

The Gap in Marital Rape Law in India:  
Advocating for Criminalization and Social  
Change

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## NOTE

### THE GAP IN MARITAL RAPE LAW IN INDIA: ADVOCATING FOR CRIMINALIZATION AND SOCIAL CHANGE

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### I. INTRODUCTION

Imagine being an eighteen-year-old girl, meeting a stranger twice, and being told that you are to get married to him. Picture that the dreams she had cultivated of care and companionship are shattered on the very first night of the marriage when she is subjected to verbal and sexual assault from the man that had vowed to love and protect her just a few hours prior. Every night, she faces a new ordeal, from being forced to mimic pornographic videos to forcibly having a candle or flashlight inserted into her vagina. If she complains to her family, they advise her to “try and adjust.” If she complains to the police, they rebuke her and tell her to be grateful that her husband is coming home to her instead of visiting a brothel. And when she tries to take her woes to the Supreme Court, they tell her that she is bringing a personal claim, not a public concern and as such, they cannot change the law for one person. This is the unfortunate reality for countless Indian women living among the culture of arranged marriages and remaining legally unprotected from the realities of marital rape.<sup>1</sup>

This Note explores the gap in marital rape law in the Indian Penal Code. Part I introduces the inception of the marital rape exception. Part II discusses the background and evolution of rape law over the years in India. Part III discusses arguments offered for and against the criminalization of marital rape and offers evidence to undercut all arguments proposed against criminalization. Part IV argues for

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1. ‘Night After night, the torture grew’: A survivor of marital rape speaks up, DAILY OPINION (May 12, 2016), <https://www.dailyo.in/voices/women-marital-rape-sexual-harassment-abuse-arranged-marriage-divorce/story/1/14390.html> [<https://perma.cc/RTM8-A9M8>]; see Chhavi Sachdev, *Rape Is A Crime In India – But There Are Exceptions*, NPR (Apr. 13, 2016), <https://www.npr.org/sections/goatsandsoda/2016/04/13/473966857/rape-is-a-crime-in-india-with-one-exception> [<https://perma.cc/6VSH-ANJR>]; see also Vimi, *Marital Rape – My Husband Rapes Me Everyday!*, PINKDOMBLOG (Aug. 1, 2017), <http://pinkdomblog.com/marital-rape/> [<https://perma.cc/CZP2-HP9W>].

elimination of the marital rape exception, criminalization of marital rape, and suggests that further actions such as gender-sensitivity training for police personnel and the judiciary, establishment of crisis centers, and implementation of measures to combat damaging stereotypes need to be taken as well.

## II. EVOLUTION OF RAPE LAW IN INDIA

### A. 1983 Amendments

Since the inception of the Indian Penal Code (“the Code”) in 1860, Sections 375 and 376 of the Code, which define the offense of rape remained unchanged until the 1983 amendments.<sup>2</sup> Since then, the progression of rape law in India has been an incremental, occasionally gaining momentum in the wake of violent sexual crimes committed against women and the ensuing public uproar.<sup>3</sup> The 1983 amendments followed from protests that occurred as a result of the Indian Supreme Court’s (“the Supreme Court”) ruling on the controversial Mathura gang-rape case, *Tukaram v. State of Maharashtra*.<sup>4</sup> In March 1972, Mathura, a sixteen-year-old tribal girl, her boyfriend, Ashoka, and her brother, Gama were taken to the local police station.<sup>5</sup> Mathura and Ashoka were in a relationship and were planning on getting married.<sup>6</sup> Mathura’s brother, Gama, had filed a kidnapping complaint against Ashoka.<sup>7</sup> While in custody, Mathura was allegedly raped by multiple inebriated male police officers.<sup>8</sup> In the controversial Supreme Court ruling, the Court acquitted the officers reasoning that she “did not raise an alarm, [there were] no visible marks or injury on her body,” and since she had had prior sexual relations, she was of “loose morals” and may have encouraged the officers to engage in intercourse with her.<sup>9</sup> The case received public attention in 1979 when women’s rights groups criticized both the mistreatment of rape victims in the Indian legal

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2. Apoorva Ramaswamy, *Anti-Rape Laws in India Prior to the Criminal Law Amendment Act 2013* at 1.

