

**DE JURE NEXUS LAW JOURNAL**

AUTHOR:

C.S. TEJASHREE

2<sup>ND</sup> YEAR, BBA LL.B.

SYMBIOSIS LAW SCHOOL NOIDA

**MARITAL RAPE: AN EXCEPTION TO RAPE****ABSTRACT**

*India is a country where concerns about a woman's safety are brought up regularly. Ironically, it stands among the 36 countries that have not denounced conjugal assaults. Marital rape is one such heinous practice that has been widely prevailing across the nation for decades. It involves forced or nonconsensual sexual intercourse with one's legal spouse, especially women. In India, raping a spouse during a marriage isn't a crime. Specifically, the 'Indian Penal Code' of 1860 does not recognize raping a spouse during a marriage as a crime. The magnitude of the issue continues to go unheard even though the fact that it violates Articles 14 and 21 of the Indian Constitution with thousands of petitions filed in court every day. By employing a doctrine-based technique, the researcher aims to draw attention to the atrocity of marital rape of women. Is it acceptable for a spouse to commit such atrocities under the veil of marriage? The present also calls attention to the lack of options for a woman who has been assaulted by her spouse to seek justice. The report also looks at the different legislative safeguards, and judicial shortcomings and makes some recommendations concerning India's prohibition of marital rape.*

*Keywords: Marital Rape, Conjugal rights, Domestic violence, Criminalization, Penal laws.*

## CHAPTER I

### INTRODUCTION

The term "marital rape," which refers to having sexual relations with one's spouse without their consent, is hotly contested. Spousal assault refers to the use of force, physical violence, cruelty, or threats of force when a woman rejects or is unable to agree to unwelcome sexual activity between a man and his wife. Any sort of penetration (vaginal, anal, or oral) that is performed without the wife's consent or will is referred to as "undesirable intercourse<sup>1</sup>." According to the Indian Penal Code (IPC) 1860, a husband will not be prosecuted for raping or sexually assaulting his better half, depending on the age of the wife<sup>2</sup>.

Marital rape, observed through the patriarchal lens, is an unfounded, unprincipled, and socially damaging construct that if allowed to thrive unimpeded, will sooner than later act as an invidious threat to the very institution of marriage. Although though marital rape is the most common and offensive type of masochism in Indian society, it is concealed by marriage. The guiding principles of the Indian Constitution, on the other hand, make them implicit. The moot point which largely remains unvoiced is that the 'factum' of marriage does not ipso facto legitimize non-consensual sexual acts between the parties to a marriage. The psychological suffering of being raped, the pain of being victimized by one's spouse, the helplessness of remaining silent, and the indelible scars of these episodes are the main components of marital rape. In India, people are protected from crimes done on the streets, but women have not been protected from crimes perpetrated within their homes, which go unreported.

The legislation disregarded a severe infringement of any married woman's fundamental right to freedom, including the right to her body and the right to protection from abuse. In Indian culture, a woman is viewed as a man's property after marriage, with the implication that he is free to act

---

<sup>1</sup>Marital rape an offence yet to criminalize (2021) Legal Research And Analysis. <https://legalresearchandanalysis.com/blog/marital-rape-an-offence-yet-to-criminalize>.

<sup>2</sup> Indian Penal Code 1860.

whenever he pleases, whether or not his wife consents. Different legal systems and viewpoints on marital rape have been further examined.

### **RESEARCH OBJECTIVES**

1. To contextualize the challenges or problems of marital rape in India by looking at them through the lens of legal support for the victims under the law.
2. To analyze how India perceives 'Sex In Marriage'.
3. To comprehend the significance of interconnection and a harmonic relationship between the exception and fundamental rights by comparing, analyzing, and evaluating those laws.
4. To associate the knowledge of various precedents and laws on the said marital rape and fundamental rights to get an overall consensus about the current issue in India.
5. Analysis of Consent under the realm of marriage and the historicity of the provision.

### **RESEARCH METHODOLOGY**

In the study “Marital Rape – An Undefined Crime”, the researchers utilize the methodology of doctrinal research. The researchers conceptualize this method apt for the research issue by gathering data from a wide range of secondary sources that include books, newspaper articles, and journals. Besides, landmark cases of marital rape and relevant legal provisions have also been referred to render a holistic approach to the research issue.

