has, at its core, a convergence of colonial legal legacies; patriarchal cultural, social and religious systems that reduced women's bodies to the property of their husbands within marriage; and contemporary gender violence. Despite the acknowledgement of gender violence and successive enactments to protect women's rights – the marital rape exemption remains a formidably difficult barrier to dismantling male entitlement in sexual relations and realising substantive equality between the genders in India. There have been some recent judicial interventions that indicate winds of change may be on the anvil, but it continues as yet another battle denying autonomy, dignity and justice to scores of married women across this country.

### **Current Legal Status of Marital Rape in India:**

Marital rape in India is not a criminal offence. Marital rape in India is not a prosecutable offence, as it is not defined by law to be rape. The context of marriage makes it impossible for Indian women to allege marital rape. Indian legal framework, evidences and procedure.

Marital rape in India, on its turn, has never been recognised as a crime & a form of domestic violence! In India, marital rapes are common, and the behaviour of the spouse will generally go unnoticed because our society supports abusive relationships.

### **The Indian Penal Code and the Marital Rape Exemption:**

However, the key statute that presently governs sexual offences in India is the Indian Penal Code of 1860. Under Section 375 of the Indian Penal Code, a definition of rape shall be provided, but a critical exception stands it aside from the purview of marital rape. The Section states, "Sexual intercourse by a man with his wife, the wife not being under 18 years of age, is not rape." This provides legal immunity for acts of non-consensual sexual Congress within marriage, codifying the very notion that, once the marriage has occurred, consent is already assumed unless, of course, the wife is a minor. The paragraph reflects an old legal paradigm that failed to conform to existing human rights standards for equality and individual autonomy in corporate governance.

Marital rape has thus far been shielded owing to the textured ideology that denies wives the right to say "No" when they are husbands. In effect, the law serves to excuse the husbands from being criminally culpable for the act of sexual violence during marriage because, according to this rationale, it is perceived that by entering into marriage, the wives have already given their sustained certification for sexual intercourse with their husbands.

### **Narrow Exceptions to Marital Rape:**

Nevertheless, Indian law includes some specific grounds on which marital rape can be prosecuted. These include:

1. If the wife is a minor child: In the 2017 *Independent Thought vs. Union of India* case, the Supreme Court of India sharpened the legal age of consent within marriage from 15 years to 18 years so that it matches the age of consent applicable to non-marital relations. This decision indicated that any sexual intercourse with a wife under the age of 18, even within the cover of marriage would result in statutory rape. However, statutory rape is confined to minors only and not to adult women.

2. Section 376B<sup>2</sup> of the IPC: It states that if during a decree of judicial separation, a husband sexually intervenes with his wife without her consent, he commits the offence of rape. Such provision is available to only those ladies who have been judicially separated from their husbands and not to women cohabiting with their husbands or those who have not sought legal separation.

Lesser still appreciate, even these exemptions go on to raise the much more grave questions of the status of marital rape, for which ordinarily women over the age of 18, are left without any legal redress or remedy against non-consensual acts of intercourse from their husbands.

### **Domestic Violence Laws and Marital Rape:**

India has created laws on domestic violence which give women some protections against it within marriage. Notably, the Protection of Women from Domestic Violence Act, 2005 (PWDVA)<sup>3</sup> defines domestic violence as physical, emotional, and sexual abuse. In the PWA,

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<sup>4</sup> IPC 1860, Section 376B

<sup>3</sup> The Protection of Women from Domestic Violence Act, 2005

if she is abused by her husband, a wife can seek protection orders, residence rights, and monetary relief.

Since PWDVA recognizes sexual abuse as domestic violence, it does so without specifically criminalizing marital rape; it has allowed concerned women to seek civil remedies such as restraining orders or financial compensation. The focus of the law is on providing relief to victims and protection from perpetrators rather than the prosecution of perpetrators for sexual violence.

While the PWDVA provides good protections for women, it cannot supplant the full range of legal remedies against the husband that creating a specific crime of marital rape might. The absence of a criminal penalty against husbands for marital rape fosters a culture of impunity that denies full recognition and protection of women's sexual autonomy.

