

# Forensic justice for marital rape victims in India: deconstructing patriarchal walls through criminal jurisprudence

## Abstract

“Women would tell me about being raped and I had to sit there and think as a lawyer, ‘Yes, but were they married?’ If (yes,) ...I had no options to help them...” These words uttered by Sarah Lerner, London-based lawyer in 1970s, felt foreign to lawyers after spousal rape criminalization in UK (1991) and several other countries including Australia (1976), Canada (1983), South Africa (1993), and USA (1993). However, Lerner’s words are still everyday reality for Indian lawyers who continue to struggle with explaining marital rape victims as to why a country supporting abortion rights to guarantee female autonomy, pulls back on this guarantee as soon as demand of criminalizing marital rape is put forth. Duality of such partial guarantee of female autonomy raises following questions – Why does marital rape still exist without criminal justice recourse in India? Whether arguments against its criminalization are legitimate? Paper explores Indian criminal jurisprudence around marital rape, along with need, relevance, and practicality of criminalization of spousal rape in India, while examining sufficiency of available civil remedies. Further, considering difficulty of proving absence of consent in marital rape cases, paper focuses on kind of forensic evidences that can be used to aid complainants’ claims in such cases, and discusses admissibility and evidentiary value of such forensic evidence. Consequently, paper analyses onus of proof in cases of marital rape, and the need for acknowledgement that a husband can commit rape on his wife, express consent, and proposing introduction of marital rape as a ground for divorce.

**Keywords:** marital rape, forensic evidence, consent, female autonomy, criminal jurisprudence

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## Introduction to marital rape

The term ‘marital rape’ is absent from India’s legislative dictionary as the concept is considered non-existent in the country’s socio-legal framework. This forces Indians to search for legal descriptions of the term in foreign laws. Several countries’ domestic law holds marital rape as ‘criminal offence’. Amongst them, United Kingdom’s (UK) 1991 marital rape criminalization,<sup>1</sup> holds relevance since Indian criminal law found its early base in English law. UK law understands marital rape as “sexual acts committed without a wife’s consent and/or against her will by the woman’s husband”.<sup>2</sup> Thus, it utilizes ‘consent’ to distinguish general performance of conjugal act from rape. This method is identical to determining occurrence of non-marital rape. Hence, UK law does not differentiate between ‘rape’ and ‘marital rape’. It deals with both under same legal definition of ‘rape’<sup>3</sup> under UK’s Sexual Offences Act. Not differentiating between the two iterates that rape can be committed regardless of marital relationship between victim and accused, disproving the notion that rape cannot be committed by a man on his wife. UK law thereby rejects ‘implied consent’ and only recognizes ‘express consent’ as actual consent, thereby emphasizing need for express consent for sexual acts even in spousal relationships, placing both spouses on equal footing in a relationship. This ensures female autonomy and strengthens right to privacy of a wife. Thus, marital rape criminalization appears as tool for re-claiming autonomy

<sup>1</sup>R v. R, 1991 UK HL 12

<sup>2</sup>Sexual Offences Act 2003. 2024.

<sup>3</sup>Definition of rape under Sexual Offences Act 2003 c. 42. Under which intentional penetration of vagina, anus or mouth of another person with one’s penis without the other person’s consent in absence of reasonable belief of consent, is considered as rape.

by wives previously deprived of it. The same is essential as equality, privacy, and autonomy are internationally recognized<sup>4</sup> human rights, and constitutionally guaranteed fundamental rights<sup>5</sup> in India, non-provision of which results in fundamental violations. International community recognized the same through CEDAW<sup>6</sup> and the Istanbul Convention<sup>7</sup> which states that, “consent is a crucial component of sexual relationships, irrespective of marital status”.<sup>8</sup> These instruments further emphasize that creation of “laws and policies that explicitly criminalize marital rape,”<sup>9</sup> is necessary to ensure “gender equality and protection of individual autonomy within marriage”.<sup>10</sup> All member states signatory to CEDAW, including India, are thus required to criminalize marital rape.

## Countering arguments against criminalization of marital rape in India

Non-recognition of marital rape as crime in India perplexes

<sup>4</sup>UN General Assembly. *Universal Declaration of Human Rights*. 217 A (III). 1948.

<sup>5</sup>India const. art. 14 and 21

<sup>6</sup>UN General Assembly. *Convention on the Elimination of All Forms of Discrimination against Women*. United Nations: Treaty Series. 1979;1249. p. 13.

<sup>7</sup>*Council of Europe Convention on preventing and combating violence against women and domestic violence*. CETS No. 210. 2011.

