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With this thought, we hereby present to you

# **INDIAN JURISPRUDENCE ON MARITAL RAPE: A CRITICAL ANALYSIS**

AUTHORED BY - HARSHIT GARG

Enrolment No. & Batch: A3221519259& 2019-2024

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I, Harshit Garg pursuing BBA.LLB(H) from Amity Law School, Amity University Uttar Pradesh, do here by declare that dissertation submitted by me is an original work and has not been submitted, either in part or full anywhere else for any purpose, academic or otherwise to the best of my knowledge.

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This is to certify that Mr. Harshit Garg, Enrollment No. A3221519259, Program- BBA.LLB(H), Batch- 2019-2024 of Amity Law School, Noida has completed his/her NTCC for the academic session 2023-2024 under my guidance and submitted the Dissertation titled 'Indian Jurisprudence on Marital Rape: A Critical Analysis'

**His Work is found Satisfactory. Supervisor**

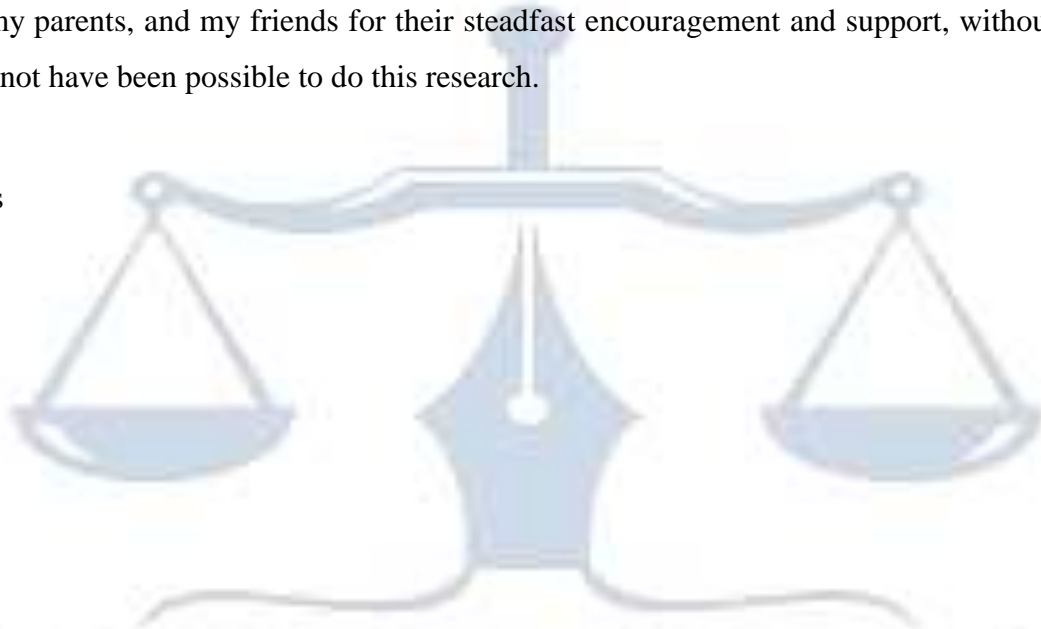
**Amity Law School, Noida**

**Amity University, Uttar Pradesh**

## **ACKNOWLEDGEMENT**

I would like to use this chance to thank our mentor from the bottom of my heart and to show my admiration for her, Ms. Pranjali Sahni for her exceptional guidance, oversight, and continuous assistance during composing this term paper. I was able to complete my term paper with ease because of the useful guidance and suggestions that she sometimes gave. I express my gratitude to the experts at Amity University for the insightful counsel they have provided me with on my area of study. Thank you for your collaboration during my assignment. Lastly, I express my gratitude to God, my parents, and my friends for their steadfast encouragement and support, without which it would not have been possible to do this research.

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## **ABSTRACT**

Marital rapes have increased in India even though different criminal laws are becoming more widely recognized. The previous twenty to thirty years. India needs a specific law regarding marital rape, which ought to be recognized in conjunction with global standards about this specific matter. Both society and Women now have the legal right to defend their own safety, but if their own spouse, whom she wedded with complete trust, attempts to torment and injure her by forcing them to have sex against her will, since it is ultimately detrimental to his health and well-being being.

There is no basis or relevance for the idea of any type of marriage exemption at the present. The goal of this essay is to make marital rape a crime, and the law ought to acknowledge this because there are various ways to analyze rape. Any coerced sexual activity without the spouse's permission or wife will be equivalent to rape.

This essay also addresses the distinction between marital and sexual rape and provides assessments of studies that compare. This study draws on a number of observations made by Indian courts from periodically in various situations have also been appropriately mentioned. Additionally, the paper sheds information regarding the legal and social aspects of marital rape. The several reasons why marital rape occurs in this its forms, numerous grave repercussions, and suitable remedies to address this severe issue has also been thoroughly addressed.

## CHAPTER-1 INTRODUCTION

We would say, at least on the basis of principles, that marriage in India is a respectful link, a holy partnership where Dharma (responsibility), Artha (property), Kama (sexual desire), and Moksha bring two persons together to make a collaborative effort to seek salvation. When discussing the nature of this connection, we must be truthful. For example, some of us often boast about how low the divorce rate is in our nation and draw parallels between marriages in the West and those in India.

We value marriage so highly in our society that we do not consider it improper when a guy takes advantage of his lawfully wedded wife. However, this is by no means the worst aspect of weddings in our nation! Yes, our nation's laws support the traditional viewpoint and reject the idea that rape in marriage can have just as much of an impact as rape alone. The specific conditions under which a person may be tried for rape are outlined in Section 375 of the Indian Penal Code. Unfortunately, though, if the victim's spouse is the criminal, then no victim is protected by these rules.

Historically, the idea of marital rape has proven to be difficult for our society to comprehend. "How can there be rape if the victims are married?" Even more disheartening are the underlying presumptions. Since slander is thought to be the single and greatest harm that can result from rape, no "respectable man" wishes to wed a victim of rape. So why is a lady whining if she's already married? The fact that even a holy institution like marriage has evolved into a legal justification for men to act out of their animal inclinations and attempt to violate their wives' dignity and self-respect is another really unsettling development. serves as the cornerstone of this precious bond.

Since consent to sex is a matter of personal choice for each individual, it cannot be discussed here at all. In India, there is a horrible crime known as marital rape that has damaged people's faith in marriage. The majority of those affected by this practice's decriminalization are women. Rape reveals the shortcomings of the social institutions designed to give people in a community more security and self-worth. In some cases, these institutions not only failed to shield a person from grave violations of their privacy and autonomy, but they also encouraged them by allowing them to continue or by not declaring them illegal.

Since rape occurs in a private setting immune to governmental intervention, states have frequently either legalized it within marriages or declined to declare it a crime. Marital rape, also known as rape inside marriage, is a worldwide issue that has terrible repercussions on the victims' minds and souls as well as their quality of life. The situation has scarcely improved in India, where marital

rape is still legal, despite the fact that many other countries have either prohibited it completely or removed the exemption for rape committed within a marriage.

In India, the phrase "marital rape," which describes non-consensual sexual relations committed by a spouse, is extremely divisive. India is one of the few nations where marital rape is not specifically criminalized, despite the increasing acknowledgment of this type of violence around the world. This has given rise to a contentious and sometimes convoluted discussion. The goal of this article is to present a thorough analysis of the idea of marital rape in India, the laws that are now in place, the arguments for change, and any possible repercussions of such change.



Unspoken in the hallways of Indian homes, marital rape is a terrible reality that many women must deal with on a daily basis. It is depressing that there is no legal recognition for this issue, and the silence surrounding it is deafening. The purpose of this article is to examine the psychological effects, societal perceptions, and pressing need for comprehensive legislative reform in order to gain a greater understanding of the hidden dimensions of marital rape in India.

When one spouse has sexual relations with the other without the other's consent, it is referred to as marital rape. This is a type of sexual abuse and domestic violence. It can take many different forms, such as physical abuse, threats, or situations in which the victim is powerless to provide permission. Due to societal standards, stigma, and the judicial system's refusal to acknowledge it as a crime, marital rape continues to be one of the most common types of domestic abuse, despite its prevalence. The two foundations that support a marriage—consent and trust—are violated in cases of marital rape. It causes severe psychological and bodily harm to the victim and destroys the sacredness of marriage.

Only fifty-two nations currently have laws that recognize marital rape as a criminal offense. Legal authorities and society do not consider marital rape to be a crime in many parts of the world, including India. Even in nations where rape is officially recognized as a crime and carries penalties, the implementation of the law is suspended in cases where the victim and the offender are married. It's commonly referred to as the "marital rape exception clause." There are four main defenses put forth in each of these jurisdictions for not acknowledging marital rape.

Owing to progress made in the area of gender equality, the first two arguments are no longer applicable. The first rationale originated from the notion that a woman is a husband's subordinate. As chattel, or property owned by their husbands, women had no rights within the marriage. It would be inconceivable to imagine a husband abusing his wife in such a situation because he was her master and had control over her body. There was also the unities hypothesis to support this rationale.

This thesis was based on the notion that a woman's identity became integrated with her husband's after marriage. As a result, the married woman was not granted an individual personality under the law. This is related to the earlier defense that viewed women as the husband's property. But following the feminist revolution and the 1970s, these arguments were no longer at the forefront of the movement to keep marital rape out of the penal code.