3. See Renae Sullivan, *Sexual Violence in India: The History of Indian Women’s Resistance*, 11 MCNAIR J. 71 (2015). See generally *id.*

4. Ramaswamy, *supra* note 2.

5. Sullivan, *supra* note 3, at 72; Ramaswamy, *supra* note 2, at 2-3.

6. Sullivan, *supra* note 3, at 72.

7. Sullivan, *supra* note 3, at 72.

8. Sullivan, *supra* note 3, at 72.

9. Sullivan, *supra* note 3, at 72 (internal quotation marks omitted); Ramaswamy, *supra* note 2.

system and the overall ignorance in Indian society about the pervasiveness of rape.<sup>10</sup>

The ensuing protests resulted in the 1983 Criminal Law Amendment Act adding several important protections.<sup>11</sup> First off, provisions were added recognizing rape in the context of abuse of power by adding a category for custodial rape and recognizing specific positions of power where abuse was widespread.<sup>12</sup> Explicit laws were introduced penalizing abuse of power by public servants in their official capacities, by superintendents or managers of jails, and by hospital staff and management.<sup>13</sup> The 1983 Criminal Law Amendment Act also shifted the burden of proof from the victim to the accused, recognizing that the position of power allows for tampering of evidence.<sup>14</sup> Furthermore, the amendments added a provision criminalizing forced sexual intercourse by husband with his wife who is living separately as a result of a legal judgment or due to custom.<sup>15</sup> Two major pitfalls that the campaigners were not able to accomplish through the 1983 amendments included the recognition of rape by authority figures in the family setting and recognition of marital rape outside the context of separation.<sup>16</sup> Nonetheless, as a result of the rampant protests that followed the Mathura case, the 1983 amendments began the wave of expansion and improvements of protections against rape under the Indian Penal Code.

### *B. 2013 Amendments*

The next wave of change came after the fatal Delhi gang-rape on December 16, 2012.<sup>17</sup> A twenty-three-year-old female physiotherapy intern returning home from a movie with a friend was beaten, brutalized, and raped repeatedly on the bus by six men.<sup>18</sup> She was penetrated multiple times with a metal rod, which was pulled out of her with such force that when she arrived at the hospital, only five percent

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10. Sullivan, *supra* note 3, at 72-73.

11. Ramaswamy, *supra* note 2, at 3.

12. Ramaswamy, *supra* note 2.

13. Ramaswamy, *supra* note 2.

14. Ramaswamy, *supra* note 2, at 4.

15. Ramaswamy, *supra* note 2, at 4.

16. Ramaswamy, *supra* note 2, at 5.

17. Ramaswamy, *supra* note 2, at 13.

18. Ramaswamy, *supra* note 2, at 13; Sullivan, *supra* note 3, at 74.

of her intestines were left inside her.<sup>19</sup> Less than two weeks later, Jyoti Singh died at a hospital in Singapore.<sup>20</sup> Nationwide protests erupted as a result of this crime and consequently, the former Chief Justice of India, Late J.S. Verma established a committee to amend and enhance laws against rape and sexual assault.<sup>21</sup> Among other recommendations, the committee suggested that the marital rape exception should be repealed as it originates from the notions of women being the property of their husbands.<sup>22</sup>

Several changes came about from the Criminal Law Amendment Act, 2013. First off, with respect to Section 375, “rape” was given a broader definition to include various forms of penetration on any of the woman or girl’s body parts.<sup>23</sup> Prior to this amendment, the Indian Penal

19. Dominique Mosbergen, *Delhi Bus Gang Rape Victim Has Intestines Removed As Shocking Details of Assault Emerge*, HUFFINGTON POST (Dec. 20, 2012), [https://www.huffingtonpost.com/2012/12/20/delhi-bus-gang-rape-victim-intestines-shocking-details\\_n\\_2340721.html](https://www.huffingtonpost.com/2012/12/20/delhi-bus-gang-rape-victim-intestines-shocking-details_n_2340721.html) [<https://perma.cc/7WKF-XDJB>].