### **Judicial and Legal Debates on Criminalizing Marital Rape:**

The legal status of marital rape in India, in recent years, has become a topic of much debate with numerous activists, legal scholars, and women's rights organizations striving to have the crime of marital rape included in the Indian penal code. Numerous petitions have been filed in the Indian courts challenging the constitutionality of marital rape exemption, citing violation of fundamental rights to equality, equity, life, and liberty guaranteed by the Constitution of India.

Probably the biggest case concerning the crime of marital rape came up, in 2022, before the Delhi High Court. The case is one filed jointly by lawyers, NGOs, and activists that challenged in Section 375 of the IPC the clause that made marital rape a non-offence. The petitioners contended that the exemption violates women's constitutional rights and entrenches gender inequalities. However, the decision of the Delhi High Court was delivered as a split decision upon which one judge favoured the criminalization of marital rape, while the other was against it, citing its potential misuse of the law and its impact on a marital relationship.

The case has since been taken to the Supreme Court of India pending the whims of the productive ruling on whether the marital rape exemption should be abolished or not. This decision could open the floodgates as far as women's rights in India and the legalisation of marital rape is concerned.

### **Arguments Against Criminalizing Marital Rape:**

Although it has been advocated for marital rape to be criminalised, there is some encouraging news on this matter there are several legal, cultural and political barriers to changing the law. Opponents of criminalizing marital rape often cite the following concerns:

1. **Potential Misuse of the Law:** Yet one of the strongest objections people tend to raise against criminalizing marital rape is the likelihood of women using this law as a persecution tool, for instance, in cases when a woman wants a divorce and her husband is against it or when she wins a divorce case but the husband does not want to give her custody of their children, respectively. Opponents claim that public parties would, thus, twist the legal system for their purposes, which would result in increased cases that saturate the legal channels.

2. **Impact on the Institution of Marriage:** Several critics, the so-called 'anti-criminalisation' camp, argue that criminalising marital rape creates a condition that undermines the sanctity of marriage: where marriage is no longer 'a partnership of equals characterised by trust and cooperation,' it becomes a site of conflict where spouses want to 'capture' each other and force them into submission. Some of them fear that marital rape laws may be employed to turn personal disagreements into an instrument in view of precipitating the breakdown of marriage.

3. **Cultural Resistance:** In most regions of India, particularly in the villages, marriage is sanctified, and it is not easy to dissolve; the husband is seen to be the master of the marriage. Such cultural beliefs and practices make it very hard to contest the cultural, legal and scriptural patriarchal narrative that a wife belongs to her husband, and such is her responsibility to provide him with sex as a wife. For some people, its criminalization poses a threat to the Traditional Family Values as well as Social customs and Norms.

### **International Obligations and the Push for Reform:**

India is a party to a number of global instruments concerning the protection of human rights and other related freedoms that embrace gender-based abuse of women. These frameworks compel member states to undertake all measures to prevent violence against women, for example, sexual violence in marriage. Nevertheless, India has come under recent criticism from the UN and other foreign organizations for not making marital rape a criminal offence, asking it to act in consonance with its obligations.



This has been boosted by the recent incidences of gender-based violence and growing awareness of women's rights. Feminists have made a point of stretching for mileage the legal strategy of outlawing marital rape as an appropriate way of entrenching women's right to control their bodies even in marriage. They also frankly state that legalizing marital rape would also create a clear message across the country that sexual assault of any form, in any circumstance, is unlawful.

The present legal position of marital rape in India is an ironic attempt to balance the patriarchal policy of the conservative society and the emerging notion of women's equality. Indeed, though there has been a series of legal reforms like increasing the age of consent for intercourse within marriage and sexual abuse is considered as domestic violence, marital rape remained almost outside the criminal law. As much as current legal discussions and cases may keep transforming justice for the better, in the course of this novel, marital rape remains legally ambiguous, consequently failing millions of wives protection from marital rape. The journey of making marital rape a criminal offence in India is accompanied by legal, cultural and political barriers, but advancing on this front can be significant to the cause of women's rights and Gender equality.

### **Challenges to Criminalizing Marital Rape in India:**

The criminalization of marital rape in India continues to be a highly sensitive issue or controversy because of various legal, cultural-social and political factors. However, due the certain circumstances, India has not yet criminalized marital rape, although the issue of marital rape has been recognized internationally, and there is pressure towards criminalization all over the world. These are issues related to marriage and gender roles in society, issues related to abuse of the law as well as those pertaining to marriage.