This resulted from the recognition of women as equal citizens alongside males. Rather, the



explanations have evolved into more complex hypotheses. One such defense is the "implied consent" doctrine. When a man and a woman enter the institution of marriage, there is assumed to be an unquestionable consent. Consent to engage in sexual activity is regarded as the defining component of marriage, which is regarded as a civil contract. The fourth and most recent argument is that criminal law shouldn't have any bearing on a husband and wife's marital status.



## CHAPTER-2

### DEFINITIONS AND LEGAL STATUS OF MARTIAL RAPE

"Marriage is for women the commonest mode of livelihood, and the total amount of undesired sex endured by women is probably greater in marriage than in prostitution," Nobel laureate Bertrand Russell stated in his 1929 book *Marriage and Morals*. Take this ignorant, jobless person and marry them off in prearranged arrangements. It is deemed rape when a woman is forced into sexual relations. This is a recognized crime for which the Indian Penal Code contains a punishment section. Nonetheless, in India, it is not illegal for a husband to force his wife into having sex without her consent. That is to say, marital rape, or marital rape in India, is not considered a crime.

The central government has stated that criminalizing marital rape will endanger the institution of marriage and has refuted this claim. As a matter of fact, the Delhi High Court is considering cases aimed at making marital rape a crime. The central government was urged by the court to provide its perspective on this matter. The Central Government responded by filing an affidavit declaring that the institution of marriage would be endangered if marital rape were deemed a criminal charge. This might catch on and become a common way for wives to be harassed. According to the central government, marital rape is illegal in many western nations. However, this does not mean that India should adopt it without question.

The Center added that all the issues, including poverty, women's economic status, and education, would need to be taken into consideration before criminalizing marital rape. In a 2017 ruling, the Supreme Court declared that "rape committed within a marital relationship will not be counted as an offence."

At that time, Independent Thought, a volunteer organization, filed a petition to make marital rape a crime. The petition was being heard by a bench consisting of Justice Madan B Lokur and Justice Deepak Gupta in the Supreme Court. The central government has declared its support for proviso (exception) 2 of section 375 of the IPC even back then. The protection of the minor wife's dignity and the husband's dignity in their marriage is provided under Section 375 Exception 2. Thus, the question that has to be answered is: What distinguishes "rape" from "marital rape," and what role does the institution of marriage play in it?

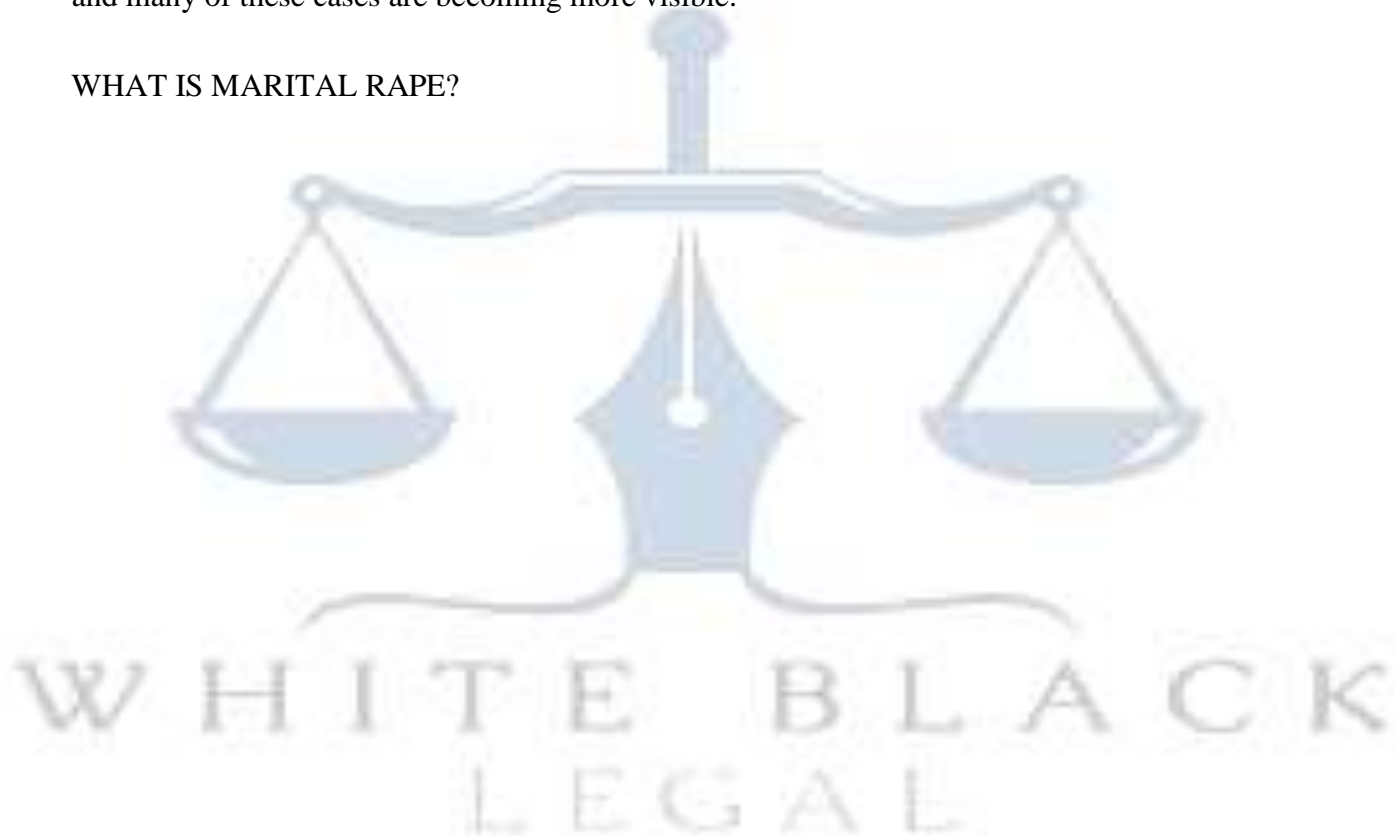
In a marital rape case, it is considered rape if the husband defies his wife's wishes and enters into a romantic relationship. This is not what we are stating, yet the Kerala High Court made this ruling.

The court defined marital rape as using a wife's body as one's own and engaging in sexual activity without her will. In a significant ruling, the Kerala High Court declared that marital rape is a solid basis for filing for divorce. Despite the fact that marital rape is not punishable in India, the court claims that it might nonetheless serve as grounds for divorce.

The High Court maintained the Family Court's ruling even though it denied the husband's application.

The High Court really noted this when it denied two appeals filed by someone contesting a family court's divorce ruling. This decision was made at a time when marital rape is a topic of discussion and many of these cases are becoming more visible.

WHAT IS MARITAL RAPE?



In short, having a connection against the wife's will is considered marital rape even though it is not considered a crime. On the other hand, a United Nations report claims that India accounts for around 75% of all married rape cases that occur there annually. "Such conduct cannot be punished, but it will amount to physical and mental cruelty," the court declared.

The woman in this scenario is exhibiting excesses." However, some think it might be a useful tool for wives to torment their husbands. Then, the question of what distinguishes "rape" from "marital rape" and how the institution of marriage relates to it emerges.

Domestic Violence Act-2005:

The Indian Parliament approved the Protection of Women from Domestic Violence Act, 2005. Its mission is to protect women from domestic abuse at home. The Act became operative on October 26, 2006. This statute defines sexual abuse that takes place within the home. which encompasses a wide range of abuse and violence as domestic violence. These also include forced physical relationships and sexual abuse like rape. What is stated in the Hindu Marriage Act? The goal of the Domestic Violence Act, which was introduced in 2005, is to shield women from domestic sexual abuse. Women are shielded from domestic sexual abuse by this law. The Hindu Marriage Act lays out a number of obligations that husband and wife have to one another. include the freedom to form partnerships. Legally speaking, it is considered cruelty to refuse to engage in physical relationships; for this reason, divorce may be requested.

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## **CHAPTER-3   TYPES OF MARTIAL**

### **RAPE**

State of Gujarat v. Nimeshbhai Bharatbhai Desai, 2018 SCC Online Gujarat 732,

The Court considered whether Section 376 of the IPC would consider forcing a husband to have oral sex with his wife to constitute rape. The Hon'ble Court addressed three prevalent forms of marital rapes in this case that occur in society:

- i) Battering Rape: This kind of marital rape involves women being subjected to various forms of physical and sexual abuse inside the relationship. There are instances where the rape occurs after a physically abusive incident in which the husband seeks to make amends by pressuring his wife to have sex against her will, or in which the wife is beaten during the sexual abuse. The victims typically fit into this particular category.
- ii) Force-only rape: Husbands employ only the necessary amount of force to pressurize their women in this type of marital rape. While abuse may not be a characteristic in such situations, women who refuse sexual relations are typically the targets of such attacks.
- iii) Obsessive Rape: Most often, these attacks are violent in nature and entail cruel torture and/or deviant sexual practices. Sadistic rape is another term for this kind of crime. It was felt that new sexual assault laws were necessary. The previous legislation that was in place failed to identify and categorize the many forms of sexual assault. The Supreme Court of India acknowledged the shortcomings in the rape law in Sakshi v. Union of India and recommended that the legislature amend the statute. Following the ratification of the criminal law reform bill, rape was reclassified as one of the most heinous crimes of 2013. The parliament attempted to expand the definition of rape by amending the legislation to include oral and nonverbal activities.