### **RESEARCH QUESTIONS**

1. What is the stand of Indian law on marital rape?
2. Does the marital rape exception abuse fundamental rights?
3. How does the proposed criminalization of marital rape affect the sacred institution of marriage?
4. Is there any justification for making marital rape legal and decriminalized?
5. Is India limited by the old-aged exception rule, viewed as a piece of Custom Law, regardless of dynamic change in social norms?
6. Do individual rights and sexual autonomy prevail in the Indian matrimonial context?

## LITERATURE REVIEW

- **Md. Zishan Khan (2018):“(Marital) Rape and Consent: Analyzing Marital Rape in India<sup>3</sup>”** This source aids the research through analysis of section 375 and various opinions with regard to petitions filed in the Delhi high court seeking removal of clause 2 of section 375 from the Indian penal code.
- **Kusum Yadav (2016): “A Socio-Legal Study of Marital Rape, A Stigma over Conjugal Rights<sup>4</sup>”**. This paper helps the researchers to aptly conceptualize the legal status of marital rapes in India and the role of the social dilemma that forbids women from taking action against marital rapes. The author also presents the alarming need to criminalize marital rape additionally addressing the limit of usage of conjugal rights by a spouse in the institution of marriage.
- **Diana E.H. Russel (1982): “Rape in Marriage.<sup>5</sup>”** It comprehensively addresses the nature, prevalence, and correlation of marital rapes with other forms of abuse besides denoting the impact of such cruel acts on a women’s mental and physical health.
- **K. Angel Jennifer: “Marital Rape: A Crime Undefined in Indian Legal Scenario<sup>6</sup>.”** The present paper throws light on the central term consent in cases of marital rapes and analyzes different types of marital rapes correlating them to various provisions mentioned under the Indian Penal Code.
- **Ayushi Kushwaha(2021) “Marital Rape: An Undefined Crime in India<sup>7</sup>”** The present articles aptly analyze the present judicial stand with regard to marital laws prevalent in the nation alongside analyzing constitutional and legal provisions of victims of marital rape with the aid of landmark case laws.
- **Raveena Rao Kallakuru & Pradyumna Soni: “Criminalization of Marital Rape in India: Understanding its Constitutional, Cultural and Legal Impact<sup>8</sup>.”** The current paper provides a proposed model for the criminalization of marital rape by suggesting changes in criminal law as well as civil law focusing on the sphere of divorce and other alternative remedies provided under law for the victims of marital rape.

---

<sup>3</sup>Khan, M.Z. (2018) “Marital Rape and Consent: Analyzing Marital Rape in India” .

<sup>4</sup> Yadav, K. (2016) Marital Rape - “A Socio-Legal Study of Marital Rape, A Stigma over Conjugal Rights”.

<sup>5</sup> Russel, D.E.H. (1982) “Rape in Marriage.”

<sup>6</sup> Jenifer, A.K. (2021) “Marital Rape: A Crime Undefined in Indian Legal Scenario,” International Journal of Law Management and Humanities, 4(2). Available at: <https://doi.org/http://doi.one/10.1732/IJLMH.26607>.

<sup>7</sup> Kushwaha, A. (2021) “Marital Rape: An Undefined Crime in India”.

<sup>8</sup> Kallakuru, R.R. and Soni, P. (2018) “Criminalization of Marital Rape in India: Understanding its Constitutional, Cultural and Legal Impact,” NUJS Law Review Journal, 11(1).

## CHAPTER II

### ANALYSIS

#### WHY IS MARITAL RAPE AN UNDEFINED CRIME?

##### → SANCTITY OF MARRIAGE

The origins of the exemption for marital rape can be found in early Sanskrit literature (such as the Upanishads and Manusmriti) as well as in Indian cultural traditions. The notion which Indian males have created because of social and cultural structure regarding marriage is “the license to have sex.” The primary justification for not terming marital rape a crime is that doing so would undermine the sanctity of marriage, which would ultimately undermine the family system. When asked about the idea of criminalizing marital rape in a Parliament hearing in 2015, then-Minister of State for Home Affairs Haribhai Parathibhai Chaudhary replied that “marital rape cannot be applied in the country since marriage was treated as a sacrament or sacred in the Indian society<sup>9</sup>.” In 2017, Union Minister of State Krishna Raj stated that the Union government was opposed to eliminating the provision.