#### **1. Gender Roles and Cultural Expectations of Women and Men**

The biggest challenge likely to hinder the criminalisation of marital rape in India is the highly rooted patriarchal culture in Indian society. Indian culture has traditionally placed marriage beyond reproach and pedestal the Indian male as the head of the family and complete master of the household, including the decisions of the wife regarding the bedroom. These patriarchal norms place women as inferior to men, especially in marriage, where they are denied their independence.

In many parts of the country, the idea of a wife withholding consent for sex within marriage is considered unacceptable or even inconceivable. A wife's sexual duty to her, husband is normalized, and the concept of marital rape challenges long-standing cultural and religious beliefs. Many still believe that marriage gives the husband an unquestionable right to sexual access, and the notion that a wife can deny consent contradicts these traditional gender roles. This cultural mindset makes it difficult to raise awareness about marital rape as a legitimate issue and create resistance to legal reform.

## 2. Religious and Cultural Resistance<sup>4</sup>

Marriage in India can be understood by looking into different religions, cultures, and regional split of the country's norms to marry. In Hinduism, marriage is regarded as a sacrament in which weights are placed on the woman, most specifically to obey her husband. In the same respect, in Islam, marriage is simply a contract, and there is always the assumption that within the marriage contract, the couple will be intimate. These religious beliefs are some of the reasons why people believe that making marital rape a criminal offence is an assault on culture and religion.

When the government debated over the new amendment bill to overhaul the laws section 375, which grants husbands the right to sexually consummate marriages irrespective of the wife's consent women's rights organizations and civil liberties groups were opposed by religious groups through religious intolerance and so-called moral conservationist groups who went on claiming that such laws would demean the noble value of the institution of marriage and defeat the religions' teachings. These groups tend to mobilize against reforms, threatening that the defence of culture and religious liberties is a strategy to oppose the change in the law.

## 3. Legal Misconceptions and the Risk of Misuse

However, two major factors have greatly hindered the criminalization of marital rape in India; these are the fear of misuse of the law. Those against criminalisation stated that the introduction of the laws could contribute to the upsurge of false accusations, especially in cases of marital misunderstandings and during divorce. Such an assertion has been made

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<sup>6</sup> M Desai "The Silence Around Marital Rape: Cultural and Legal Barriers in India." (2019)

by legislators and some branches of the judiciary, which suspect that marital rape laws may be abused by women to extortion or punish their husbands for any reason.

Of course, there are legitimate concerns about the abuse of laws in this context, but these concerns should not supersede the imperative that recognizes women as being capable of being sexually assaulted. Like every other law, the anti-terrorism 'law' can be abused; however, it cannot be precisely argued that the absence of legal frameworks is contributing towards the safety of most victims of terrorist activities. Besides, there are other sections in Indian law like Section 498A of the IPC, which deals with cruelty by husbands, and it has been charged with being abused as well; these arguments have been used against Indian women. Opponents of liberalizing laws often make the argument that misuse should play a part in stopping legal reform where human rights such as marital rape are involved.

#### 4. The Sanctity of Marriage and Family Unity

Marriage is regarded as very important in Indian society, and any law that is thought to have an impact on the marriage relationship is highly unpopular. Persons called for the non-recognition of marital rape because the outlawing of marital rape leads to the dissolving of marriages and the weakening of the family unit. They argued that legalising marital rape creates the 'policing' of private relationships and precipitates conflict in marriage, thus disrupting the togetherness of the family.

This perspective supposes that a wife's job is to keep the marriage strong and is thus willing to sacrifice the right to self-ownership and security. That way, it mirrors a cultural viewpoint that it is better to save the home and the family than to protect women against sexual violence in the privacy of their homes. Critics concerned with this third argument assume that criminalizing marital rape will lead to the collapse of families, while the fact is that many marriages are already violent and can hardly be considered a healthy and safe union no matter how much criminal law is utilized in an attempt to fix the problem.

#### 5. Legislative and Political Hesitancy

For many years, Indian lawmakers have remained indifferent toward the problem of marital rape, and the political debate on the subject is nearly non-existent. Since there has been activism and advocacy for legal change, the political will to do so has been quite weak.

This is primarily because the issue is still sensitive, and politicians are aware that they might get out of line with some of the conservatives or get the church's backlash.

Besides, some concerns are making marital rape an offence will result in the availability of a flood of cases in our courts.