## **CHAPTER-4**

### **STATUS OF MARTIAL RAPE IN INDIA**

There was no change in the National Family Health Survey (NFHS) of 2015–16, as data indicated that 99.1% of cases of sexual assault go unreported. According to a data analysis, 99.1% of incidences of sexual assault are thought to go unreported, and Indian women are 17 times more likely than other women to experience sexual violence from their husbands. Of the 80,000 women surveyed for the National Family Health Survey, 93% reported experiencing sexual abuse at the hands of their present or former spouses. The majority of people have a negative perception of "marital rape" despite the numbers. The Verma committee, which was established to reinforce sexual harassment regulations following the Nirbhaya case, noted that the presence of consent should be the primary focus and that the victim-perpetrator relationship is not significant.

According to a 2011 International Men and Gender Equality Survey, one in five Indian men forced their spouses to engage in sexual activity.

As per the United Nations Population Fund Survey conducted in 2000. Between the ages of 15 and 49, over two thirds of married Indian women said that their husbands had physically abused them or coerced them into having sex.

An additional research carried out by the non-governmental organization Joint Women's Program in New Delhi revealed that one in seven Indian married women had experienced at least one rape at the hands of their spouse. Because these rapes are not considered crimes by the law, women are unable to report them.

According to a research conducted by the International Institute of Population Sciences, 16 percent of women in Jaipur, 23 percent in Bhubaneswar, and 26 percent of women in Pune frequently have sex with their husbands against their choice. Alcohol usage and sexual abuse were revealed to be directly related by the study. According to 5% of the women polled, their husbands frequently forced them to have sex while they were drunk.

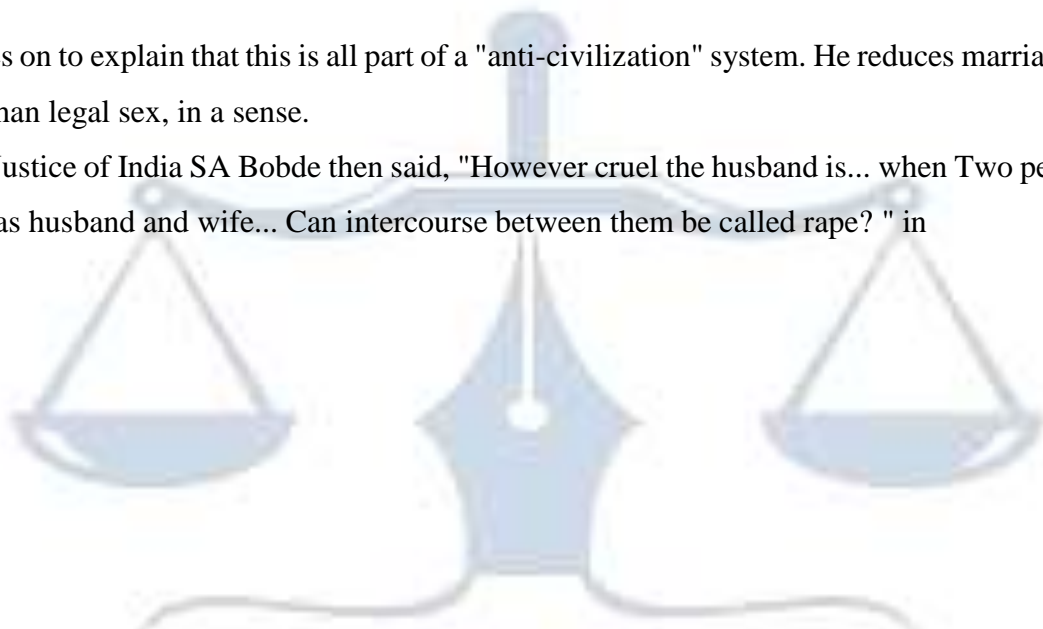
Many nations have made forced sex by a husband in a married relationship illegal in the past few decades. In the Declaration on Violence Against Women, the UN High Commissioner for Human

Rights identified marital rape as a human rights violation.

According to a United Nations report, 34 nations have classified marital rape as a distinct crime, out of the 104 that have made it a criminal offense. In contrast, it is regarded as a crime in the rest of the nation along with other rape cases. In India, marital rape is not a criminal offense. But the Justice Verma Committee, established following the horrific Nirbhaya Rape Case in Delhi in 2012, had suggested eliminating the Section 375 of the IPC exemption for marital rape. Nageswara Rao, the former director of the Central Bureau of Investigation (CBI), asserted, "Does marriage not damage the family if the husband gets imprisoned for having sex against the wishes of his wife? breaks their marriage and ruins their children?"

He goes on to explain that this is all part of a "anti-civilization" system. He reduces marriage to little more than legal sex, in a sense.

Chief Justice of India SA Bobde then said, "However cruel the husband is... when Two people [are] living as husband and wife... Can intercourse between them be called rape? " in

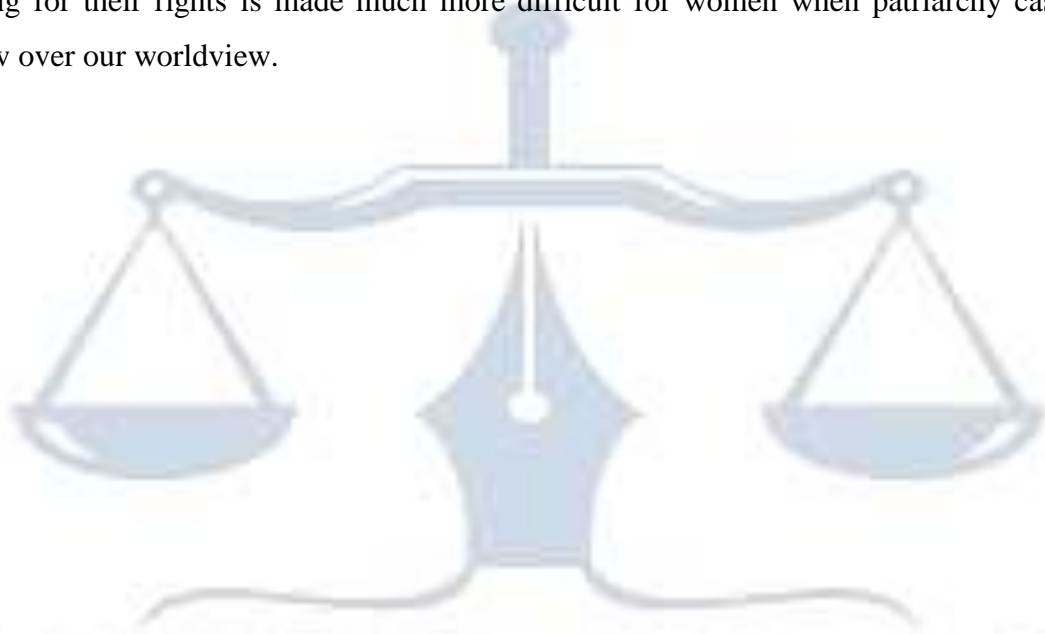


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March 2021 in response to a petition filed by a man accused of rape by a woman who had dated him for two years.

Indeed, the Chief Justice of India questioned a government worker last year about marrying a lady who had accused him of raping her multiple times. This appears to be an attempt to legitimize rape while showing utter contempt for the suffering the victim has endured.

It restates that the woman's honor is valued more than her permission in cases of rape. Even worse, the Indian Bar Council endorsed the statement. According to the Karnataka High Court, refusing to have sex is grounds for divorce since it violates certain provisions of the Hindu Marriage Act. Fighting for their rights is made much more difficult for women when patriarchy casts a long shadow over our worldview.



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## **CHAPTER-5**

### **CAUSES AND SOCIAL ISSUES RELATED TO MARTIAL RAPE**

Due to a lack of resources, marital rape has not received much attention up to this point. It is important to address the problems of women's empowerment and low literacy rates, particularly in nations like India. The persistence of social standards that have shaped women's minds for generations has also played a significant role in the failure of women to identify marital rape as rape. Women have a tendency to believe that it is their duty to obey their husbands' orders and satiate their sexual cravings in order to be the perfect wife.

Religious writings state that it is appropriate to have sex with the husband's wife in order to uphold the hierarchy within the family.

Regarding the causes of marital rape, a number of renowned psychotherapists and sociologists assert that "the husband tries to prove himself as more powerful and dominant than the woman when the discord between husband and wife increases." to degrade his spouse "demolishes her seclusion and demonstrates his power over her.

He degrades the lady he holds most holy by doing this. Rape is a horrible act in and of itself; it frequently entails the victim being insulted and physically assaulted. The process of committing and stripping a woman is complex, making marital rape especially degrading for the victim.

The male is attempting to assert that she is weaker than him and that she is under his control by acting in this way." Prominent psychotherapists state that a woman may occasionally reject her spouse and not be interested in sex for reasons that are only apparent to herself. In general, men oversex more than women do. The man views being refused sex as a slight to his manhood as a result.