According to the ruling in the “*T. Sareetha V. T. Venkata Subbaih*<sup>10</sup>” case, a marriage's rights and obligations are more like those of a formation and termination of a private contract between two people. Even if the offense of marital rape takes place in a marriage's private realm, it is the obligation of the State to pierce that privacy. Since long customs, standards have been ingrained in people's minds, and anything that deviates from them or does not occur frequently is seen as taboo. Traditional religious obligations have also contributed to the cultural annulment of marital rapes. It was also asserted that the scope of marital responsibility includes the obligation to satisfy the spouse sexually, which has been termed the rationale for non-consensual sex in

---

<sup>9</sup>Singh, S.R. (2018) 'Marital rape an offence under law'. Available at: <https://www.thehindu.com/news/cities/Delhi/marital-rape-an-offence-under-law/article22467416.ece>.

<sup>10</sup> T. Sareetha V. T. Venkata Subbaih,, AIR 1983 AP 356.

marriages. Sati was once a recognized cultural tradition, albeit it was nonetheless illegal. The claim that a crime is socially or culturally acceptable is not a justification for not making it a crime.

### → CONSENT IN PERPETUITY

The word "consent" is the most crucial one to consider when discussing rape. Nevertheless, when one is sealed off by the rigidity of matrimony, this component disappears. It's also possible to assert that after marriage, assent to sexual activity is assumed, giving birth to the idea of "implied consent." This is the presumption that when a woman marries, she gives her husband her perpetual consent. The belief that a woman constitutes a man's property lays the basis of this legal doctrine from the colonial era. Due to such a proprietorial arrangement of the marriage, women had no legal existence of their own. But since the feminist revolution, female rights organizations recognized their right to sexual autonomy-that is, the ability to consent over their own bodies, even when they are bound by marriage.

### → PROBABILITY OF MISUSE ARGUMENT

As per the arguments of men's rights groups, women can exploit the legalization of marital rape as a justification to impose false allegations against one's spouse. The relationship of a wife with her husband is primarily sexual in nature, making her testimony the primary witness to the crime, making it impossible for the male victim to establish his innocence. In the case of "*Arnesh Kumar v. State of Bihar*" the apex court ruled that section 498A<sup>11</sup> of the Indian Penal Code is utilized more as an armament than a shield by unhappy wives. This might lead to turmoil in the courtroom since numerous false cases can be filed, in turn delaying justice in other issues. Also in "*Nimeshbhai Bharatbhai Desai v. State of Gujarat*"<sup>12</sup> the Court considered if a husband compelling the wife to engage in an oral sexual activity would qualify under the sphere of rape under section 376 of the IPC? According to the court, since marital rape is not considered a crime in the nation it was read that a spouse who assaults his wife commits an offense under the IPC, but if that same spouse coerces the wife into having sex, then he is only guilty of assault and not rape because the marriage is legal<sup>13</sup>.

---

<sup>11</sup> Indian Penal Code 1860 § 498 A.

<sup>12</sup> Nimeshbhai Bharatbhai Desai v. State of Gujarat, 2018 SCC OnLine Guj 732.

<sup>13</sup> Indian Penal Code 1860 § 376.



## MARITAL RAPE IN THE REALM OF INDIAN PENAL CODE

Marital rape is not considered a crime under the Penal Code 1860 (IPC, 1860)<sup>14</sup>. But the act of rape committed against women is considered a heinous crime according to section 375 of the IPC<sup>15</sup>. This term broadly encompasses sexual contact and other forms of sexual penetration as "rape." Nonconsensual sex between a wife and her husband is, however, not covered by this section's exemption 2. However, this does not imply that marital rape is not rape. The apparent flaw in section 375 is exception 2, which exempts wives from the definition of rape but offers no justification for the exception. The idea of **consent** serves as the section's primary focal point. Unfortunately, the IPC, 1860, does not mention a definition for the term 'consent' precisely. It simply states what would not be considered consent. Thus, an individual is presumed to have given consent when a such agreement was made, willingly, without any influence of fear or misrepresentation on a person.

An unmarried woman who is the victim of rape stands protected by taking recourse to various provisions of sections 228-A and 498-A of IPC<sup>16</sup>. If the complainant is a married woman, the same regime does not apply under Sections 26, 53-A, 154, 161, 164-A, 309, 327, and 357-C of the Civil Procedure Code. Rape consists of hurt (319), grievous hurt (322), wrongful restraint (339), use of force (349), and Assault (351)<sup>17</sup>.

Any act by someone who utilizes unlawful force against a woman with knowledge or intention that such act will offend her modesty then it is illegal under Section 354<sup>18</sup> of the IPC.