20. Rocky Soibam Singh, *Dec 16 gang rape verdict: What happened the night Delhi was shamed*, HINDUSTAN TIMES (July 19, 2017), <https://www.hindustantimes.com/delhi-news/dec-16-gang-rape-verdict-what-happened-the-night-delhi-was-shamed/story-9Y99n4OO3ZTdhXr2bPtzcL.html> [<https://perma.cc/PFV2-GJLC>].

21. See Prachi Sharma et al., *Sexual Violence in India: Addressing Gaps Between Policy and Implementation*, 30 HEALTH POL’Y & PLAN. 656, 656-57 (2015); see also Ramaswamy, *supra* note 2, at 13; Himanshi Nagpal, *The Historical Journey Of Rape Laws In India*, FEMINISM IN INDIA (June 22, 2017), <https://feminisminindia.com/2017/06/22/historical-journey-rape-laws-india/> [<https://perma.cc/8JGM-4ARD>]; Amoolya, *Comparison and critical analysis of the rape laws before and after the Criminal Law Amendment (2013)*, ACADEMIKE (Feb. 3, 2015), <https://www.lawctopus.com/academike/comparison-critical-analysis-rape-laws-criminal-law-amendment-2013/> [<https://perma.cc/9ZM2-EPAQ>].

22. See Saptarshi Mandal, *The Impossibility of Marital Rape - Contestations Around Marriage, Sex, Violence and the Law in Contemporary India*, 29 AUSTL. FEMINIST STUD. J. 255, 256 (2014); see also SHALU NIGAM, *THE SOCIAL AND LEGAL PARADOX RELATING TO MARITAL RAPE IN INDIA: ADDRESSING STRUCTURAL INEQUALITIES 1-2* (2015).

23. Amoolya, *supra* note 21; see Criminal Law (Amendment) Act, No. 13 of 2013, PEN. CODE § 375:

A man is said to commit “rape” if he—

- (a) Penetrates his penis, to any extent into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
- (b) Inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
- (c) Manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or
- (d) Applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

Under the circumstances falling under any of the following seven descriptions:—

Code only accounted for vaginal penetration by a man's penis as rape.<sup>24</sup> A seventh "circumstance" was added for when a woman is unable to communicate consent.<sup>25</sup> This amendment also clarified and solidified the provision that lack of physical resistance does not amount to consent.<sup>26</sup> Under Section 376, several specific acts of rape were added including rape by the armed forces, by a relative, guardian, teacher, person in position of trust or authority, on a person incapable of giving consent, by a person in a position of control or dominance, on a person suffering from mental or physical disability, rape which causes grievous harm or disfiguring or maiming or endangering the life of the person, and persistent rape committed against the same woman.<sup>27</sup> It further criminalized other forms of violence against women such as acid attacks, stalking, and voyeurism.<sup>28</sup> The shortcomings of this amendment include changing the age of consent from sixteen to eighteen, retaining the violation of "outraging the modesty of a

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*First.*—Against her will.

*Secondly.*—Without her consent.

*Thirdly.*—With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

*Fourthly.*—With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

*Fifthly.*—With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

*Sixthly.*—With or without her consent, when she is under eighteen years of age.

*Seventhly.*—When she is unable to communicate consent.

*Explanation 2.*—Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

*Exception 2.*—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.

*See also*, Mandal, *supra* note 22, at 257-58.

24. *See* Amoolya, *supra* note 21. *See also* Ramaswamy, *supra* note 2, at 14.

25. Amoolya, *supra* note 21; Ramaswamy, *supra* note 2.

26. Amoolya, *supra* note 21; Ramaswamy, *supra* note 2.

27. *See* Criminal Law (Amendment) Act, No. 13 of 2013, PEN. CODE § 376(c), (f), (j), (k), (l), (m), (n).