Social Concerns:

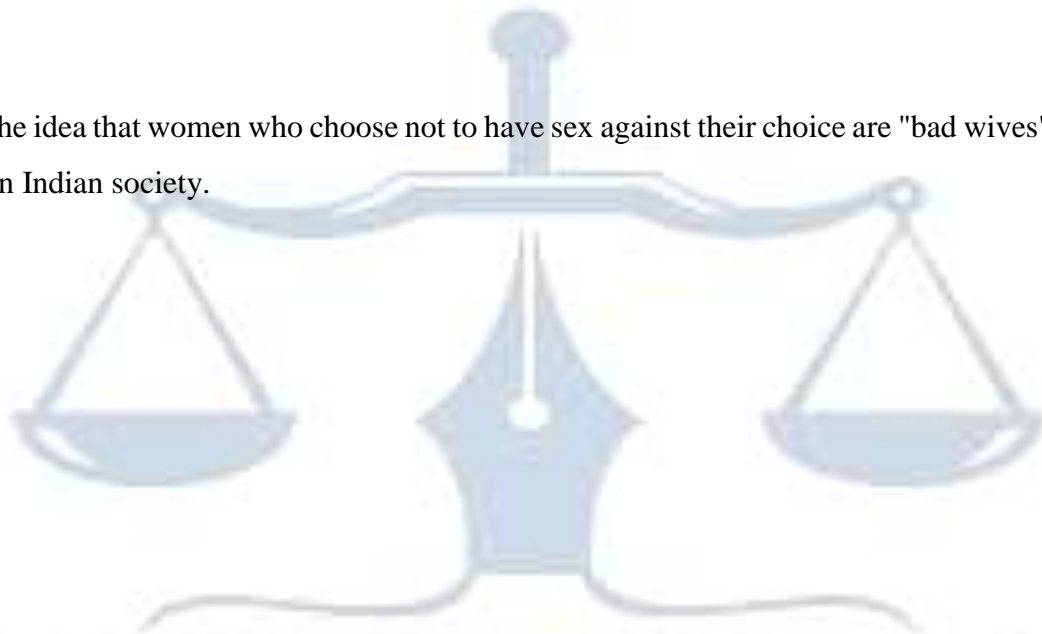
- i) The term "marital rape" is contentious and confuses marriage as socially acceptable sex with rape, which is generally seen as a sexual offense. Generally speaking, women are less likely to disclose sexual assaults by their spouses because they do not view such acts as rape (in contrast to

acts of sexual attack by strangers or acquaintances).

ii). There are several common misconceptions regarding women and sex, such as the idea that they prefer forced sex and that they mean "yes" when they say "no" to it. In Indian culture, a wife is expected to have sex with her husband, and males are encouraged to do so by both mainstream and pornographic media. And it gives them the impression that a woman's objection should always be disregarded.

iii). In Indian society, the victim-blaming game is very prevalent. But also deceive women into thinking that they could have "sent the wrong signals," holding them responsible for unwelcome sex.

iv). The idea that women who choose not to have sex against their choice are "bad wives" is widely held in Indian society.



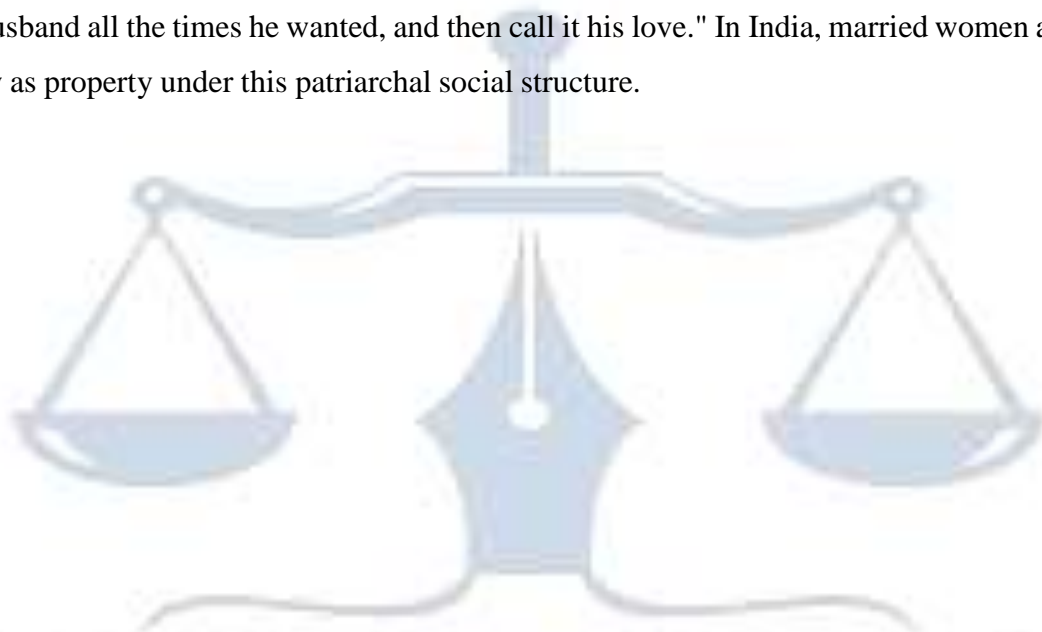
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v). Researchers discovered that distinguishing between various forms of coercion in a husband-wife relationship and the encouragement of marital rape is helpful.

vi). Scholars propose that the concept of marital rape should be restricted to instances in which physical force is used or threatens to be used without the agreement of the victim, even though they acknowledge that other forms of compulsion play a significant role in politicizing the issue.

vii) Patriarchal society as a concept: It has been said that "A good husband makes a good wife," but we Indians have interpreted this slightly differently, saying that "a good wife is someone who can show his masculinity over his better-half" and that "a good husband is someone who satisfies her husband all the times he wanted, and then call it his love." In India, married women are viewed solely as property under this patriarchal social structure.



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## **CHAPTER-6**

### **CONSEQUENCES NAD EFFECTS OF MARTIAL RAPE**

What consequences does marital rape have down the road? The signs and symptoms of marital rape are all excruciating and unpleasant. Among them were:

1. Clinical depression
2. Fear
3. Anxiety
4. Restlessness
5. Lack of confidence
6. Lack of self esteem
7. Hate yourself too much

While the above worries might not be entirely accurate, the following consequences need to be carefully thought through. An individual who has experienced marital rape possesses many resources to assist her in pursuing justice. A married rape victim has to live without legal protection. If this keeps up, a sizable section of the populace will remain dissatisfied, and no amount of government action or policies to empower them will work because, as we've seen, the issue starts behind closed doors.

Prominent medical professionals express gloomy opinions regarding marital rape, saying that "marital rape cannot be stopped 100% of the time. despite the fact that numerous laws are designed to safeguard victims and penalize offenders. The perpetrators, husband and wife, were observed for their behavior, early years, and particularly for their interactions with their parents.

Try to increase their confidence gradually, and if necessary, use sex therapy.

The Criminal Penal Code and Evidence Act was amended in 2013 with the primary objective of expanding women's access to the legal system through much-needed changes to the definition of

rape.

To prevent women from becoming victims again when they commit rape after being raped, the Evidence Act and the Criminal Penal Code have been modified. The modifications intend to enhance the investigation and testing of rape cases and do away with needless medical examinations and queries posed to women during cross-examination. Legislators and governments have done nothing to address the issue of marital rape despite legal modifications. Discrimination against women is against the principles of equality of rights and human dignity, according to the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), to which India is a signatory.



## **CHAPTER-7**

### **LACK OF CRIMINALISATION OF MARITAL RAPE AS A FUNDAMENTAL RIGHTS' VIOLATION.**

One of the arguments against making marital rape a crime—that it would unduly interfere with the institution of marriage—was demonstrated in the previous section. We view marriage as a holy institution that serves as the cornerstone of our society. Since it is seen as extremely private, the State is reluctant to intrude on this delicate area. This is done to protect residents' privacy, which would be compromised by government intervention. Therefore, no two people are forced to get married or get divorced by the state.

But it can be troublesome when the State refuses to even access this private area under certain circumstances. For instance, the State would have to intrude on a woman's private life in order to criminalize the wife's exposure to cruelty in her marriage.<sup>54</sup> Should the State fail to take such action, the woman will be without legal recourse.

Therefore, it is imperative that the State occasionally intrude into this private domain. In accordance with Articles 14 and 21 of the Indian Constitution, marital rape is also a violation of a woman's fundamental rights. In this section, we contend that a woman's fundamental rights are violated by the fact that marital rape is not criminalized. Even if the crime of marital rape takes place in a married couple's private realm, it is the State's duty to pierce this private realm. In the event that a woman is sexually assaulted by her spouse and the State chooses not to intervene, she will have no recourse.

Nonetheless, an examination of court rulings concerning issues customarily considered to fall inside the private domain of matrimony and family reveals the judiciary's reluctance to impose fundamental rights in this domain. The judiciary has established an imaginary private domain in which it declines to enshrine and apply fundamental rights. This has had the consequence of disproving the claim that marital rape constitutes a violation of fundamental rights. This is due to the fact that fundamental rights have no place in the imagined realm of marriage.

Therefore, we shall first refute this establishment of a private domain in which constitutional rights are impermissible in this Part. The formation of the private sector, where fundamental rights are unenforceable, will be covered first in Part A. We will examine the reasons behind this conceptualization of the private sphere's flaws in Part B. In addition, we will illustrate in Part C how Article 14 of the Constitution is violated by the exception language found in §375 of the IPC.



## A. THE CREATION OF A PRIVATE SPHERE WHERE FUNDAMENTAL RIGHTS CANNOT BE ENFORCED

Analyzing the court's resistance to addressing fundamental rights in the private realm requires following the development of rulings pertaining to "restitution of conjugal rights" (or "RCR"). This is due to the fact that the arguments surrounding RCR and constitutional law are comparable to those surrounding marital rape. Though it is no longer in effect there, the RCR is a remedy that has its roots in English law.

It's a legal tool that allows a judge to compel a married couple to live together or to restore one spouse's marital rights against the other. This is covered in India in Section 9 of the Hindu Marriage Act (Hindu Marriage Act, 1956). The main idea of the section is that the court may issue an RCR ruling if a husband or wife does not reside with the other spouse "without reasonable excuse." Women have been reported to suffer when RCR is implemented. Women are frequently pressured to go back into relationships with their husbands. The main argument here is whether the State can force a woman to have sex with her husband, much to the dispute over marital rape.

