

# Why Marital Rape should not be criminalised

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## Abstract

Marital Rape (or spousal rape) means- Rape committed by a person to whom victim is married. In other words it can be defined as a forceful sexual intercourse, with one's spouse. Albeit Sexual intercourse is considered to be an indispensable part of Conjugal Right and Cohabitation, which ensues after marriage, but nowadays there have been certain episodes of domestic violence, where there are non-consensual sexual intercourses involved, elucidated as Marital Rape. Spousal Rape has been recognised as a crime by many societies around the world, and many are in the row of giving it an incriminating nature. There are many developed countries such as America, England, and Australiaetc., which has recognised Marital Rape. The criminalization of marital rape in the United States started in the mid-1970s and by 1993 marital rape was a crime in all 50 states. But the scenario in India is fundamentally different when compared to some developed countries, where it has been recognised as crime. There are multitudes of problem which has homed India such as poverty, differences of culture and traditions, illiteracy etc. which acts as an impediment in the way of criminalisation. If Marital Rape will be recognised in India, than it will have a booming potential to destabilise the Institution of Marriage, and to decide which intercourse is legitimate, will singularly vest in the hands of wives. The author has tried to underscore some of the problems in the way of criminalising Marital Rape. Author has also, shown and recommended certain other legal options and provisions, which can be sought by a women, if there is an episode of sexual harassment or cruelty. Author stands with a view that the issue of marital rape can be checked with the other pivotal provisions, such as Cruelty-498A etc. and many others. Author has also analysed the affidavit of the centre to Delhi High Court. Author has also focussed on some of the Judgements to substantiate his arguments.

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## **Objectives**

The objectives of this project are as follow:

1. To study the meaning of Marital Rape
2. To study various encumbrances in way of criminalising Marital Rape
3. To study various other legal options or provision which can be sought in case of sexual assault or any sort of barbarity

## **Research methodology**

In this project, the researcher has adopted Doctrinal research. Doctrinal research is essentially a library-based study. The researcher also used computer laboratory to get important data related to this topic. The researcher also found several good websites which were very useful to better understand this topic.

## **Introduction**

### **Why Marital Rape cannot be Criminalized**

Marital rape or Spousal rape is defined as a forceful non-consensual sexual intercourse with one's spouse. This can be comprehended as a standard theoretical definition of Marital Rape, but would this be same for all? Proffersa reasonable question in itself what may seem to be marital rape to an individual wife, it may not appear same to others. Hence as to what embodies marital rape and what would constitute marital non-rape needs to be defined conspicuously before giving it an incriminating nature. It is all about common sense, if a woman is bestowed with sweeping power so as to decide which sexual intercourse is rape and which one is a consensual, then what about the conjugal right of the spouse?, will it not become a tool for harassment of husbands?, will it not destabilize the institution of marriage? There are certain rudimentary questions which needed to be ventilated and answered before taking a step for criminalise Marital Rape.

### **Societal Acceptance**

Is society is ready to acclimatize this change? This is a big question in itself. India is a country which is profoundly graded. It is home to myriad number religions, cultures, language, traditions etc. The census of 1961 has shown that there are 1,652 languages and dialects. India is a heterogeneous country and also a land to multitude of religions. We find here followers of various religions, particularly of Hinduism, Islam, Christianity, Sikhism, Buddhism, Jainism, Zoroastrianism etc. The population of India is 132.2 cr. as recorded in 2016. The population of the country leads to many problems- but the most important problem is poverty and illiteracy. These social conundrums play an important role in deciding the

criminalisation of marital rape. According to the World Bank report on India's poverty profile, 270 million Indians are poor, that means 22% of the whole population is under the National Poverty line. 80% of India's poor lives in rural area. Whereas the Literacy rate is concerned it's 74.04%. It creates an impression that still there are volumes of people who need to get alleviated from the downgrades. People need to understand the functioning of law, and for that they have to be educated enough. Peoples, who have not been exposed to education, will not have an iota of idea, so as to what constitute Marital Rape and may easily fall in some trap, rising from vendetta. Henceforth before criminalising Marital Rape, these two factors should be taken into consideration and hence discussed.

### **Pliability of Marriage in Accepting Marital Rape as Offence**

Marriage is a social institution which in India is regulated by personal laws of different religions.<sup>2</sup> Marriage is a socially supported union involving two or more individuals in what is regarded as a stable, enduring arrangement based at least in part on a sexual bond of some kind. In Hinduism, According to R.N. Sharma a Hindu marriage is "a religious sacrament in which a man and a woman are bound in permanent relationship for the physical, social and spiritual purposes of dharma, procreation and sexual pleasure." It is evident from the above-mentioned definition that marriage in Hinduism is considered to sacrosanct, of which cohabitation is essence. Will it not be threat to the sanctity of the institution, if absolute power is given to woman, to ascertain the right of cohabitation of the male? It therefore raises pertinent question regarding viability of law, as it can be potential tool to harass husbands.<sup>3</sup> The Muslim marriage is known by the Arabic word "Nikah" Which means civil contract. Mulla writes, "Marriage according to Mohammedan law is not a sacrament but a civil contract. In the Muslim social system, marriage as an institution is governed basically by "Shariat", the personal law.<sup>4</sup> According to Ronal Wilson, "Muslim marriage is a contract for the purpose of legalizing sexual; intercourse and the procreation of children. It is a contract because it can be broken at any time. Now the pivotal question which gets raised is, if there is an instance of sexual assault or cruelty in a Muslim Marriage than it basically tantamount to breach of contract, as to live life in harmony and protection of wife can be construed as implied terms of contract, if it gets vitiated, there can be compensation granted. Here we simply cannot incriminate a matter which of civil nature, without any proper