28. Press Release, Amnesty Int'l, India: New Sexual Violence Law Has Both Positive and Regressive Provisions (Mar. 22, 2013), available at <https://www.amnesty.org/en/press-releases/2013/03/india-new-sexual-violence-law-has-both-positive-and-regressive-provisions-2/> [<https://perma.cc/DX6S-JUGC>] [hereinafter India: New Sexual Violence Law].

woman,” introducing of the death penalty for sexual assaults that result in death or a vegetative state for the victim, and retaining immunity for rape committed by security forces.<sup>29</sup> Many changes made under The Criminal Law Amendment Act, 2013 were necessary and substantive, but the Act failed to criminalize marital rape with the exception of Section 376A where sexual intercourse by a man with his wife who is living separately shall be punishable with imprisonment and liable for a fine and where the girl is under the age of fifteen.<sup>30</sup>

### C. *Independent Thought v. Union of India*

The most recent change came through the Supreme Court’s decision under *Independent Thought vs. Union of India* in October 2017.<sup>31</sup> The case was filed as a Public Interest Litigation by the non-governmental organization, Independent Thought, to protect child brides from marital rape.<sup>32</sup> Exception 2 under Section 375 of the Indian Penal Code provides an exemption to rape for men having sexual intercourse with their wives under the age of fifteen.<sup>33</sup> In *Independent Thought*, Supreme Court Justices Madan B. Lokur and Deepak Gupta rationalized that Indian Penal Code, Section 375, Exception 2 should not apply to child brides between the ages of fifteen and seventeen.<sup>34</sup> The Court held that Exception 2 creates an arbitrary and discriminatory

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29. *Id.*

30. Criminal Law (Amendment) Act, No. 13 of 2013, PEN. CODE § 375, Exception 2; *India: Reject New Sexual Violence Ordinance*, HUM. RTS. WATCH (Feb. 11, 2009, 9:30 PM), <https://www.hrw.org/news/2013/02/11/india-reject-new-sexual-violence-ordinance> [<https://perma.cc/G887-JE6B>]; see *India: New Sexual Violence Law*, *supra* note 28; see also, The Criminal Law (Amendment) Act, No. 13 of 2013, PEN. CODE § 376A:

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 § 375.

31. *Independent Thought v. Union of India*, (2017) 382 SCC (India).

32. Urmila Pullat, *The Legal Dissonance Between Marriage and Rape in India*, THE WIRE (Oct. 14, 2017) <https://thewire.in/gender/the-legal-dissonance-between-marriage-and-rape-in-india> [<https://perma.cc/D9X6-WXY5>]. Public Interest Litigation in India loosens the standing requirement and allows any private party to bring a claim for the protection of public interest.

33. PEN. CODE (1860), § 375, Exception 2.

34. *Independent Thought*, 382 SCC; see Pullat, *supra* note 31.



distinction between a married girl child and an unmarried girl child.<sup>35</sup> The Supreme Court offered well-supported and rational arguments to defend its decision to change the exception from “under fifteen years of age” to “under eighteen years of age.”<sup>36</sup>

The Court stipulated that the distinction between the married girl child and the unmarried girl child is contrary to the spirit of the Constitution of India (“the Constitution”), specifically Article 15(3) and Article 21.<sup>37</sup> The concurring judgment also pointed out equal protection clause under Article 14 of the Constitution.<sup>38</sup> Similarly, the Court identifies that the Constitution and the Protection of Human Rights Act, 1993, guarantee liberty and dignity as protected rights and to allow a man to engage in forced sexual intercourse with his child bride would be a violation of these rights.<sup>39</sup> The Supreme Court also recognized the importance of a woman’s autonomy over her own body, her right to bodily integrity, and her right to privacy.<sup>40</sup>