High Courts and the Supreme Court have had to deal with challenges to the question's constitutionality on a regular basis. In *T. Sareetha v. T. Venkata Subbaiah* (also known as "Sareetha"), the Andhra Pradesh High Court rendered the first decision invalidating the constitutionality of the RCR as stated in the Hindu Marriage Act. The Court was presented with the claim that Articles 14, 19, and 21 of the Constitution were infringed by the Hindu Marriage Act's §9. The Court accepted this line of reasoning. The RCR remedy, according to the Court, was unconstitutional since it gave the State the woman's option over whether or not to engage in sexual activity.

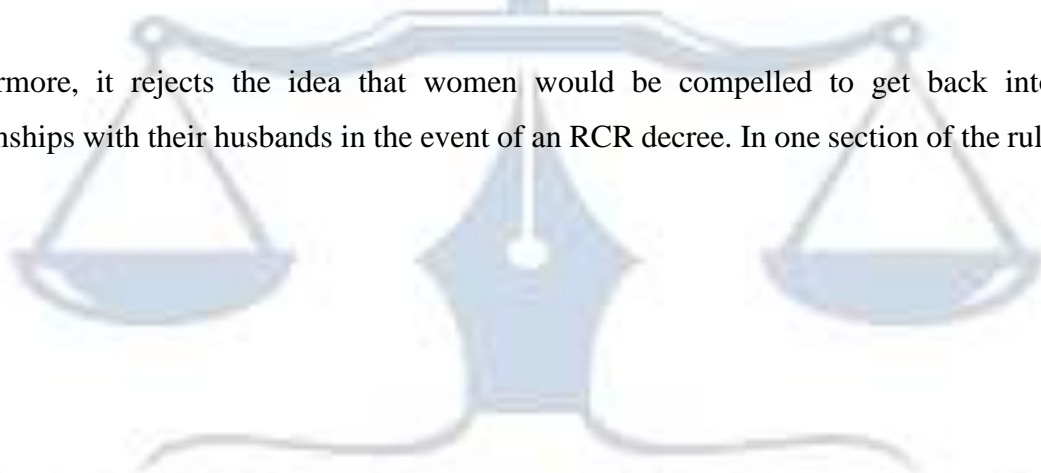
Since it violates a person's right to personal autonomy, this would be against Article 21 of the Constitution.

Furthermore, the Court acknowledged that this rule would harm women and noted how



important sexual autonomy is to women. "No positive act of sex can be forced upon the unwilling persons, because nothing can conceivably be more degrading to human dignity and monstrous to human spirit than to subject a person by the long arm of the law to a positive sex Act," the Court also agrees in this passage. It's interesting to notice that the Court acknowledges the possibility of coerced sex even in marriage, which is quite uncommon for it to do. The Court did rule, however, that the ideas of the "marital sphere" and RCR are incompatible. Physical injuries to the vaginal and anal areas, including lacerations, bruising. A petition contesting the validity of the RCR was also presented to the Delhi High Court in the case of Harmander Singh Choudhry v. Harvender Kaur, or "Harvender Kaur." In contrast to Sareetha, the Court maintained that Section 9 of the Hindu Marriage Act is valid. In this instance, the court ruled that the RCR's goal was to "protect the institution of marriage," not to force someone to remain with their spouse. 1.

Furthermore, it rejects the idea that women would be compelled to get back into married relationships with their husbands in the event of an RCR decree. In one section of the ruling,



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the Court expresses its progressive views by noting that marriage covers more types of connections than only sexual ones. Again, though, the Court ignores the likelihood that forced cohabitation increases the likelihood that forced sexual interactions will result for these women, citing this "progressive" interpretation of marriage. The Court ignored this type of mistreatment that women would endure by upholding the notion of "marital privacy."

## **B. CRITIQUING THE CREATION OF A PRIVATE SPHERE**

These cases highlight two points of view that are pertinent to the argument that marital rape does not violate fundamental rights. First, a "marital sphere" is created, an impenetrable domain where constitutional law is non-applicable. This has the effect of making the case that rape violates a woman's fundamental rights invalid in the "marital sphere," despite this being widely accepted.

This is so because marriage is a context in which fundamental rights do not apply. The concept of public and private areas in law has been criticized by feminist philosophy. It was once thought that certain family matters were too private for the law to control. It was believed that the private sphere was exempt from the law and that the law primarily governed public activities.

This, however, is now recognized to be an outdated understanding of the function of the law. In the "Feminist Critique," Frances Olsen makes the case that the idea of specific private places creates a situation in which people who are injured have no legal redress, making it impossible to take legal action against those who hurt.

The claim that constitutional law has no business being within the family unit is unfounded. The Indian Constitution was enacted with the goal of eradicating public-private boundaries by guaranteeing equality and outlawing customs like untouchability even in private settings. This distinction has gradually been lost with the introduction of laws addressing the violence against women in their marriages.

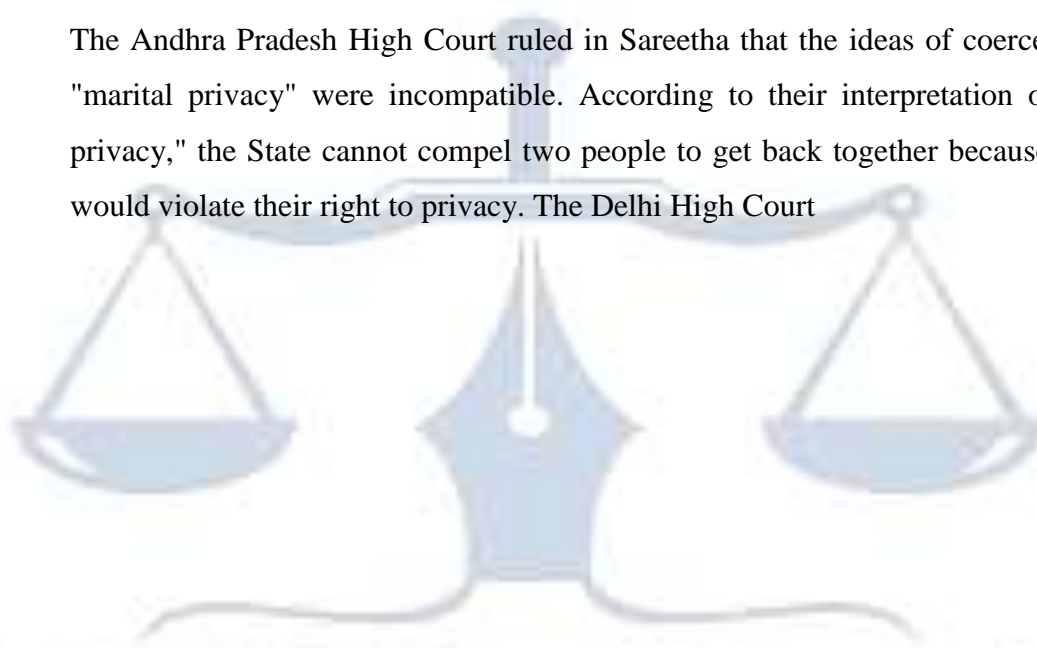
For women who are abused in marriage, there are already several civil and criminal

remedies available to them under the PWDVA, 2005 and §498A of the IPC. This was done to safeguard these women's rights.

Therefore, in the current context, the claim that there is a domain devoid of constitutional rights is no longer valid. It is just used as a cover for some types of marital violence that are uncomfortable for the legislative and the judiciary to accept and address. As we will show later, the exemption clause in §375 of the IPC does not pass the constitutional test, hence we contend that it can be decided based on constitutional law.

### **1. The State's Selective Penetration into the Private Sphere**

The Andhra Pradesh High Court ruled in Sareetha that the ideas of coerced sex and "marital privacy" were incompatible. According to their interpretation of "marital privacy," the State cannot compel two people to get back together because doing so would violate their right to privacy. The Delhi High Court



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interpreted "marital privacy" in Harvender Kaur to indicate that the Constitution does not apply there.

In the Harvender Kaur case, the Court used the phrase "marital privacy" to refer to a private domain that the Court is not allowed to penetrate. This demonstrates the disparities in interpretations of "marital privacy" and the potential for ambiguity when using this word. This is demonstrated by the State's contradictory involvement in this field.

For instance, as previously noted, the "marital sphere" defense is the reason why the court in Harvender Kaur declines to address the infringement of a woman's Article 21 rights when she is under an RCR judgment. However, the State still meddles in the private sexual affairs of two consenting adults despite calls to decriminalise §377 of the IPC. State authorities frequently monitor sexual activity between consenting individuals. In this case, the State enters this imaginary private realm without hesitation.

This is also present in the regulations that govern abortions, where women's privacy is infringed upon and they are constantly harassed in this regard. This suggests that the State is infiltrating this sector selectively.

This idea of the "private sphere" is ill-defined and subject to change at the whim of the government. The State determines the sphere's privacy based on its beliefs while also considering its impenetrability. The State may decide that certain behaviors, such as adultery or sexual relations between consenting adults of the same gender, should be made illegal while refusing to make marital rape a crime since it occurs in a private setting.