According to Section 354B of the IPC, it is unlawful to physically harm or otherwise use criminal force against a woman with the intent to cause her to become undressed or remove her clothing<sup>19</sup>.

---

<sup>14</sup> Indian Penal Code 1860.

<sup>15</sup> Indian Penal Code 1860 § 375.

<sup>16</sup> Indian Penal Code 1860 § 228 A and § 498 A.

<sup>17</sup> Indian Penal Code 1860 § 319, §322, §339, §349 and §351.

<sup>18</sup> Indian Penal Code 1860 § 354.

<sup>19</sup> Indian Penal Code 1860 § 354 B.

## LAW COMMISSIONS

The **42nd Law Commission Report** officially supports spousal rape for the first time. However, it was only permitted when a husband and wife were living apart with one another's consent or under a court order for judicial separation. This change was approved and incorporated into the Penal Code of 1860. Another recommendation from the Commission was to charge the husband with a crime for having sex with his underage wife, but this suggestion was not accepted. This report emphasized the distinction between rape and marital rape where the latter is seen as less severe, and the assumption of consent prevails when a married couple lives together.

In its **172nd report**, the “Law Commission of India” was once more challenged with the issue of the legality of the rape exception<sup>20</sup>. However, the report once more declined to charge a husband for raping his wife because doing so would constitute an excessive intrusion into marital affairs. The report was written in response to the shortcomings in the rape law and recommendations that the legislature to change it and the Supreme Court mandated them to resolve concerns posed in the case of “*Sakshi v. Union of India*”<sup>21</sup>. ”

A nationwide agitation to criminalize severe marital rape took place later in 2012 in this country, “**Verma Committee**” with a panel of 3 members was employed to bolster sexual assault laws in the nation in the wake of a gang rape (Nirbhaya Case) which was headed by Justice J.S. Verma<sup>22</sup>. Within a short time, the Commission completed its report, regarded it as a historical document, and made significant change recommendations. The committee believes that the IPC needs to distinguish between rape that occurs within marriage and outside of marriage. Sections 375<sup>23</sup>, 376<sup>24</sup>, and 376 A<sup>25</sup> to 376 D<sup>26</sup> of the Indian Penal Code were suggested for reform and substitution by the committee in its report to improve the effectiveness and deterrence of the legislation

---

<sup>20</sup> Law Commission of India, Reforms in the Judiciary: Some Suggestions, Report No.230, 8 (January 2009)

<sup>21</sup> *Sakshi v. Union of India*, (2001) 10 SCC 732 : 2003 SCC (Cri) 1048 : 2000 SCC OnLine SC 1505

<sup>22</sup> Justice J.S. Verma Committee, Report of the Committee on Amendments to Criminal Law, 66 (January 23, 2013).

<sup>23</sup> Indian Penal Code 1860 § 375.

<sup>24</sup> Indian Penal Code 1860 § 374.

<sup>25</sup> Indian Penal Code 1860 § 376 A.

<sup>26</sup> Indian Penal Code 1860 § 376 D.



pertaining to sexual assault of women and girls. The Committee suggested eliminating the exemption for marital rape.

Marriage shouldn't be viewed as a sexual act's unconditional permission. This idea was rejected by the government at the time, which was governed by the Congress party. When the proposal was being considered, a group of politicians opposed it, stating that it "had the potential to undermine the institution of marriage; if marital rape is brought under the law, the entire family structure would be destroyed." But the judicial aspect asserts that "sexual intercourse by a man with his own wife, the wife not being under 15 years of age, is not rape" under section 375<sup>27</sup>.

In "*Independent Thought v. Union of India*<sup>28</sup>", although exemption 2 of Section 375<sup>29</sup> of the Indian Penal Code, 1860 takes a cynical stance on this matter, the court argued that sexual intercourse with a girl under the age of 18 constitutes rape whether or not she is married. If a married girl aged between 15 to 18 is raped by her spouse, she may be a victim of "aggravated penetrative sexual assault under The Protection of Children from Sexual Offences (POCSO) Act, 2012, but she cannot be the victim of rape under the IPC because the IPC does not classify such an assault as rape<sup>30</sup>."