Furthermore, the Court pointed out the inconsistencies that arise from the fact that husbands can be charged with lesser sexual crimes, while enjoying an exemption from the much more serious crime of rape.<sup>41</sup> Lesser crimes for which the husband can be prosecuted include intent to outrage her modesty, sexual harassment, assault or use of criminal force against woman with the intent to disrobe, voyeurism, and stalking.<sup>42</sup> There are no marital exception clauses associated with any of these crimes.<sup>43</sup> Relatedly, women also enjoy protection under

35. Independent Thought, 382 SCC. Child marital rape is now illegal.

36. Independent Thought, 382 SCC.

37. Independent Thought, 382 SCC at 2, 4; Independent Thought, 382 SCC at 112, 114 (Deepak Gupta, J., concurring); *see also* INDIA CONST., art. 15(3) (“Nothing in this article shall prevent the State from making any special provision for women and children.”); INDIA CONST., art. 21 (“No person shall be deprived of his life or personal liberty except according to procedure established by law.”).

38. Independent Thought, 382 SCC at 112 (Deepak Gupta, J. concurring); *see also* INDIA CONST., art. 14 (“The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”).

39. Independent Thought, 382 SCC at 22, 38-39 (quoting *Maharashtra v. Madhukar Narayan Mardikar*, (1990) 26 SCR 115-17).

40. Independent Thought, 382 SCC at 14-15, 38 (quoting *Maharashtra v. Madhukar Narayan Mardikar*, (1990) 26 SCR 115-17); Independent Thought, 382 SCC at 41 (quoting *State of Karnataka v. Krishnappa*, (2000) 2 SCR 761); Independent Thought, 382 SCC at 125-26 (urging the right of privacy from Justice K.S. Puttaswamy (Retd.) & Anr. v. Union of India, (2018) 494 SCC (India)).

41. Independent Thought, 382 SCC at 21.

42. Independent Thought, 382 SCC at 21; Independent Thought, 382 SCC at 120-21 (Deepak Gupta, J., concurring).

43. Independent Thought, 382 SCC at 121 (Deepak Gupta, J., concurring).

Section 3 of the Protection of Women from Domestic Violence Act, 2005.<sup>44</sup> Lastly, the Court pointed to India's international obligations, especially under the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW").<sup>45</sup> The decision under *Independent Thought v. Union of India* was a milestone for advocates in furthering the fight against marital rape.

### III. PERSPECTIVES ON CRIMINALIZATION OF MARITAL RAPE

#### A. Arguments against Criminalization of Marital Rape

There are several arguments put forth by supporters of the marital rape exception that have been countered by national and international studies, court of law decisions, and various academics. First off, advocates purport that women already have adequate legal remedies through the Protection of Women from Violence Act as well as Section 498A of the Indian Penal Code. Further, the reasoning used by India's Law Commission as well as other high-positioned officials is one of cultural relativism indicating that criminalizing marital rape is not feasible in the context of the Indian culture. Among these arguments, proponents also maintain that marriage connotes consent, that marital rape is uncommon in India, and that providing a specific legal recourse for marital rape in the criminal code would be misused by women. Overall, these arguments are augmented by ingrained stereotypes and stigma against women that is prevalent in Indian society and can be reasonably opposed by current statistics and academic findings.

#### 1. Adequate Legal Recourse Against Marital Rape Already Exists

Many proponents of maintaining the marital rape exception state that the gap created by the exception has been filled by the Protection of Women from Domestic Violence Act of 2005, Section 498A of the Indian Penal Code, and the Hindu Marriage Act.<sup>46</sup> The Domestic

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44. *Independent Thought*, 382 SCC at 22. (Section 3 provides protection from conduct that harms, injures, or endangers the health, safety, life, limb, or well-being of a woman, whether that amounts to mental, physical, sexual, or economic abuse).

45. *Independent Thought*, 382 SCC at 25-26. India signed on to the CEDAW Convention on July 30, 1980 and ratified it on July 9, 1993.