<sup>8</sup>Convention on the Elimination of All Forms of Discrimination against Women, art. 16, opened for signature Mar. 1, 1980, 1249. UNTS. 13. *Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence*. Art 36. 2011.

<sup>9</sup>Ibid.

<sup>10</sup>Ibid.

many. Common arguments to support such non-recognition include following three. First is possibility of false marital rape cases being filed. However, this argument lacks logic and empathy, as said possibility exists in any illegalized act, thus, is not special to marital rape criminalization. Further, welfare state must not deny chance of justice to any citizen, let alone entire class of vulnerable citizens. Leaving countless victims of an inhumane act without sufficient recourse constitutes breach of state's social contract and international duty to protect human rights, as recognized by UN Program Chief stating "India would not be able to achieve Sustainable Development Goals...if it fails to criminalize marital rape...India...must fulfill the international standards..."<sup>11</sup> While concern of harassment of falsely accused persons is valid, its validity does not weigh more when scaled against actual victims being left unprotected due to lack of legal shield and being subjected to constant suffering at hands of perpetrators of force. Moreover, denying protection to rape victims due to possibility of false accusations displays legislators' distrust in India's criminal justice system, one that boasts of being crafted in a way that prevents innocent convictions. A system where the most apparent perpetrators are sometimes let loose due to legal intricacies, claiming high risk of conviction for all falsely accused persons is far-fetched and ignorant towards plight of actual victims.<sup>12</sup> Additionally, existing measures such as counter-suits for malicious and frivolous prosecution in bad faith and defamation help combat false accusations. Finally, underreporting of rape and domestic violence cases due to attached social stigma, fear of legal persecution, social isolation, and maltreatment is a well-recognized issue in India.<sup>13</sup> Since marital rape only amplifies these factors due to additional social resistance in matters against one's own family, especially spouse, underreporting is a foreseeable issue which would require awareness and sensitization of victims concerned. This strikes at and weakens the foundational stone that supports non-criminalization due to possibility of falsified claims.

The second argument involves the concern that criminalizing non-consensual spousal intercourse would lead to harmful blows on 'sanctity of marriage' leading to breakdown of institution of marriage. As 'sanctity' denotes "the quality of being important enough to make something worth protecting",<sup>14</sup> in an instance where husband forces himself on his wife or where wife falsely accuses her husband of such force, question arises whether such marriage even holds the sanctity that socio-legal actors of society are trying to protect at cost of violating fundamental and human rights of victims, leaving them permanently and continually scarred with distrust in criminal justice system and helplessness stemming from it. Furthermore, marriages are based on consent of both parties even in personal law systems such as Muslim and Christian, depicted by requirement of saying '*Qubool Hai*', 'I do' or other similar phrases before a marriage can be solemnized. Even the Hindu system is based on '*dharma*' which lays focus on everyone abiding by their duties instead of forcing others to abide by theirs'. Thus, even if conjugal sexual activity is seen as a duty that a marital couple 'should' abide by, it is not something they 'must' do or that one is justified in forcing other to perform. Forceful enforcement of any thought, let alone a non-consensual sexual act, is not allowed under Hindu *dharma*. Therefore, true understanding of marriage lies in spouses being involved in constant exchange of express consent and not in assuming consent of one's partner, thereby rejecting notion of implied consent. This argument, therefore, falls

short of any real basis in any personal law, especially Hindu *dharma*. Thus, the concept of 'implied consent' is wrongfully associated to them, only to provide a faux basis to this extremely patriarchal, regressive, suppressive, and male-hegemonistic norm. However, a valid concern is that no innocent should face the blunt of wrongful accusations, which is indeed a possibility. This leads us to the third argument against criminalization of marital rape which highlights difficulty in proving consent in such a case given the intimate nature of marital relationship. How must one decipher between a married couple's consensual sexual intercourse and marital rape is a justifiable concern. The following sections focus on deciphering this complex concern.