So, based on the above arguments, the following are major challenges elicited from the government that should be considered before passing the bill: lawmakers point out the difficulties involved in the prosecution process of marital rape since the evidence mostly depends on other words of the wife against the husband as being a challenge. Due to this, they typically end up supporting what is current, with emphasis on the problems in the process of working on the change that is needed.

#### 6. Inadequate Legal Framework

The law in force in India is not well equipped to handle marital rape. The Protection of Women from Domestic Violence Act 2005 (PWDVA) is operative when sexual abuse is a type of domestic violence, but the resources available are mainly civil ones, such as protection orders and compensation. It does not categorise marital rape as a crime and does not contain a structure for criminal justice response for RAPE within marriage. In the same regard, the IPC still holds an exception that does not treat marital rape as an offence for women who are above eighteen years to date, making the law lack sufficient protection for adult married women.

Legal qualified definitions of marital rape have also been ambiguous, and have also been determined by judges' discretion. As in *Independent Thought v. Union of India* (2017). However, the question of whether sexual intercourse by a husband with his wife aged over eighteen years amounts to rape still lacks clarification after the recent judication. The recent Delhi High Court case wherein the possibility of the marital rape exemption in India being unconstitutional was decided equally in 2022 is the principal example supporting this notion.

The criminalization of marital rape, in particular, remains problematic because of the lack of a lucid legal approach. Legal authorities such as the courts and the parliaments have not yet understood in their entirety how best to tackle the problem without violating the rights

of women on one hand while at the same time outlawing misuse on the other hand, as well as the implications it could have on marriage.

#### 7. Lack of Public Awareness and Advocacy

To date, marital rape as a type of sexual violence is not well understood among the people of India. Many people in the world do not consider marital rape as a criminal offence, but rather a domestic affair between the husband and his wife. Such an attitude is accompanied by a lack of awareness brought about by the illegitimacy of discussing sexual matters in public, particularly as far as marriage is concerned. Some of these women would never know they are victims of marital rape because the culture has led them to think that any sexual intercourse within marriage is the husband's prerogative and their marital obligation.

Additionally, although the flow of grass-root and professional NGOs, global and Indian advocacy groups and activists addressing the issues of violence against women in general, and gender-based violence in particular has remained very active and insistent to draw the Indian government's attention to the problem the situation with marital rape has not received the same degree and kind of publicity and strategic planning as that of the other well-publicized and strategically prioritized types of violence such as dowry. This imbalance can be seen as a shift in the lens of how attention is directed away from randomized approaches towards specific areas, which requires approaches to resource mobilization and stakeholder engagement as key elements for operationalizing social change agendas within gender as justice remedial measures. This lack of advocacy organisations means that public pressure to make the laws better cannot be easily created.

There are barriers to the criminalization of marital rape, such as; the cultural values entrenched in India, resistance from the culture, other cultural ruses, fears of misuse, apprehensions for domestic stability and political culture. However, there is a slow emerging perspective for putting sanctions on women's rights infringed in marriage; the current court cases and lobbying for change give some prospects for change. Although these are formidable issues they cannot be wished away if India has to comply with its international human rights commitments and ensure that women receive protection from sexual violence as rightfully claimed in any status of marriage. Thus, the possibility of criminalization of marital rape in India presupposes only a multi-levelled approach,

including legal change, employing new campaigns, and alterations in the people's perception.

### **Legal Remedies for Marital Rape Survivors in India:**

As it is still presently not a recognized criminal act in India to rape one's spouse, survivors of marital rape can obtain legal redress under the umbrellas of the following laws as stated above. These remedies, though restricted, are the legal balm available to women who experience sexual violence in marriage. Nevertheless, marital rape is not outlawed by its law but is instead covered under laws on domestic violence or cruelty or sexual assault. Below are the key legal avenues available for marital rape survivors in India:

#### **1. The Protection of Women from Domestic Violence Act, 2005 (PWDVA)**

The PWDVA 2005 is the key legal intervention available to women victims of domestic violence including marital rape. This actively shields the abused woman with civil solutions of this law; it lists "sexual abuse" under the definition of domestic violence. According to the PWDVA, the women can ask for protection orders, residence orders and monetary remedies among others.