In the case of "*Queen Empress v. Haree Mythee*<sup>31</sup>" the court noted that the laws concerning rape between wife and husband do not apply beyond the age of 15 years in cases of married women. This case examined the past legal rulings on the infliction of damages by husband on his wife. In "*Emperor v. Shahu Mehrab*<sup>32</sup>", the husband was found guilty under IPC Section 304A<sup>33</sup> of killing his young wife via careless or reckless sex with her. In "*Sree Kumar v. Pearly Karun*<sup>34</sup>" case held that if the wife is not residing apart from her husband pursuant to a judgment of

---

<sup>27</sup> Indian Penal Code 1860 § 375.

<sup>28</sup> Independent Thought vs Union of India (2017) 10 SCC 800.

<sup>29</sup> Indian Penal Code 1860 § 375.

<sup>30</sup> Mishra, A. (2018) Law on marital rape – a much needed reform in our legal system - crime - India, Law On Marital Rape – A Much Needed Reform In Our Legal System - Crime - India. S&A Law Offices. Available at: <https://www.mondaq.com/india/crime/691482/law-on-marital-rape-a-much-needed-reform-in-our-legal-system>.

<sup>31</sup> Queen Empress v. Haree Mythee, (1891) ILR 18 Cal 49.

<sup>32</sup> Emperor v. Shahu Mehrab, 1917 SCC OnLine Sind JC 7 : AIR 1917 Sind 42 (1).

<sup>33</sup> Indian Penal Code 1860 § 304A.

<sup>34</sup> Sreekumar v. Pearly Karun, 1998 SCC OnLine Ker 353 : (1999).

separation, an offense under Section 376A<sup>35</sup> IPC would not be committed even in case she is exposed to sex by her spouse unwillingly<sup>36</sup>.

### **CONSTITUTIONAL SAFEGUARDS AGAINST MARITAL RAPE**

Rape constitutes a serious breach of a person's individual freedom and right to life in addition to being a violent act against women. Due to the connection between the victim and the criminal, nothing changes. Married women are denied their fundamental equality rights, including the right to hold their husbands accountable for crimes against their inherent dignity, sexual autonomy, and personal preferences. The exception only strengthens patriarchal ideals of women being owned and subjugated by their husbands under the guise of defending the institution of marriage.

As per **Article 14**<sup>37</sup> of the Constitution of India, "the State must not deny to any person within the territory of India equality before the law or the equal protection of the laws." The marital rape exception, which is codified in clause 2 of section 375<sup>38</sup>, appears to be a violation of it. The exemption of marital rape draws a clear line between unmarried and married women, thus asserting two unique sets of defence: unmarried women are protected from rape by all males, whereas married women are not protected from being raped by their spouses. The exception breaches article 14 by not protecting married women against rape and sexual assault in the same way that it protects non-married women since the distinction in treatment between the two groups of women cannot be justified by the intention of the provision ("*State of West Bengal v. Anwar Ali Sarkar, 1952; Ajay Hasia v. Khalid Mujib, 1981; Gupta & Gupta, 2013*<sup>39</sup>"). Since the classification is discriminatory, its rational connection to the State's chosen methods is irrelevant and fails to pass the equality test. The primary goal of section 375 is to safeguard women from sexual assaults, besides holding those who engage in such acts accountable. However, exception 2 exempts such crime from punishment in case it is practiced by a man against his legally wedded wife, which violates the section's goal.

---

<sup>35</sup> Indian Penal Code 1860 § 376A.

<sup>36</sup> Indian Penal Code 1860 § 376 A.

<sup>37</sup> INDIA CONST. art. 14.

<sup>38</sup> Indian Penal Code 1860 § 375.

<sup>39</sup> *State of West Bengal v. Anwar Ali Sarkar* ([1952] S.C.R. 284), *Ajay Hasia v. Khalid Mujib* 1981. AIR 487, *Gupta & Gupta* (1995) 111 PLR 411.

The right to personal freedom and life is assured in **Article 21**<sup>40</sup> of the Constitution. Despite being expressed negatively, this article grants every person the fundamental rights to life and personal liberty. The case of “*Maneka Gandhi v. Union of India*”<sup>41</sup>, has come to represent all rights about the defence of human life and liberty. In “*Vishakha v. State of Rajasthan*”<sup>42</sup>, the Apex Court reiterated quickly that society should have no tolerance for such a crime. Considering the significance of several vital rulings by the nation's highest court, they indicate the need for women to have an unrestricted right to sexual privacy, whether at home, at work, or in any other place. In “*State of Karnataka v. Krishnappa*”<sup>43</sup>, the apex court held that “sexual violence apart from being a dehumanizing act is an unlawful intrusion of the right to privacy and sanctity of a female.” It also argued that rape degrades women and deals a significant blow to their dignity and self-esteem, leaving behind a horrific experience. The Supreme Court ruled in the “*State of Maharashtra v. Madhukar Narayan*”<sup>44</sup> that a woman's sexual privacy is not accessible to everyone by their preferences. Rather it should be recognized as her own personal freedom and decision-making.