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<sup>2</sup> Ashley Crossman, *How Sociologists Define Marriage*, THOUGHTCO, (June. 28, 2018) <https://www.thoughtco.com/marriage-3026396>.

<sup>3</sup> Shauni, *Essay on Muslim Marriage*, YOUR ARTICLE LIBRARY, (July. 5, 2018), <http://www.yourarticlelibrary.com/essay/essay-on-muslim-marriage/47622>.

<sup>4</sup> *Ibid.*

deliberations. According to Christian law, a marriage is considered to be a permanent union of one man and one woman to the execution of others. Marriage, as is seen in Christian tradition, is not merely a civil contract nor is it purely a religious contract. Roman Catholic Church regarded marriage as one of the sacraments. Here it can be said that the Christian marriage congregation of the both civil and sacrament. Before taking a step towards criminalisation, it portrays a bleak picture where there appears no consensus in the personal laws of various religions, there is not specific and definite route through which a cogent course of action can be taken. The most important encumbrance in the way of criminalisation would be “procreation’ which is aim of all the marriages as an institution, to contribute to the human development. The question is Procreation is fundamental to all the marriages; let it be of any religion, will this will not get thwarted?

### **Impediments in the Judicial Administration and other substitute provisions**

The qualm of the centre in giving a green signal to Marital rape is “on what evidences the courts will rely upon in such circumstances, as there can be no lasting evidence in case of sexual acts between a man and his own wife”- Centre’s Affidavit To Delhi HC.

This doubt in the mind of centre that holds water, and corroborate to the apprehensions, that Marital rape as an offence will have booming potential to destabilise the institution of marriage, and it is evident that how Section 498A is misused. We cannot deny from the fact that Cruelty and Sexual Assault are recurrent problem in India, but giving recognition to Marital Rape as a separate crime will only debilitate the institution of marriage. Many crimes without witnesses are hard to prove; hence it will become a crime of “unprosecutable” nature. But then if there any sign or marks of barbarity or cruelty, the victim can seek justice in other provisions of IPC. The act of marital rape is covered under the provision of 498A of the Indian Penal Code, 1860 which says Husband or relative of husband of a woman subjecting her to cruelty. Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine. Explanation.—For the purpose of this section, “cruelty” means—

1. any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or
2. harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable

security or is on account of failure by her or any person related to her to meet such demand.

Other vital provisions of IPC, 1860 which can act as Substitute to the Marital Rape can be-

**Section 319- Hurt**

Whoever causes bodily pain, disease or infirmity to any person causes hurt.

**Section 320-Grivous Hurt**

Any hurt which endangers to life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits.

**Section 354- Assault or criminal to woman with intent to outrage her modesty**

Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Modesty is nowhere defined in the section, but the essence of women's modesty is her 'sex'. The culpable intention of the accused is the crux matter. The act of pulling saree, coupled with a forceful request for sexual intercourse, is such would be considered to be an outrage the modesty of a woman; and knowledge, that modesty is likely to be outraged is sufficient to constitute an offence under this section.*Raju Pandurang Mahale V, State of Maharashtra.*

**Section-354 A- Sexual harassment and punishment for sexual harassment-**

1. physical contact and advances involving unwelcome and sexual overtures; or
2. a demand or request for sexual favours
3. showing pornography against the will of a woman; or
4. making sexually coloured remarks, shall be guilty of the offence of sexual harassment.

Any man who commits the offence specified in clause (1) or clause (2) or clause (3) shall be punished with rigorous imprisonment for a term which may extend to three years, or with fine, or with both.

Any man who commits the offence specified in clause (4) shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

**Section-354 B-Assault or use of criminal force to women with the intent to disrobe**

Any man who assaults or uses criminal force to any woman or abets such act with the intention of disrobing or compelling her to be naked, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to seven years, and shall also be liable to fine.

**Section-376. Punishment for rape-(2) whoever-(k) being in a position of control or dominance over a women, commits rape on such woman;**

**Section-376 B. Sexual Intercourse by a husband upon his wife during separation**

Whoever has sexual intercourse with his own wife, who is living separately, whether under a decree of separation or otherwise, without her consent, shall be punished with imprisonment of either description for a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine.

Explanation.—In this section, "sexual intercourse" shall mean any of the acts mentioned in clauses (a) to (d) of section 375

**Section-503.Criminal Intimidation**

Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation. Explanation.—A threat to injure the reputation of any deceased person in whom the person threatened is interested, is within this section. Illustration A, for the purpose of inducing B to desist from prosecuting a civil suit, threatens to burn B's house. A is guilty of criminal intimidation.