#### **Key Provisions of PWDVA for Marital Rape Survivors:**

**Protection Orders:** Any woman, including one who has been raped sexually or maritally, can approach the court for an order that she is protected from further abuse by her husband. These orders can exempt the husband from approaching or providing any form of violence to the survivor.

**Residence Orders:** It lets the survivor stay in the marital home so that they do not end up homeless even if they do not own the property where they live or have been subjected to abuse.

**Monetary Relief:** It may compel the husband to pay the survivor such costs that may include medical expenses, loss of earnings, and all other costs resulting from the abuse.

**Counselling and Support Services:** The right passage from The PWDVA now stipulates that the counselling and support services shall include referral for the survivors to Shelters and legal services.

The PWDVA provides basic protection, but it is a civil law, so if marital rape were not an

officially recognized crime, there would be no criminal penalty. Consequently, it affords comfort to the victim but does not punish the offender legally or legally punish him for the sexual assault.

## 2. Section 498A<sup>5</sup> of the Indian Penal Code (IPC): Cruelty by Husband

Section 498A of the Indian Penal Code relates to cruelty by the husband or any relative of the husband against the wife. Although this section does not refer to marital rape, it does give the wife a legal redress for physical/ mental cruelty within marriage, which may include rape.

### Key Aspects of Section 498A:

**Cruelty Defined:** In the law, cruelty is described as any action that is intended to result in the commission of suicide by the woman or the infliction of serious harm on her body and/or mind. This includes harassment and assault (violence and abuse), which if translated and understood in the correct context, can be understood to mean sexual coercion or forced intercourse within marriage.

**Criminal Penalty:** Section 498A is a criminal provision that implies that if a husband is convicted, he can be imprisoned for a term of up to three years and/or be fined. Section 498A allows women who have been homosexually raped by their husbands to file a complaint as long as the rape was part of a sample of cruelty. But this has a weakness in that the provision does not categorize sexual violence as a distinct offence on its own, but more often, it requires corroboration of sustained cruelty beyond the act of spousal rape.

## 3. Section 376B of the Indian Penal Code (IPC): Rape of a Separated Wife

Marital rape is not an offence that is prosecutable in India under normal circumstances; however, there is an exception in the IPC section 376B, which make sexual intercourse by a husband with his wife after judicial separation punishable.

### Key Features of Section 376B:

**Judicial Separation Requirement:** This section applies only when the husband and wife are living apart under a decree of judicial separation made by the court.

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<sup>7</sup> IPC 1860, Section 498A

Criminal Penalty: A husband who has sexual intercourse with his wife without her consent during judicial separation may be imprisoned for a term of 2 years and fined.

However, this applies to women who were deserted by their husbands and got legal separation but not to women still living with their husbands or those who have not filed for legal separation yet. Therefore, it is of little use, and practically all the women who fell victim to their husbands' violence cannot turn to this provision to seek justice unless they are already in the process of divorce.

#### 4. The Criminal Law (Amendment) Act, 2013<sup>6</sup>

In 2013, India's criminal laws were amended through the Criminal Law (Amendment) Act, soon after the brutal gang rape and murder of a young girl in December 2012 in Delhi. This legislation extended the definition of sexual assault and also increased the severity of punishment for rape and any other forms of sexual violence. But in Section 375 of the IPC, the marital rape exemption remained intact, so the new provisions did not include sexual violence against women married above 18 years.

However, it must be noted that the 2013 amendment did provide for other reforms for sexual violence in general and has paved the way to a proper legal basis for prosecuting rape outside marriage. Those amendments also increased the awareness of people about such types of violence; controversies around possible criminalization of marital rape remained active as well.

#### 5. Legal Precedents and Judicial Interpretations

Lacking statutory prohibition of marital rape, Indian courts have significantly contributed to the legal dialogue on this issue. To date, there has been no decision of the Supreme Court of this country that has criminalized the act of rape in marriage, but there have been significant progressive judgments that provide at least some legal justice to survivors of sexual violence if married.

*Independent Thought v. Union of India* (2017): In this historic judgement, the Supreme Court of India also increased the age of consent in marriage from 15 to 18 years: sex with a wife below this age is statutory rape, no matter if the marriage was legitimate. Apart from the

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<sup>6</sup> The Criminal Law (Amendment) Act, 2013



situation where the victim is a minor, it is important to note that this ruling is a step forward in recognizing the importance of consent in sexual relationships, even in marriage.