The apex court recognized a woman's right to choose her reproductive options as a component of “*personal liberty*” under Article 21 of the Indian Constitution. In “*Suchita Srivastava v. Chandigarh Administration*”<sup>45</sup>, the rights of married and single women were held to be treated equally in the Court's observations. In “*Bhodhisathwa Gautam v. Subhra Chakraborty*”<sup>46</sup>, the Supreme Court ruled that rape violates fundamental human rights and infringes on the most prominent rights of victims. By noting that the sensitive intimacies of a home and marriage should be protected under the right to privacy, the Supreme Court in “*Gobind v. Governmental of M. P*”<sup>47</sup> expanded the scope of the right to include marriage and so set it beyond the scope of state interference. However, it wasn't until “*T. Sareetha v. T. Venkata Subbaiah*”<sup>48</sup> the ruling asserted

---

<sup>40</sup> INDIA CONST. art. 21.

<sup>41</sup> *Maneka Gandhi v. Indira Gandhi*, 1984 SCC OnLine Del 108.

<sup>42</sup> *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241.

<sup>43</sup> *State of Karnataka v. Krishnappa*, 2012 SCC OnLine Kar 1693

<sup>44</sup> *State of Maharashtra v. Madhukar Narayan Mardikar*, (1991) 1 SCC 57.

<sup>45</sup> *Suchita Srivastava v. Chandigarh Administration* (2009) 9 SCC 1.

<sup>46</sup> *Bhodhisathwa Gautam v. Subhra Chakraborty*, 1996 AIR 922 .

<sup>47</sup> *Gobind v. Governmental of M. P*, 1975 AIR 1378.

<sup>48</sup> *T. Sareetha v. T. Venkata Subbaiah* AIR 1983 AP 356.

that an individual's "right to privacy" is an unrestricted one that isn't negated by a marital relationship. Even though it was a high court ruling, Puttuswamy gave its legal standing.

On August 24, the Supreme Court issued its historic nine-judge bench ruling in "*K.S. Puttaswamy v. Union of India*<sup>49</sup>", recognizing the "right to privacy" as a fundamental right. It was also held that privacy protects individual autonomy. According to the autonomy principle, each person is in charge of their own body. In other words, it is entirely up to the individual whether or not they willfully surrender their autonomy to another.

The views of autonomy and privacy are intertwined and dependent on one another to be fully realized. A component of autonomy and privacy constitutes the "right to intimacy", including the right to sexual privacy. The ability for a person to engage in sexual intercourse out of their own will gives rise to the right to intimacy. It is essential to remember that these rights are tied to the individual and cannot be diminished just because that person has chosen to participate in the institution of marriage.

## De Jure Nexus

### PRESENT LEGAL SYSTEM IN INDIA

The Domestic Violence Act of 2005 refers to any sexual abuse in a married or live-in relationship as marital rape under Section 3(a)<sup>50</sup>. The term "sexual abuse" under this definition refers to any sexual behaviour that breaches the dignity of women in any way, whether by abusing, humiliating, degrading, or otherwise. This provides spouses with the right to file a lawsuit. The drawback of this act is that it has more of a civil than a criminal nature. Section 498 of IPC is the most pertinent law in this case. In order to protect women from acts of cruelty, Section 498 was included. In the seminal ruling in "*Shobha Rani v. Madhukar Reddy*<sup>51</sup>", the bench held the term "cruelty" is undefined. Cruelty has been used to indicate any sort of behaviour or behavioral patterns of people in connection to marriage obligations and duties.

---

<sup>49</sup> K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.

<sup>50</sup> Domestic Violence Act, 2005 § 3(a).

<sup>51</sup> Shobha Rani v. Madhukar Reddy, 1988 AIR 121.

## **PROVISIONS FOR CRUELTY**

According to Section 10(1)(b) of IPC, cruelty is one of the grounds for judicial separation<sup>52</sup>. If a person believes it would be detrimental to continue to be married to their spouse, they may file for a judicial separation on the grounds of cruelty. A reason for issuing divorce specified in Section 13(1)(a)<sup>53</sup> is cruelty: A marriage may be dissolved on a petition filed by either the husband or the wife on the justification that the other party treated the petitioner cruelly after such marriage was solemnized.