## **2. The Need to Move Away from 'Privacy' to 'Individual Autonomy'**

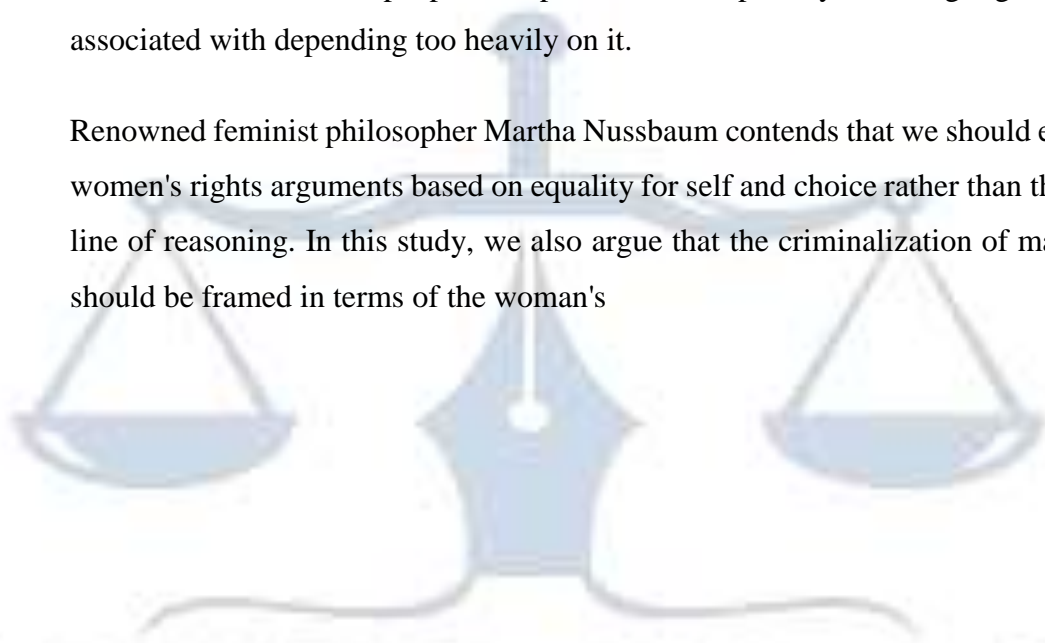
Therefore, even while the privacy argument supports a woman's right to sexual and personal autonomy, we suggest that we move away from depending on it. As was the case in K.S. Puttaswamy v. Union of India, the private sphere can be conceptualized in a progressive way that emphasizes women's rights.

The Court determined that RCR was unlawful in Sareetha as well since it did not align

with "marital privacy." The main point of the ruling, however, is how a woman's personal autonomy is infringed upon when she is forced to remain with her spouse. Consequently, rather than exploring the "marital sphere" viewpoint, the Court in Sareetha ought to have relied only on the concept of human autonomy and liberty to declare §9 of the Hindu Marriage Act invalid.

However, because the term "marital privacy" was used, Harvender Kaur had the opportunity to utilize it in a completely different context, stating that the idea of individual autonomy would not apply in this context. This demonstrates the inconsistencies in how people interpret the term "privacy" and highlights the risks associated with depending too heavily on it.

Renowned feminist philosopher Martha Nussbaum contends that we should emphasize women's rights arguments based on equality for self and choice rather than the privacy line of reasoning. In this study, we also argue that the criminalization of marital rape should be framed in terms of the woman's



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autonomy—both sexual and individual—rather than her right to privacy. Therefore, we have discussed the flaws in the idea that the private sector is exempt from constitutional law in this section. Furthermore, we have illustrated how the discussion ought to shift its focus from the privacy issue to the autonomy argument. After demonstrating that the constitutional legislation is enforceable even in matrimonial unions, we will address Article 14 and how the exemption clause violates it in the following section.

### C. ANALYSING THE EXCEPTION CLAUSE IN LIGHT OF CONSTITUTIONAL

Now that the legal system has demonstrated the errors in the conception of the private domain and the importance of constitutional rights in marriage, our goal in this section is to demonstrate the unconstitutionality of the exception clause. We need to revisit the dispute that arose following *Sareetha and Harvender Kaur* before we try to do the same. The Supreme Court tried to resolve the matter in *Saroj Rani v.*

*Sudarshan Kumar Chadha*<sup>76</sup> in light of these conflicting rulings, and in the end, it maintained the RCR's validity. The Court approved with the *Harvender Kaur* decision.

Upon closer inspection, it differs marginally from the Delhi High Court ruling.

According to the Court's analysis, the RCR does not infringe either Article 14 in this case because its goal is to maintain a marriage. The Court contends that as there is a valid classification, the statute's objective justifies having a distinct provision for married women and that this does not infringe Article 14. Applying this to the discussion of marital rape, one could argue that although the law gives married and single women different rights, this does not mean that the law violates Article 14 because marriage is a legitimate classification.

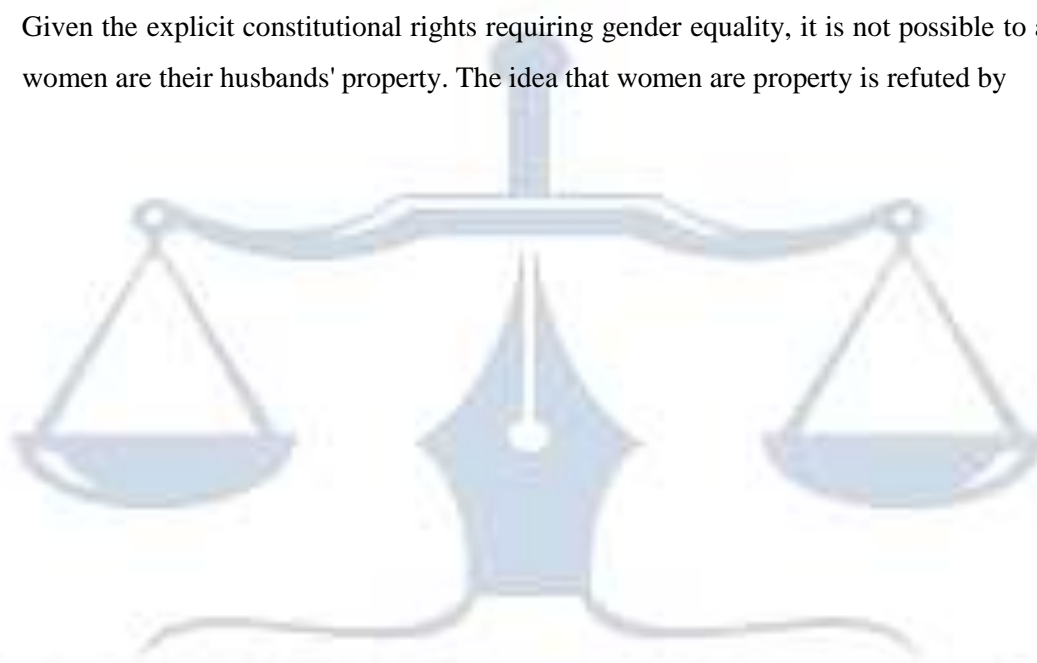
It is crucial to understand that the argument is not that rape in and of itself is not illegal, but rather that marriage meets the requirements set forth in Article 14 of the Constitution for justifiable differentia. Thus, even though rape is against Article 21, "marital" rape is acceptable since it fits within a legitimate category. In order to refute this, we will illustrate how the legal definition of marriage has evolved to include women as equal partners. Using this, we will demonstrate how the evolving definition of marriage prevents the marital rape exception from meeting Article 14. 1 standards.



Over the past few decades, there has been a major evolution in the Indian legal idea of marriage. Currently, marriage is governed by rules unique to each religion; but, if the parties to the marriage agree otherwise, a law that is neutral to religion will apply.<sup>78</sup> The dynamics of the spouse relationship have altered as a result of the codification of marital laws. The traditional conception of women's place in a marriage was to see them as the husband's property from the outset.

If it wasn't property, it was to consider gender norms and see the wife as less than the husband. Nonetheless, the codification has eliminated any distinction in the position of the husband and wife within the marriage. There is no distinction made between the position of the wife and the husband in codified laws like the Hindu, Christian, Parsi, and Special Marriage Act.

Given the explicit constitutional rights requiring gender equality, it is not possible to assume that women are their husbands' property. The idea that women are property is refuted by



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religious scholars and case law, which states that husband and wife have equal standing under Islamic law even when they marry under Islamic personal law.

Significant progress has also been made in women's rights to property and divorce, which only serves to further validate their status as equal partners in marriage. The idea that women are their husbands' property cannot thus be upheld by the law. Given the body of case law and constitutional jurisprudence supporting gender equality, and the Supreme Court's recent recognition of a third gender, an argument advocating for women to be married before men will never be able to meet the requirements of Article 14.

By highlighting the equality of the husband and wife, we also disprove the claim that marriage requires the wife's agreement to sexual activity. The issue with discussions about consent to sexual behavior in marriages is that they frequently see consent into two distinct groups.

First, a sexual connection and marriage are inextricably related. The other is that being married does not imply having a sexual connection. The fact that so many divorce claims are based on sexual connections is proof positive that the idea that marriage and sexual relationships are incompatible cannot stand up in court. Marital status does not, however, entail consent to all sexual acts.

In light of general contract law norms, consent to sexual contacts at any stage of the marriage cannot be upheld, even if we were to visualize sexual interactions as a provision in the marriage contract. A contract that lacks clarity, violates public policy, or is uncertain is void.<sup>83</sup> According to this reasoning, a marriage contract in which the wife agrees to have sex whenever she wants to without taking her body's needs into account will not fail the test of a contract.