**Section-509.Words, gesture or act intended to insult the modesty of a women**

Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

These provisions are evident that there are plenitudes of legal provisions, in which a victim of sexual assault or cruelty or a woman suffered from forceful sexual intercourse with her spouse can seek justice. These various provisions are sufficient to check the evil of Marital Rape from stem to stern.

**A brief evaluation of *Independent Thought v. Union of India*<sup>5</sup>**

The Supreme Court delivered a landmark judgement on 13<sup>th</sup> October, 2017, where the Exception 2. of the section was impugned, by invoking writ jurisdiction of SC, which reads "Sexual Intercourse or sexual acts by a man with his own wife, the wife not being under

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<sup>5</sup> W.P.(C) 382/2013.

fifteen years of age, is not rape. The age of consent for sexual intercourse has been prescribed in Section 375 as 18. This exception 2 can be comprehended as, if a man if having non-consensual sexual intercourse with her wife, aged between 15 to 18, would not be penalised by virtue of exception 2. The exception was not only arbitrary but also in contravention with Art. 14 and the same was changed to “Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years (instead of fifteen years as provided in the Indian Penal Code, 1860) of age, is not rape.” However it has not dealt with the issue of “marital rape” of adult women as that issue was not raised before it. This Judgement is considered to be a pioneer judgement in the arena of marital rape, but as a whole this judgement was basically focussed on the age of consent that’s. This verdict can be seen as a method which could be used as deterrent to Child Marriage. Child marriage has been a tendentious issue in India, which has been tough to fight because of its genesis in traditional, cultural and religious practices.<sup>6</sup> According to UNICEF, 47% of girls are married by 18 years of age, and 18% are married by 15 years of age. Marriage is not a joke. A person should be mature and experienced enough before getting married. In this there can be two standpoints, firstly, sometime the girl elopes with her boyfriend and ties knot with her consent and become reluctant to return home. Secondly, sometime the bride is pressurized by their parents, to get married. If we analyse both the scenarios than, firstly it is immaturity which leads to someone into child marriage and secondly as compulsion, now if there are certain instances of sexual assault or cruelty or forceful sexual intercourse, thenceforth the Exception 2 was increase to 18. As the child marriage takes it birth from immaturity and impatience and if somebody is suffering from that, there shall be a remedy. Hence the age was increased to 18 for consensual sexual intercourse.

### **Analysis of centre’s affidavit to Delhi High Court**

The affidavit referred to Law Commission 172<sup>nd</sup> report titled Review of rape laws and the department Parliamentary standing committee on home affairs in its 162<sup>nd</sup> report said that there is no need to criminalise Marital Rape.<sup>7</sup> Quoting the Justice J S Verma Committee Report on “Amendments to Criminal Law”, it said it was recommended that the exception to marital rape be removed, but it also pointed out that it is also important that legal prohibition

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<sup>6</sup> *Courts still confused about legal age of marriage?*, THE TIMES OF INDIA, (July. 2, 2018) <https://timesofindia.indiatimes.com/life-style/relationships/love-sex/Courts-still-confused-about-legal-age-of-marriage/articleshow/21333081.cms>.

<sup>7</sup> PTI, *Criminalising marital rape may destabilise institution of marriage, Centre tells HC*, THE HINDU, (July. 4, 2018) <http://www.thehindu.com/news/national/criminalising-marital-rape-will-destabilise-marriage-govt-tells-hc/article19581512.ece>.

on marital rape is accompanied by changes in the attitude of the prosecutors, police officers and those in society generally. This demands a high social and moral awareness. Just because the other western country's has criminalised, that doesn't impel India to criminalise it, as India faces multitudes of problem. Moreover Criminal law comes in concurrent list, hence it is important to know the opinion of the states before taking any action, to avoid any complications in future. The qualm in the mind of the centre is correct as this process of criminalisation will demand a broad societal consensus, which appears to be a herculean task, merely deleting the exception 2 of Section 375 will not complete the work per se.

### **Conclusion and Recommendation**

Hence here the author would like to conclude by saying that, there is no need to criminalise Marital Rape, as it has been covered in the various provisions of Indian Penal Code namely section 498A, section 354, section 354 A etc. If Spousal Rape is recognised in anyway, chances are there that it can act as a tool to harass husband, and there can also be an abrupt rise in frivolous and vexatious cases. India suffers from its own problem, which are encumbrances in the way of criminalising Marital Rape. This process will require a broad societal consensus. Apart from Judicial awakening; we initially require awareness amongst the masses. Researcher don't deny from the fact that there are instances of domestic violence, however where there are episodes of sexual assault and cruelty, let it be of any form, giving it a concrete form will have undue ramifications. Researcher would like recommend that there should be awareness programme, which shall be carried out by the concerned authorities, this shall be done with a view to apprise people of their rights and duties. And if there are any episodes of assault, then they can seek justice from the above-mentioned sections of Indian Penal Code. "Educating boys and men to view women as valuable partners in life, in the development of society and the attainment of peace are just as important as taking legal steps protect women's human rights", says the UN.