The recent Kerala High Court decision significantly departs from Indian law regarding marital rape. The Kerala High Court upheld the wife's claim that her husband had raped and tormented her for 12 years on August 7, 2021. In this case, a divorce petition was filed where the court noted that, even though the act of marital rape is not against the law in India, it is a legal basis for divorce under Section 13 of the Hindu Marriage Act and Section 27 of the Special Marriage Act, where cruelty is recognized as a ground for divorce. Thus, in the present case divorce was granted setting aside the petition filed by the husband.

But because (1) there is a significant distinction between rape and cruelty and (2) the provision exclusively addresses cruelty and not rapes, this section falls short in its ability to address marital rape. There is no rigid definition of cruelty, which brings us to our first point. But the exact definition of cruelty depends entirely on the facts of each individual situation. It is still highly challenging and complex to bring in cases of rape under the broad definition of cruelty provided by the courts. Since (1) under cruelty, the severity of the conduct is examined, and the barrier for such is extremely high, but in situations of rape the threshold is too maintained very low, we cannot deal with cases of marital rape with section 498<sup>54</sup>. (2) Section 498 mandates repetition of the same behavior, whereas rape simply requires one occasion. (3) The maximum sentence under Section

---

<sup>52</sup> Indian Penal Code 1860 § 10(1)(b).

<sup>53</sup> Indian Penal Code 1860 § 13(1)(a).

<sup>54</sup> Indian Penal Code 1860 § 498.

498 is 3 years, either with or without a fine; however, the maximum sentence for rape is 7 years or life imprisonment.

### **DELHI COURT SPLIT VERDICT**

The Delhi High Court received the first petitions to make marital rape a crime in 2015. The criminalization of marital rape, according to an affidavit submitted by the central government in the case in 2017, "may destabilize the institution of marriage" besides serving as a provision for harassing spouses. The case hearing got underway in January 2022. In a split verdict regarding the constitutionality of the exception of marital rape, the Delhi High Court issued its ruling in May 2022. Unlike Justice Shakti, who upheld the marital rape exemption by citing Puttaswamy's progressive interpretation of privacy, Justice Hari Shankar did so by citing "unwarranted incursions on the privacy of the marital relationships."

Section 375 of the IPC outlines the behaviors that qualify as rape<sup>55</sup>. However, the clause also specifies two exceptions. It states that medical interventions would not constitute marital rape. There is no legal definition of "marital rape" in India. In the present case, the All-India Democratic Women's Association along with the NGO RIT Foundation and a victim of marital rape filed applications contesting the exemption to Section 375 of the IPC. An NGO by the name of Men Welfare Trust challenged the filed petitions asserting that, since the question of permission cannot be separated from the setting of marriage, sexual activity among a wife and husband cannot be compared with other relationships that are non-marital in nature.

---

<sup>55</sup> Indian Penal Code 1860 § 375.



### CHAPTER III

#### CONCLUSION

Changing the legal provisions and related norms concerning sexual offences particularly in the sphere of marriage which is considered a sacred institution is a delicate task. Such a task would be a major change in a nation like India, a land of diverse religious laws that might clash with novel amendments in the criminal law. But with cases of marital rapes across the nation, there is an alarming need to bring alterations in law with regard to sexual offences by making them eliminating inequities. However, mere declaration of an act or behavior as unlawful will not suffice. The role of police and judiciary needs to play a vital role in spreading awareness about the outcomes of committing such heinous acts. Indian society and government need to comprehend that marital rape is the worst type of family-level violence against women. By condoning rape throughout the marriage, we are continuing to embrace the outdated view of women as property. Under the veil of marital privacy, women's fundamental human rights cannot be abused.

The issue of marital rape is essential to achieving fundamental equivalence for married women who are usually confined to their households and hold no say in legal and public issues. Due to the societal stigma that victims of rape face in India, women are less likely to disclose incidences of rape within their marriage. Such presumptions can be eliminated with widespread education and sharing of social and economic knowledge about women's empowerment. Marital rape is an awful crime that goes undetected in our country and is viewed as very demeaning. Decriminalized provision of marital rape is an illegal conduct that hinders a woman's rights. Marital rape is a heinous act that needs to be recognized as a crime in the nation thus breaking the clutches of victims who have been facing violence by their spouses under the guise of marriage.