The state's desire to defend the institution of marriage for the greater stability of society, on the other hand, is a counterargument. The idea that the harms a broken marriage supposedly causes to society will be much outweighed by the harms done to women is a blatant error in this strategy. Furthermore, it is implied that the State has realized that upholding the institution of marriage cannot be the primary objective given the laws that criminalize cruelty and the PWDVA, 2005.

Furthermore, it is best to avoid using this strategy since it just serves to further the public versus private divide. We have tried to show that there is no justification for treating married and single women differently when it comes to rape through these levels of reasons. The current legal framework's standards under Article 14 call for the law to be non-arbitrary in addition to having a connection to the goal being pursued.<sup>85</sup> Recently, in the case of *Independent Thought v. Union of India* (often referred to as "*Independent Thought*")<sup>86</sup>, the Court partially invalidated the exemption clause found in §375 of the IPC.

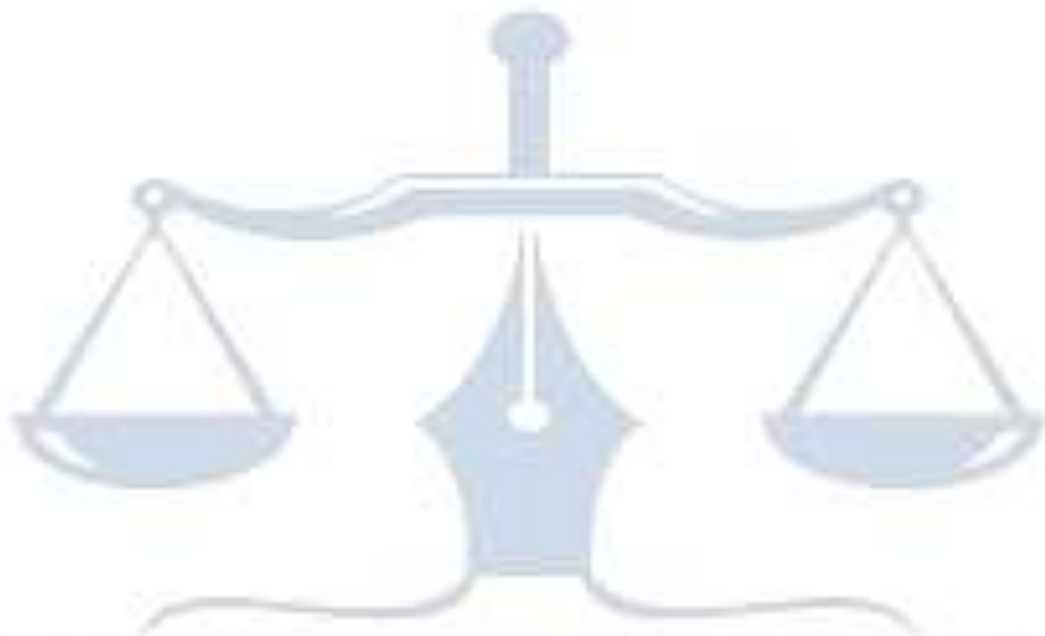
It is prohibited by the Protection of Children from Sexual Offenses Act, 2012 (POCSO) to engage

in sexual activity with a minor who is younger than eighteen. But in the event that a girl is married and between the ages of fifteen and eighteen, this is permitted by the exception clause. The girl was treated differently based on her marital status, according to the court, which was completely unlawful. This was due to the fact that marriage was not a valid classification. While emphasising that the ruling did not apply to adult marital rape, the Court's recognition that women's rights cannot be swallowed by marriage is a positive development.

By using this criterion, we have proven that consent to sexual activity in a marriage is not a prerequisite. Furthermore, it would be arbitrary to keep marital rape legal when there is a fundamental right at risk and other forms of violence have been decriminalized in order to preserve the institution of marriage. As a result, the exemption clause is illegal since it does not pass the Article 14 test.



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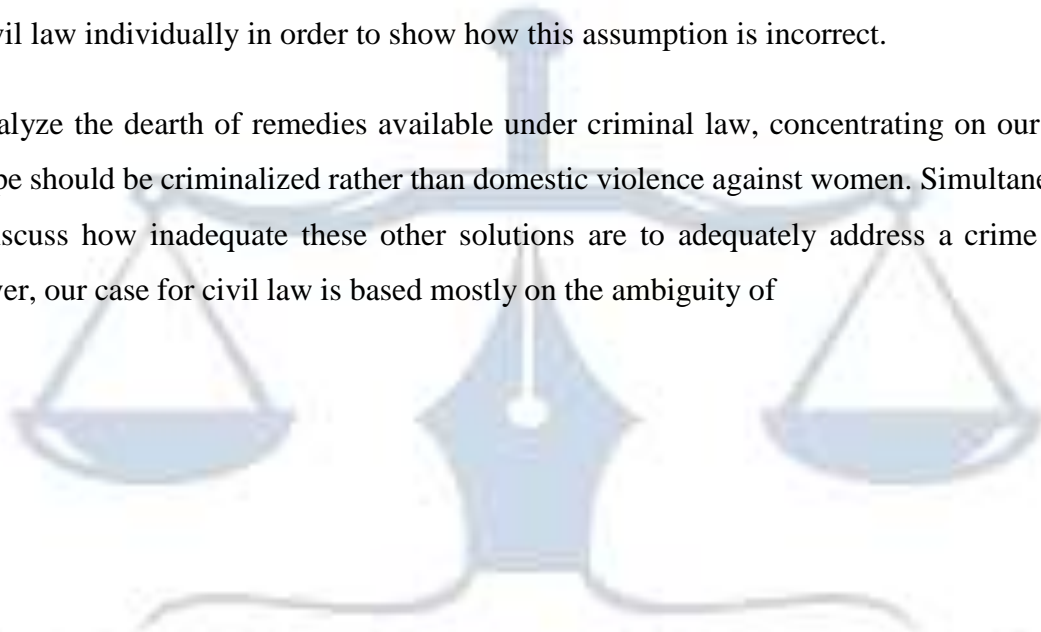
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## **CHAPTER-8**

### **THE REMEDIES THAT EXIST IN LAW TO PROVIDE REDRESS TO VICTIMS OF MARITAL RAPE**

One common response to calls for criminalization, as discussed in Part II, is that there are already sufficient legal remedies. In the study that follows, we will look at the laws pertaining to criminal and civil law individually in order to show how this assumption is incorrect.

We analyze the dearth of remedies available under criminal law, concentrating on our argument that rape should be criminalized rather than domestic violence against women. Simultaneously, we also discuss how inadequate these other solutions are to adequately address a crime like rape. However, our case for civil law is based mostly on the ambiguity of



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the legislation and the underlying principles of family law that run counter to our support for making marital rape a crime.

## A. CRIMINAL LAW

§498A of the IPC is the most pertinent clause that is frequently mentioned as a workable substitute for true criminalization. The IPC was amended to include §498A to address cruelty against women in particular. We contend, however, that this is insufficient for two reasons. Our first justification is that there is a clear distinction between rape and cruelty.

The characteristics and deed of rape set it apart from other brutal crimes. The insufficiency of this provision to address rape situations is the second argument. The significance of acknowledging rape as a distinct criminal offense has long been recognized by feminist literature. Beyond that, the very nature of the crime itself makes rape a unique offense.

It is cruelty, without a doubt, but it is not the same as physical or psychological assault. It is accompanied by intricate power and patriarchal systems. This is further demonstrated by the way that rape is treated in criminal statutes as a separate offense from assault or serious injury. A change in the rape legislation is a sign that women's status in society is improving. Furthermore, there are particular standards in evidence law related to rape.

The type and quantity of evidence that can be presented varies depending on the nature of the offense. Making marital rape a crime has the dual goal of "putting the perpetrator in jail" and pursuing legal action against them for the offense they committed. The discussion of women's rights does not need to be reduced to the topic of where to turn for alternatives to the legal system because the latter is required by the constitution. Practically speaking, it may be the case that a victim of marital rape has other coping methods; but, this is unrelated to the need to make marital rape illegal.

We acknowledge that some feminists contend that calling rape a different kind of cruelty supports the patriarchal notion of a woman's chastity.

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There are three reasons why we depart from this line of reasoning. First, we highlight the difference between seeing a rape victim as impure and criminalizing rape. A number of reasons, such as gender inequity and societal attitudes, lead to the latter rather than the former.

Second, the fact that rape is now considered a specific offense indicates that the offender—rather than the victim—is the one who broke the law. The criminal, even if he happens to be the victim's spouse, bears full responsibility for the crime as the victim had no involvement whatsoever. This is consistent with our third argument, which holds that rape is a different crime from cruelty due to the nature of



the offense being different, as well as the evidence standards that will be covered in more detail later. This distinction between cruelty and rape may not matter much in cases when a woman has been physically raped and abused, but it matters greatly in other situations for the reasons listed below. To begin with, there is no straightjacket definition of cruelty.

The definition of "cruelty" in §498 is provided. But the exact definition of cruelty is factual and will differ from situation to situation. The matrimonial relationship between a husband and wife, their cultural background and temperament, their current health, and their day-to-day interactions are some of the aspects that could be crucial in evaluating cruelty. In addition, mental cruelty differs from person to person based on the level of sensitivity and bravery or fortitude needed to endure it.

Put differently, the determination of whether mental cruelty was proven depends on the specific facts of each case. Although the courts have not provided a precise definition of cruelty in order to maintain its broad connotation, it is nonetheless exceedingly challenging and convoluted to



introduce rape cases under this provision. We make this claim based on our three-pronged reasoning. The first is that there is a very high standard for conviction under cruelty.