### Indian criminal jurisprudence around marital rape

As discussed above, marital rape is not criminalized in India. However, an exception to this exists in form of Section 376B of the Indian Penal Code.<sup>15</sup> This provision criminalizes non-consensual sexual intercourse by a husband with his wife who is living separately from him.<sup>16</sup> Thus, 'absence of consent' is recognized by the act of 'living separately'. It shows how difficulty in proving consent may be the only major barrier in non-criminalization of rape in cases where spouses are living together. The provision further underscores invalidity of arguments related to possibility of false accusations, protecting marriage, and presence of implied consent in marital relationship. If these arguments held substance, the above-mentioned exception would also be non-justifiable. An emerging argument may be interpretation of 'separation' as symbol of 'absence of consent', thereby, of 'living together' as 'consent'. However, such argument cannot be allowed to run as it allows not just a loophole but an entire alleyway of protection to marital rape instances between spouses residing together. In doing so, it completely neglects the neutral nature of consent in any relationship, especially marital, meaning that before any sexual act, the negative or positive nature of consent for that act cannot be assumed. Therefore, an express answer is required before proceeding or not for that act. Another aspect of consent is that it has individual standing in different situations. Therefore, a wife may be consenting and willing to engage in sexual intercourse with her husband at other times, but not consent to the same if she is not willing to at any time. Therefore, rape can happen at any point in marital relationship whenever sexual intercourse happens without consent. Justification is non-essential for non-provision of consent; thus, non-justification must not allow for wife being subjected to rape, same as any other reason. Since absence of consent can occur even without separation, separation shouldn't be a pre-requisite for holding offenders responsible in marital rape cases. Nonetheless, at present, marital rape is not completely criminalized in all its aspects pointing towards insufficiency of legal criminal recourse. The most a victim can do in cases not covered under Section 376B<sup>17</sup> is sought relief through

<sup>15</sup>Section 376B of the Indian penal code, 1860, Act no. 45 of 1860. India.

<sup>16</sup>The Indian penal code, 1860, Section 376B, "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."

<sup>17</sup>The Indian penal code, 1860, Section 376B, "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."

<sup>11</sup>Shreya Ila Anasuya, *Will the Indian Government Finally Criminalise Marital Rape?* The hindu. 2016.

<sup>12</sup>Pramit Bhattacharya. *99% cases of sexual assaults go unreported, govt data shows*. Mint. 2018.

<sup>13</sup>Ibid.

<sup>14</sup>Definition of 'sanctity' noun from the Oxford Advanced American Dictionary

cruelty<sup>18</sup> provision. However, punishment for cruelty<sup>19</sup> is insufficient for cases of rape, as is the case under Section 376B<sup>20</sup> which provides maximum imprisonment of up to 7 years, which is lesser than general minimum punishment for rape.<sup>21</sup> Only other recourse is available under the Domestic Violence Act<sup>22</sup> which provides civil remedies of monetary relief,<sup>23</sup> and temporary custody of children.<sup>24</sup> However, these remedies prove insufficient in providing actual justice to victims of marital rape, given that marital rape is not even included in grounds for judicial separation or divorce, leaving most victims stranded in violating situations. Thus, highlighting need for criminalization of marital rape along with provision of efficient civil remedies.

In *Independent Thought v. Union of India*,<sup>25</sup> India's first judicial-legal recognition of marital rape emerged, recognizing marital rape for wives below 18 years of age (previously, 15).<sup>26</sup> However, wives above 18 years of age still remain unprotected.

### Forensic justice for marital rape victims in India

Once we criminalize marital rape, accusations by prosecution can be proved in court of law with forensic evidencing techniques aiding process of establishment of absence of consent for proof of occurrence of marital rape. As initial burden of proof lies on prosecution<sup>27</sup> and onus rests on prosecution unless reasonable doubt<sup>28</sup> is created in favor of occurrence of offence,<sup>29</sup> practicality of criminalizing marital rape becomes concerning due to intimate environment in which it can be committed. Forensic evidencing of the matter provides an effective solution. If collected efficiently, it can help in creation of needed reasonable doubt of non-existence of consent while occurrence of concerned sexual activity to shift onus of proof on accused and take the case forward to provide victim the just recourse. Forensic evidencing can also help in relieving false accusations, proving beneficial to true

<sup>18</sup>The Indian penal code, 1860, Section 498A, "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 purposes of this section, "cruelty" means—

(a) anywilful 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

(b) 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.]"

<sup>19</sup>The Indian penal code, 1860, Section 498A, "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.

<sup>20</sup>The Indian penal code, 1860, Section 376B, "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."

<sup>21</sup>Punishment for rape: minimum: 10 years except minimum 5 years in cases of rape by person in authority

<sup>22</sup>The protection of women from domestic violence act, 2005. Act no. 43 of 2005. India. 2005.

<sup>23</sup>Section 20 of the protection of women from domestic violence act, 2005. Act no. 43 of 2005. India.

<sup>24</sup>Section 21 of the protection of women from domestic violence act, 2005, Act no. 43 of 2005. India.