**Delhi High Court 2022 Split Verdict:** The Delhi High Court in November 2022 passed a divided decision in which everyone gave one judgment on a PIL to question the constitutional validity of Section 375 IPC and the marital rape exemption. One judge argued that the exemption infringed women's constitutional rights while the other argued that making marital rape unlawful might have some unforeseen erosions. The case has now gone to the Supreme Court, and people are waiting for the verdict to be passed on the case.

These judicial changes are indicative of increasing legal awareness of marital rape and of dynamics that underlie shifts in legal approaches to understanding marital sexual assault.

#### 6. Compensation under Tort Law

The third legal relief available is compensation through tort law besides the criminal and civil action that the survivor of marital rape takes. Tort legislation permits people to bring legal proceedings for compensation for harm done by unlawful acts of perversion. While marital rape civil suits are exceptional in India, these are not precluded, and a woman can sue for tort for pecuniary recovery for physical and or mental injury done to her by her husband.

However, tort law does not offer criminal penalties to the offender; moreover, tort action may take a long period, and it is not always easy to win a tort lawsuit. The applicability of this remedy also hinges on the survivor's capacity to aver harm in court, very often a difficult feat for survivors of sexual harm.

#### 6. Counselling, Support Services, and Helplines

Even though legal proceedings are a valuable source of protection for women subjected to marital rape, receiving counselling and other kinds of help is important as well. Some NGOs and women's rights groups across India offer counselling, and legal and shelter facilities to women who are victims of domestic violence, including marital rape.

Non-governmental organizations like National Commission for Women (NCW) and Women Helpline (181) provide legal aid, security as well as assistance to women who are being abused

by their husbands. Those affected can also call on helpline numbers or counselling centres and women's offices where such distressed women can be helped immediately.

## 7. International Legal Frameworks and Human Rights

Currently, India is a party to most of the International Human Rights Instruments such as the Convention on the Elimination of All Forms of Discrimination Against Women and the UN Declaration on eliminating violence against women. Both of these frameworks define marital rape as a violation of women and encourage member states to take steps to prevent all forms of sexual violence.

Although India has not ratified these international treaties yet fully implemented the domestic laws according to these treaties, the human rights treaties do provide the ground for the legal and moral approach towards the criminalization of marital rape. People's activists and organizations fighting for women's rights use these treaties to lobby for the change of laws prevailing in India and fight against the marital rape exemption law.

Although there are legal ways through which a survivor of marital rape can seek justice with some legal provisions available in India such as PWDVA, Section 498A of the IPC, and judicial decisions, the absence of criminalization hinders much progress. There is very little protection currently available within the law, such that even when a victim seeks legal redress, it is mainly in the form of civil rather than criminal justice. While the debate over marital rape goes on, there is an increasing interest in legally reforming marital rape and ensuring that survivors are adequately protected by the law.

### The Way Forward: Criminalizing Marital Rape in India<sup>7</sup>:

The criminalization of marital rape in India has been an issue of contemporary debate, discussion, and concern among lawmakers, human rights activists and the judiciary. Despite the increasing awareness about the rights of women and their protection, marital rape remains a victim's insufferable plight. It is being perceived as a structural element within India's process of transition and modernization. The non-criminalization of marital rape can be considered as an obvious lacuna or an oxymoron in view of development within the legal system. Criminalizing marital rape does not involve only reducing sexual vulnerability but also concerns gender justice, a woman's right to her own body and human rights more generally.

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<sup>9</sup> R Singh "Criminalizing Marital Rape in India: Legal and Social Perspectives." (2021)

Overall solutions need to be inclusive combining legal reform, societal change and institutional support.

### 1. Legislative Reforms:

Amending the Indian Penal Code (IPC): The most direct and impactful way to tackle the problem of marital rape is by implementing a broad-based legal reform. India needs to make amendments to its criminal laws, especially the Indian Penal Code (hereinafter IPC), whereby it should withdraw, the immunity given to husbands under this provision. Section 375 of IPC, which defines rape, contains an exception clause that says that any sexual act by a man with his own wife, the wife not being under fifteen years of age, is not rape. This means that non-consensual sexual acts by a man with his wife cannot be considered rape if she has attained the age of fifteen years. This means that there is no explicit provision in law to deal with the situation where a husband is raping/forcing his wife to have sex against her will with use of force or even without it.