46. Rea Savla, *Trapped in Tradition's Prison: Why India is Not Ready to Criminalize Marital Rape*, BERKELEY POL. REV. (Oct. 29, 2019), <https://bpr.berkeley.edu/2015/10/29/trapped-in-traditions-prison/> [<https://perma.cc/7QHM-LGH2>]; see S. Murlidharan, *Law on Marital Rape: Why the Domestic Violence Act is a Reasonable Substitute*, FIRSTPOST (May 3,

Violence Act recognizes sexual abuse within the definition of domestic violence and provides civil remedies including protection orders, judicial separation, and monetary compensation.<sup>47</sup> Section 498A of the Penal Code provides criminal penalties for a husband or his relatives subjecting a woman to cruelty.<sup>48</sup> Furthermore, Section 13 of the Hindu Marriage Act allows “cruelty” to be used as a grounds for divorce.<sup>49</sup>

An immediate setback of the Domestic Violence Act is seen in the fact that this act only provides civil remedies, but does not classify marital rape as a criminal offense.<sup>50</sup> Furthermore, Section 122 of the Indian Evidence Act prohibits disclosure of communications during marriage in court unless one spouse is being prosecuted for a crime against the other spouse.<sup>51</sup> As such, since the Domestic Violence Act only provides civil remedies for sexual violence perpetrated against wives, spousal communication may be relevant to attaining appropriate remedies and yet, would be inadmissible.<sup>52</sup> Furthermore, the Hindu

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2015), <https://www.firstpost.com/living/law-marital-rape-domestic-violence-act-reasonable-substitute-2223674.html> [<https://perma.cc/2A4C-SJYZ>]; Mandal, *supra* note 22, at 263; *see also* NIGAM, *supra* note 22, at 2.

47. The Protection of Women from Domestic Violence Act, No. 43 of 2005, PEN. CODE; *see* Sakshi Kanodia & Ranjabati Ray, *Why Penalize Marital Rape*, 21 J. OF HUMAN. & SOC. SCI. 49, 53 (2016); Savla, *supra* note 46; *see also* Murlidharan, *supra* note 46.

48. PEN. CODE § 498A (India).

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 §, “cruelty” means—

- a. any willful conduct which is of such a nature as is likely to drive to 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.

49. Hindu Marriage Act, No. 25 of 1955, HINDU CODE, § 13; Dr. Sanjay Sindhu & Monika Thakur, *Indian Perspective on the Legal Status of Marital Rape: An Overview*, 2 INT’L J. OF MULTIDISCIPLINARY APPROACH & STUD. 235, 239 (2015).

50. Kanodia & Ray, *supra* note 47, at 53. *See also* NIGAM, *supra* note 22, at 2.

51. Indian Evidence Act, No. 1 of 1872, INDIA CODE (1993), § 122; Akansha Singh, *Marital Rape: A Socially and Legally Justified Crime in India*, in SECOND INTERNATIONAL CONFERENCE OF THE SOUTH ASIAN SOCIETY OF CRIMINOLOGY AND VICTIMOLOGY 26 (K. Jaishankar & Natti Ronel eds., 2013).

52. Indian Evidence Act; Singh, *supra* note 51.

Marriage Act and the Domestic Violence Act give women a recourse to remove themselves from a violent and dangerous situation, but neither does anything to deter the violent behavior itself. Simply granting a divorce on the basis of cruelty still provides the perpetrator with the freedom to marry another woman and subject her to the same abuse.<sup>53</sup> Lastly, in upholding a Madras High Court decision, the Supreme Court in India stated that denial of conjugal relations in a marriage can amount to “cruelty” and be grounds for seeking a divorce.<sup>54</sup> As such, instead of arguing that women can be subjected to the torture of marital rape and then seek divorce on the basis of cruelty, it would stand to reason for the government to criminalize marital rape and retain the allowance for men to seek a divorce on the grounds that denial of sexual relations is cruel.