It is not sufficient for the accused's actions to be intentionally and grossly unfair to a woman; additionally, the accused's unjust actions must be of a severity that puts the woman in danger of suicide or seriously hurt, endangering her life, limb, or health.<sup>95</sup> This was said in a case where the husband used to compel his wife to have sex and would stick his fingers and a stick in her vagina, causing excruciating pain and bleeding that rendered the victim comatose.

The accused was not charged under §498 by the court, even in this instance. This builds on what we said before about the unique needs for rape evidence, which is especially relevant in situations involving marital rape. The evidence-related specific subtleties included in §375 are absent from §498A. Second, the conduct must be repeated or sustained over an extended length of time in order to be found guilty under §498A.

Consequently, if forced sexual relations is committed once or twice, there is no way to convict. It needs to be continued for an extended amount of time, which is obviously detrimental. This also connects to a real-world issue: the worry that §498A may be abused. The Supreme Court has also been informed of the notion that §498A has been utilized to harass men. Recently, the Court issued directives to stop the misuse of §498A in *Rajesh Sharma v. State of U.P.* This rhetoric from the highest court reflects the mindset that permeates the State's many branches and will further complicate the prosecution of cases involving marital rape.<sup>99</sup> Third, §498A only allows for a maximum sentence of three years, with or without a fine.

For rape, life in prison is the harshest penalty. This significant disparity in the penalty once more demonstrates how the idea of cruelty is completely inadequate to address the crime of marital rape. It's interesting to note that violent sexual encounters have been made illegal under IPC §377.

Although the act does not criminalize the offense, we must commend the judiciary's attempt to punish the offender rather than dismissing the case. However, given the ongoing efforts to repeal the section in light of the rights violations of sexual minorities, using §377 is not a practical solution. The problems caused by the public-private dichotomy, lack of engagement with fundamental rights as explained in Part II of this paper, are common to the LGBTIQ movement as well. The usage of §377 will only reinforce these notions. Therefore, usage of §377 will be detrimental to our advocacy as well.

## **B. CIVIL LAW**

The civil law remedies are a contentious topic when talking about gender-based violence. The

idea that concentrating on civil remedies will simply strengthen the public-private divide since it reduces gendered violence to an issue involving the perpetrator and victim rather than an act of violence against the State is arguably one of the main causes of this.

However, it is also reasonable to downplay the significance of civil remedies because they give women the agency to select their own course of action, enabling them to "do something" as opposed to depending on the criminal justice system to act appropriately and quickly. This should assist women in escaping private structures.

But when we place this conversation in the context of marital abuse, it usually becomes more understandable. This is so because marriage is regulated by family law and involves a connection between two people. In these situations, it is crucial to have a civil remedy that corresponds with the criminal remedy for the specific act, as well as to ensure that the criminal and civil remedies coexist peacefully.

Therefore, even though we advocate for criminalization all the time, we doubt its effectiveness if family law does not take this into account. In the analysis that follows, we primarily address the issue of how family law is currently ill-equipped to address the concept of marital rape. The priority placed on sexual connections throughout family law is the main issue that unites us about its construction. For instance, even though the RCR was repealed in the UK, it is still in effect in India, as was covered in Part II. Men generally utilize this to coerce their spouses back into having a conjugal relationship.

Notably, "cruelty" is recognized as a basis for divorce in all personal religion laws. But "sexual violence" isn't mentioned expressly as a reason for divorce. This results in a legally difficult situation. As previously said, the predominant theme in family law is the unwavering exaltation of marital sexual relations. 1.

Therefore, "refusal to engage in sexual intercourse" is a form of cruelty, especially classified as "mental cruelty." However, "forced sexual intercourse," which is a kind of sexual assault, ought to be considered cruelty as well. Thus, cruelty encompasses two different viewpoints. On the surface, it would appear to be easy to distinguish between pushing a wife to have sex and her outright refusing to engage in sexual activity.

However, because cases have focused on the wife's duty to have sex with her husband, it is challenging to conceptualize this line while analyzing case law. The issue arises because the argument in favor of marital rape is predicated on the idea that marriage is evolving and, thus,

that women have the freedom to reject their husbands' advances on a sexual basis.

But our support for the right to refuse is undermined if courts rule that a husband may sue for divorce simply because his wife isn't having sex. We never claim that it is impossible for the two of them to coexist, but it is risky and unknown. How do the courts determine what constitutes "required" sexual contact and when the spouse forfeits his "right" to such contact?

There is no set standard, and the threshold is dependent on the judiciary's perception of the minimal quantity of sexual activity necessary for marriage rather than a general prohibition of sexual activity or an incapacity to engage in it. It goes without saying that this gives the judges discretion in this case.

Furthermore, it is evident from a jurisprudential perspective that there is a conflicting ideology between the right to refuse, as demonstrated by the recognition of forced sexual relations in marriages, and the refusal to engage in sexual relations as a type of mental cruelty. An ideal remedy to this would be that future case trajectory will be sensitive to this contradiction and produce decisions that will be pro-choice of the woman, since the acknowledgment of the "right to sexual intercourse" is a development of case law. But this also seems overly straightforward. Another idea would be to make explicit reference to "sexual violence" in a nasty way. One possible amendment to the Hindu Marriage Act would be to add sexual abuse under §13(1)(i)(ia). Again, there are two ways to contest this requirement's necessity. First off, sexual violence is now included in the definition of domestic violence as per the PWDVA, 2005. This definition might be utilized in conjunction with other approaches if it might serve as a framework for comprehending cruelty. Second, it will not be suitable to incorporate sexual violence inside cruelty since the term "cruelty" in family law is gender neutral, although the law on the offense of sexual violence solely recognizes women as the victim.

This article, which focuses on the criminalization of marital rape, is not equipped to analyze this in greater detail. However, a wife may petition for divorce once marital rape is become illegal because the husband's rape conviction is recognized as a basis for divorce. The more significant issues addressed in this part are more relevant to understanding the necessary ideological changes in family law, as well as situations in which the victim of sexual violence may not choose to report the incident as rape or in which the assault would not have met the legal definition of rape but still qualify as sexual assault.

Notably, the PWDVA, 2005 acknowledges sexual assault and is a crucial instrument for

ensuring that the wife receives maintenance, protective orders, and other benefits.

As a result, we have talked about the subtleties of the current criminal and civil laws that address rape cases in marriage. By doing this, we hope to have demonstrated the significance of making marital rape a crime rather than considering other options.

Nevertheless, we made clear that there aren't many good options. We have looked at the role that sexual activity plays in family law and analyzed it in light of our support for making marital rape a crime.



## **CHAPTER-9 CONCLUSION**

The connection of two individuals who respect each other mutually is called marriage. Teaching boys and men to value women as important contributors to life, society's advancement, and the realization of peace, in accordance with UN rights. In order to do this, marital rape must be covered by the law and society must be educated about it starting in elementary school. One of the most horrible types of sexual assault that may happen in a family is marital rape.

Because of the nature of the activity and the related problems of relationship secrecy, internalization of patriarchal dominance, and, most of the time, economic dependency, the women victims do not come out with their sufferings.

Due to the patriarchal attitude, the law has ignored the horrible pain that abused women endure, and it does not even consider marital rape to be a crime or offer any kind of punishment in these situations. Rape happens in many different kinds of marriages, regardless of age, social status, race, or ethnicity. Research on the topic is scarce, and this lack of information significantly hinders efforts by the government and legislature to provide traumatized victims with an advantageous legal situation.

In order to achieve meaningful equality for married women who are otherwise restricted to the house in public and legal discourse, the discussion of marital rape is essential. It is critical to acknowledge that there is currently a significant gap in criminal law that undermines the constitutional guarantees of equality and autonomy for women.

There have been strong political, legal, and cultural considerations against criminalization, as we have repeatedly shown. We have carefully examined the viability of these arguments, which are layered with ideas about marriage, the family, and women's place in society. We have demonstrated that there is no legal basis for any of the objections against criminalization.

We have maintained that the current version of the IPC's §375 exception clause is invalid. This is due to the fact that it does not pass Article 14's equality requirement. Furthermore, we have shown how there are no viable legal alternatives and that the criminalization of the practice should be the primary focus instead of the alternatives.

We also emphasized the fact that the lack of acceptance of marital rape in our culture does not excuse



it from criminalization. Considering everything, we provide a framework for making marital rape a crime. Firstly, we suggest eliminating the exception clause. Second, we suggest making it very clear that the accused and the woman's marital status will not be utilized as a defense. Third, we suggest maintaining the current sentence guidelines. Fourth, in order to make sure that the Evidence Act considers the difficulties of prosecuting cases of marital rape, we suggest making some changes to it.

The idea of guilt for marital rape is absent from our penal codes. Articles 14 and 21 of the Indian Constitution appear to be broken by this. The fact that marital rape is not criminalized worries the Indian legal system. The legal system ought to take action to protect women.

Married women ought to be respected and not be the targets of sexual abuse or violence. Because of this, this section has a very narrow definition of sexual assault, and married women are not now protected by any laws.

The Supreme Court has ruled that it is illegal to rape a minor wife and has issued a landmark ruling suggesting a legislative formula to outlaw child marriages from the outset.

The major spouses, however, have not been able to win over judges to have the Supreme Court acknowledge marital rape. A lot of sexual assaulters have a pathway to rape thanks to the narrow and restrictive definition of rape, which permits marital exemption. As a result, the pursuit of justice is unrelenting.

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