<sup>25</sup>10 SCC 800. 2017.

<sup>26</sup>Section 375 of the Indian penal code, 1860, Act no. 45 of 1860 (India)

<sup>27</sup>Section 101 of the Indian evidence act, 1872, Act no. 1 of 1872 (India)

<sup>28</sup>Deonandan Mishra v. The State of Bihar, AIR 1955 SC 801.

<sup>29</sup>Section 106 of the Indian evidence act, 1872, Act no. 1 of 1872 (India)

victims of the situation, whether raped or falsely accused, regardless of gender.

Legally admissible evidencing techniques relevant to marital rape include collecting trace evidence from patient's clothes, drop-sheet including evidence from offender such as pubic hair, head hair, and clothing fibers, evidence from scene of crime such as sand, fibers or vegetation, sanitary pad, tampons, fingernail scrapings or clippings, oral swab or sterile water rinsing's, saliva or semen on skin, pubic hair combing, vaginal swab, anal and rectal swab, victim or accused's DNA, buccal swab, and blood and urine for DNA, alcohol and drugs. Check of body parts affected by sexual offence, especially for extra-genital injuries, is salient. Along with this, body must be checked for immediate injuries, bruises, marks, etc. which portray signs of struggle, or are results of being struck, pushed, stabbed, or shot, and after some time for STDs and pregnancy. Relevant symptoms requiring long term observation include psychological symptoms such as fear, nightmares, sleep problems, anger, embarrassment, shame, guilt, or combination of aforesaid. However, some of these may also be observed immediately after assault. Crime-scene investigation to collect relevant evidence includes evidencing assault bedding and surrounding area for wet stains of bodily or other fluids such as alcohol or drugs, trace DNA, fingerprints, other material of evidentiary value such as shoe-prints, blood stains, and all possible signs of struggle such as tears, scratch marks, broken parts or denting of furniture, and assault-objects. Other evidences include eye witnesses including children or in-laws, video recording of the instance, awareness of similar previous instances in family members, neighbors, house-help, and the like. Forensic evidence can provide additional help through these, for example, help in facial recognition of accused in video evidence. This facet of forensic evidence also needs acknowledgement while discussing forensic evidencing of marital rape cases.

In rape cases, as iterated in *State of Maharashtra v. Chandraprakash Keval Chand Jain*,<sup>30</sup> victim of rape has been undoubtedly recognized as a competent witness whose testimony need not be further corroborated under Section 118 of the Indian Evidence Act.<sup>31</sup> Thus, judiciary, from case to case, can accordingly decide relevant evidence and their probative value and provide justice as it deems fit. Therefore, marital rape victims' testimonies can be accorded same probative value where the court deems it fit.

Concerns while using DNA evidence in legal cases arise in form of privacy issues, self-incrimination, bodily autonomy of accused, and mishandling of evidence. At such times right balance must be struck between the interests of victim and accused by the court concerned.

### Conclusion and suggestions

The article discusses in detail the criminal jurisprudence regarding criminalization of marital rape in India. While untying the tussle between arguments for and against, it recognizes the difficulty in proving presence or absence of consent as the major roadblock in criminalization. To solve the issue, the article then discusses the practicality of criminalization through use of forensic evidencing to benefit the actual claimant of truth in given case.

Suggestions include amending the legislative provision on grounds for divorce<sup>32</sup> and separation to include marital rape, and declaring marital rape as a criminal offence in India to fulfill international as well as national obligations to safeguard victims against individual or repeated violations of autonomy and privacy, physical and

<sup>30</sup>1990 AIR 658

<sup>31</sup>Section 118 of the Indian evidence act, 1872, Act no. 1 of 1872 (India)

<sup>32</sup>Section 13 of the Hindu marriage act, 1955. Act no. 25 OF 1955 (India)

psychological issues resulting from mal- and unequal-treatment such as lack of confidence, fearful nature, etc. Additionally, the concept of implied consent must be done away with where sexual activity is concerned, and express consent must be standardized. Judiciary must understand its pertinent role in cases of sexual offences against women and draw legitimate inference from evidence to shift onus of proof in such cases more realistically than technically. To tackle concerns of mishandling of sensitive evidence, detailed guidelines must be released and their implementation must be ensured to not let justice slip away due to lack of appropriate evidence management. Finally,

the punishment for marital rape must be identical to that under other rape provisions. Therefore, punishment under Section 376B, Indian Penal Code must also be increased to match appropriate standards.

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### Conflicts of interest

The author declares there is no conflict of interest.