## 2. Cultural Relativism

At the forefront of the fight against criminalization is the argument that the concept of marital rape cannot work in India due to the stark cultural differences between the prevalent culture in India and the concept of marriage in the West.<sup>55</sup> The argument put forth is that social customs and values, religious beliefs, and the idea of marriage as a sacrament along with the staggering rate of poverty, illiteracy, and lack of education, all create an environment in India that is not conducive for the criminalization of marital rape.<sup>56</sup> Proponents of this argument stipulate that criminalizing marital rape is intruding on the privacy of the sacrament of marriage.<sup>57</sup> A few facets emerge from the cultural relativism argument. First off, the cultural value placed on the sanctity of marriage advances the argument that criminalizing marital rape would destroy the institution of marriage.<sup>58</sup> This argument has

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53. NIGAM, *supra* note 22, at 4.

54. Manish Raj, *Denial of sex by spouse is cruelty: Supreme Court*, THE TIMES OF INDIA (Sept. 26, 2014), <https://timesofindia.indiatimes.com/india/Denial-of-sex-by-spouse-is-cruelty-Supreme-Court/articleshow/43470243.cms> [<https://perma.cc/6XMM-88T3>].

55. Mandal, *supra* note 22, at 257.

56. Sachdev, *supra* note 1. Sonal Singh, *Dear Supreme Court, Here's Why Marital Rape Should be Criminalised*, THE BETTER INDIA (Dec. 1, 2017), <https://www.thebetterindia.com/123017/supreme-court-criminalise-marital-rape-laws-india/> [<https://perma.cc/WA5W-TER8>]. Press Release, Gov't of India Ministry of Home Affairs, Women Subjected to Marital Rape (Apr. 29, 2015); NIGAM, *supra* note 22, at 2.

57. See Sindhu & Thakur, *supra* note 49, at 244.

58. Independent Thought, 382 SCC at 57; Singh, *supra* note 51; Samarjit Pattnaik, et al., *The Viewpoint: The law on Criminalisation of Marital Rape*, BAR & BENCH (Dec. 27, 2017), <https://barandbench.com/viewpoint-criminalisation-marital-rape/> [<https://perma.cc/4BPC->

already been struck down by the Supreme Court in *Independent Thought*, where the Court specifically explained that marriage is personal and nothing short of the Indian State (“the State”) criminalizing marriage itself can destroy the institution of marriage.<sup>59</sup> The Court further elaborated that if divorce and judicial separation are not seen as destroying the institution of marriage, the concept of marital rape certainly does not have the potential of destroying the institution of marriage.<sup>60</sup> Moreover, the High Court of Gujarat, India has recently argued that the non-consensual act of marital rape violates the trust and confidence within a marriage and the prevalence of marital rape in India is what has damaged the institution of marriage.<sup>61</sup> Secondly, the culture of India is cited to say that most Indian women are not financially independent or literate and thus would be unable to survive outside the framework of marriage.<sup>62</sup> The State is obligated under the Constitution as well as its international obligations to provide institutions where women can access needed assistance in order to be able to survive outside of the context of marriage.

### 3. Implied Consent

A common argument used against the criminalization of marital rape is the idea of implied consent within a marriage. In 1736, Sir Matthew Hale of England had declared that “the husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband which she cannot retract.”<sup>63</sup> Another historical justification for not recognizing marital rape comes from William Blackstone in 1753 when he defended the common law doctrine of coverture.<sup>64</sup> Blackstone contended that

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V44K]. See generally LAW COMMISSION OF INDIA, 172ND REPORT ON REVIEW OF RAPE LAWS (2000).

59. *Independent Thought*, 382 SCC at 57.

60. *Independent Thought*, 382 SCC at 57.

61. *Nimeshbhai Bharatbhai Desai v. State of Gujarat*, (2017) No. 26957, at 1-2 (India). Pattnaik et al., *supra* note 58.

62. Swarupa Dutt, *Why marital rape should be criminalised*, REDIFF NEWS (Sept. 12, 2017), <http://www.rediff.com/news/interview/why-marital-rape-should-be-criminalised/20170912.htm> [<https://perma.cc/2VZS-XAZR>].