## **SUGGESTIONS**

So, after this elaborate and threadbare discussion on each and every aspect of marital rape, one thing is crystal clear marital rape is a necessary social evil that has strongly engulfed India. There is an urgent need to eliminate the same from the country. Following are some of the vital suggestions to achieve that objective:

1. Marital rape needs to be criminalized, and the punishment sentence for marital rape needs to be amended on similar footings as that of rape outlined in the IPC under section 376.
2. Marriage between the parties should not result in a lower sentence.
3. If the husband is found guilty of the alleged marital rape, the woman should be given the choice of a divorce.
4. Special fast-track courts with female judges and female staff must be established all over India to deal with cases of marital rape. Media trials of such cases must not be entertained.
5. Adequate safeguards must be attached to marital rape laws so that they are not misused by anyone. The offender must not be arrested straightaway on the allegation of marital rape by his/her spouse unless a proper investigation is done in this regard, and the family members of the accused must not be harassed in such cases, etc.
6. There must also be a provision of penalty on the accuser in marital rape laws for leveling false charges of marital rape.
7. The provisions of the Indian Evidence Act must apply to marital rape in the same way as they apply to rape.
8. Is it time for parliament to declare marital rape a crime under the Indian penal code.

**REFERENCES**

- Gargi Bhadoria & Amisha Priyadarshi, *Marital Rape: Screams Unheard*, 3 INT'L J.L. MGMT. & HUMAN. 1038 (2020).
- Kanjirathingal, A.S. (2021) *Marital rapes in India: An in-depth analysis*, Law Planet - Legal News, Law Updates & Law Exams Preparation. Available at: <https://lawplanet.in/marital-rapes-in-india-an-in-depth-analysis/> (Accessed: October 30, 2022).
- Mankatalia, P.P. & D. (2022) *Explained: Marital rape in India: The history of the legal exception, Return to frontpage. The Hindu.* Available at: <https://www.thehindu.com/news/national/explained-marital-rape-in-india-the-history-of-the-legal-exception/article65404106.ece>.
- Vaishali Yadav & Madhu Singh, *Marital Rape*, 3 INT'L J.L. MGMT. & HUMAN. 707 (2020).
- Asmit Wadhwa & Swadha Bhargava, *Marital Rape*, 3 *Supremo Amicus* 136 (2018).
- Mishra, A. (2018) *Law on marital rape – a much needed reform in our legal system - crime - India*, Law On Marital Rape – A Much Needed Reform In Our Legal System - Crime - India. S&A Law Offices. Available at: <https://www.mondaq.com/india/crime/691482/law-on-marital-rape-a-much-needed-reform-in-our-legal-system>.
- Russel, D.E.H. (1982) “Rape in Marriage.”
- Yadav, K. (2016) *Marital Rape - “A Socio-Legal Study of Marital Rape, A Stigma over Conjugal Rights”*.
- Vishwanath, A. (2022) *Explained: What is the law on marital rape, and what has the Delhi High Court ruled?*, The Indian Express. Available at: <https://indianexpress.com/article/explained/explained-what-is-the-law-on-marital-rape-and-what-has-the-delhi-high-court-ruled-7912104/>.
- Kushwaha, A. (2021) *Marital Rape: An Undefined Crime in India*.
- Kallakuru, R.R. and Soni, P. (2018) “Criminalization of Marital Rape in India: Understanding its Constitutional, Cultural and Legal Impact,” *NUJS Law Review Journal*, 11(1).
- Bhadoria, A. (2021) *Marital rape : An undefined crime in India*, StuDocu. Available at: <https://www.studocu.com/in/document/svkms-nmims/bachelors-of-business-administration-and-law/marital-rape-an-undefined-crime-in-india/16732089> (Accessed: October 30, 2022).

- *Jenifer, A.K. (2021) "Marital Rape: A Crime Undefined in Indian Legal Scenario," International Journal of Law Management and Humanities, 4(2). Available at: <https://doi.org/http://doi.one/10.1732/IJLMH.26607>.*
- *Khan, M.Z. (2018) Marital Rape and Consent: Analyzing Marital Rape in India .*
- *Singh, S.R. (2018) 'Marital rape an offence under law'. Available at: <https://www.thehindu.com/news/cities/Delhi/marital-rape-an-offence-under-law/article22467416.ece>.*



# De Jure Nexus

LAW JOURNAL