#### Proposed Legal Changes:

Eliminating the Marital Rape Exemption: First and foremost, it is very much important to make a change in Section 375 of the IPC to do away with the marital rape exemption. Consequently, this will clarify that forced sexual intercourse, even if within marriage, is a form of rape and should be punishable by law.

Clear Definition of Consent: Indian law must define consent more explicitly and it must be a comprehensive one. Consent should be seen as something ongoing and revocable, which quite simply means that even when someone is married, they have the right to say no to sex.

Stronger Punishments: If stricter punishments are introduced for marital rape then this will act as a deterrent and also ensure that the survivors get justice. The sentences should be in sync with what is prescribed for other forms of rape under IPC, giving equal legal recourse.

### 2. Harmonizing Civil and Criminal Law

While criminalization would mean that marital rape is considered an offense, the civil laws are also to be reformed to ensure full protection and facilitation of the survivors. At present, sexual abuse within the meaning of the Protection of Women from Domestic Violence Act 2005 constitutes one of the domestic violence acts but only affords civil remedies, including

protective orders and compensation. Therefore, there is a need to bring about harmonization between civil and criminal law to enable survivors of marital rape to access both criminal as well as civil remedies.

Changes in the Civil Law:

Assimilation with the PWDVA: The amendments in PWDVA need to include marital rape under the ambit of sexual violence and should provide corresponding seamless access to both the avenues of prosecution, criminal as well as civil so that survivors do not need to choose between criminal and civil protection.

Comprehensive Support for Survivors: The law should provide for immediate protective measures like restraining orders, available safe accommodation, and financial compensation alongside criminal prosecution so that survivors will be protected from further abuse as their cases are heard.

### 3. Addressing Fears of Misuse

Misuse in divorce proceedings is one of the major reservations against the criminalization of marital rape. Critics worry that in the absence of proof, the defendants, mostly the males in the relationship, would be vastly unfair to accept the accused's contention that they were raped. An increase in false allegations, they suggest, would be yet another likely consequence of introducing a marital rape law. While such concerns have merit, they should not stand in the way of progress. Of course, every law can be misused, but that doesn't mean a serious offence like marital rape should go unaddressed.

Strategies to Prevent Misuse:

Clear guidelines of prosecution: The laws must also clarify specific procedures on how and when to carry out the investigation and prosecution related to cases of marital rape, thus not allowing any bogus or baseless complaints. A rich legal framework that equates the rights of the accused to those of the survivors is fundamental.

Judicial Training: It is high time that judges, police officials, and prosecutors are provided with special training about the handling of marital rape cases. This will ensure proper distinction between established acts of violence and mala fide cases, thereby avoiding misuse of such opportunities while extending justice to the survivors.

Ensuring Due Process: On both sides, due process needs to be ensured because otherwise, due and fair proceedings cannot be expected and the parties end up with vulnerable rights. It would involve the best standards for the collection of evidence along with a legal appeal mechanism against injustices in verdicts.

#### 4. Shifting Societal Attitudes and Challenging Patriarchal Norms

It is societal norms deeply rooted in beliefs that drive marital rape, thus legislating laws alone is not the way ahead; this is because, mainly, patriarchal views and the idea that marriage is a relationship where males dominate the women's bodies act as an obstacle toward criminalizing marital rape. An effective criminalization of marital rape may hinge upon a broader cultural attitudes shift toward gender roles, sexuality, and marriage generally.

#### Strategies for Change in the Society

Public awareness campaigns: Information should be dispelled at large by the government, NGOs, and the women's rights groups that constitute the idea of consent, sexual rights, and the dangers of marital rape. Communication should be done in the way of myth-busting related to marriage and sexual entitlement and in the way of mutual respect and autonomy in the relationships.

Education and Gender Sensitization: This project should sensitize education to be gender-responsive in mainstream curriculum and add value to all curricula with teachings on consent, equality of genders, and human rights. Schools and colleges can be important institutions that imbibe progressive attitudes about marriage and personal autonomy.

Engaging Men and Boys: To shift perspectives entails involving men and boys, in discussions regarding gender equality and the importance of consent and respect in relationships. Exposing and breaking down aspects of masculinity and patriarchic norms through initiatives is vital in lowering instances of violence against women, like marital rape.

#### 5. Strengthening Institutional Support

There must be an enhanced institutional framework so that victims of marital rape will get legal. Emotional assistance also calls for strengthening the capacity of the police, judiciary as well as medical practitioners among others.

### Proposed Institutional Reforms:

**Training for Law Enforcement:** Cops must undergo education on how they can attend equally without any form of prejudice or bias in these special cases whereby one has been raped by their spouses. To ensure that survivors' rights are observed & taken seriously, these specially trained personnel under sexual violence units should handle such related issues.

**Establishing Crisis Centres:** The state needs to set up safe houses where victims of spousal sexual abuse can receive immediate medical attention, legal redress, trauma counselling, as well as housing facilities. Such facilities must also operate from a central point for easy reach by the clients.

**Medical Protocols:** Healthcare providers should have guidelines that are specific enough in offering medical services for the survivors of marital rape. This consists of ensuring that the process is done respectfully without posing any harm, whereby there is follow-up on things like counselling, among others, for the affected persons.

### 6. Learning from International Best Practices

Marital rape is already a crime in many countries worldwide; this offers India lessons. The fact that some countries like the UK, South Africa, and the US, among others, have had to consider this when drafting their laws also provides a very relevant lead for reforms on the statute law regarding such issues as well! As such, India may take a cue from such nations while formulating its domestic laws so that they are not only in tune with the rights of women & children but also maintain uniformity at the global level thereof.

### Key Lessons from International Models:

**Comprehensive Legal Definitions:** According to international best practices, there must be clear legal definitions of rape & consent in such a way that there cannot be any doubt that sexual relationships, regardless of whether it is within marriage or not, require mutual agreement.

**Victim-Centred Approaches:** In countries where marital rape is a punishable offence, there is usually a focus on the victim whereby it is guaranteed that he or she gets enough support all through the justice system and that such support takes precedence over everything else.

Holistic Legal Frameworks: A holistic legal framework that includes criminal prosecution, civil remedies, victim compensation and long-term rehabilitation services has been adopted in many countries.

### 7. Judicial Support and Constitutional Interpretation

In criminalizing marital rape, the judiciary is very important. The courts can contribute to this matter by giving an interpretation to the current constitutional provisions, which would serve to protect the rights of women within the institution of marriage, such as equality, integrity, & bodily autonomy. It is through judicial activism that many legal reforms have been experienced in India, and as such, the courts should not relent in upholding the rights of women.

#### Role of the Judiciary:

Constitutional Interpretation: The Indian judiciary is supposed to read the Constitution in such a manner that it safeguards women's rights to equality & freedom from violence with a special focus on sexual violence at marriage. Some judicial pronouncements, like the one given by the Delhi High Court in 2022, overruled cases of marital rape exemption based on which several legal battles are still pending today.

Progressive Judgments: Through court decisions challenging patriarchy and upholding that marriage should never take away women's right to consent, we can develop momentum for positive change in legislation. Any such judgment will be very important today for the call for a new law tomorrow.

### CONCLUSION

Marital rape is still seen as one of the complicated issues that face gender justice in India. There have been many changes in the law aimed at curbing sexual violence & upholding women's rights. However, the exception of marital rape in the Indian Penal Code continues to let down many women who experience this form of abuse within their marriages!. The continued allowance for spousal non-consensual sex within the Indian Penal Code reflects deep-seated patriarchy whereby there is presumed consent in matrimony, with women having little or no say about their bodies in such relationships.

Considering spousal rape as a punishable offence is not only important to uphold women's legal rights but is also vitally linked with an agenda for their equality, integrity & human rights in India!. Even though victims of such atrocities can seek some redress under civil law like "The Protection of Women from Domestic Violence Act" or section 498A of the IPC, which deals with crimes against women, they are inadequate and incomplete in addressing the seriousness of sexual violence within marriage. Immediate legal reform should be adopted together with changing how people think to get rid of the long-standing factors that encourage marital rape.

If marital rape were made illegal, it would communicate clearly that by getting married, one does not give up their right to decide about sex with them. Changing legislation, courts taking action, enlightening the public, & having supportive organizations are all necessary steps to be taken in this reform process. Once India criminalizes marital rape & enforces it properly, then it will be seen as moving forward with ensuring gender equality by offering proper help for those who have been raped & creating an environment where women live equally like men without any fear.