63. SIR MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 628 (1736); *Independent Thought*, 382 SCC at 44-45.

64. SIR WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND IN FOUR BOOKS, \*442 (1893) (emphasis in original); Maria Pracher, *The Marital Rape Exemption: A Violation of a Woman’s Right of Privacy*, 11 GOLDEN GATE U. L. REV. 717, 727 (1981).

[B]y marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing [sic] . . . and her condition during her marriage is called her coverture.<sup>65</sup>

This immunity was revoked in England and Wales in 1991, when Lord Keith communicated on behalf of the Court that modern marriage is a partnership of equals and the wife is no longer considered the subservient chattel of the husband.<sup>66</sup> The revocation was further supported by the European Commission of Human Rights, which attested that the rapists' relationship with the victim does not change the fact that he is a rapist.<sup>67</sup> Nonetheless, the argument that marriage implies consent is still used today in India to justify the marital rape exemption in the penal code as seen by the Law Commission of India's 172nd Report on Review of Rape Laws of 2000.<sup>68</sup>

#### 4. Marital Rape is Uncommon

Another argument put forth by advocates for maintaining the marital rape exception is that cases of rape within the marital context are few.<sup>69</sup> In a survey done by the United Nations Populations Fund in 2000, one-third of Indian men admitted to perpetrating some form of sexual violence against their wives.<sup>70</sup> Another study done in 2011 by the International Center for Research on Women indicated that one in five Indian men admitted to having forced sexual relations with their wives.<sup>71</sup> Furthermore, the Committee on the Elimination of Discrimination against Women in its 2014 concluding observations noted concern about the 902.1% increase of violent crimes against women including cases of rape as compiled by the National Crime

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65. BLACKSTONE, *supra* note 64, at \*442; Pracher, *supra* note 64, at 727.

66. Independent Thought, 382 SCC at 45.

67. *Id.*

68. LAW COMMISSION OF INDIA, 172ND REPORT ON REVIEW OF RAPE LAWS (2000); NIGAM, *supra* note 22, at 13.

69. See Sindhu & Thakur, *supra* note 49, at 244.

70. NANDA PRIYA ET AL., MASCULINITY, INTIMATE PARTNER VIOLENCE AND SON PREFERENCE IN INDIA – A STUDY 38-39 (2014).

71. Flavia Agnes, § 498A, *Marital Rape and Adverse Propaganda*, ECON. & POL. WKLY. (June 6, 2015), [http://www.epw.in/system/files/pdf/2015\\_50/23/§\\_498A\\_Marital\\_Rape\\_and\\_Adverse\\_Propaganda.pdf](http://www.epw.in/system/files/pdf/2015_50/23/§_498A_Marital_Rape_and_Adverse_Propaganda.pdf) [<https://perma.cc/KA2N-ZJRT>]; NIGAM, *supra* note 22, at 10.

Records Bureau.<sup>72</sup> Furthermore, a National Family Health Survey conducted in all twenty-nine states by the Ministry of Health and Family Welfare in India in 2005 and 2006 surveyed over 125,000 women and found that two-fifths of all married women have experienced physical, sexual, or emotional abuse perpetrated by partners.<sup>73</sup> Specifically, one out of every ten married women disclose that they have faced sexual violence, either by being physically forced to have intercourse or being forced into performing unwanted sexual acts.<sup>74</sup>

#### 5. Repealing the Marital Rape Exception Will Lead to Misuse by Wives

Lastly, defenders of the marital rape exception purport that repealing the exception will allow wives to misuse the law and bring rape charges against their husbands to settle scores in unrelated quarrels.<sup>75</sup> This argument has been used time and time again for various domestic violence laws enacted to protect women in India including the Protection of Women from Domestic Violence Act, the Dowry Prohibition Act and Section 498A of the Indian Penal Code, which criminalizes physical and mental cruelty against a woman by her husband or his family.<sup>76</sup> For example, in *Arnesh Kumar v. State of Bihar*, the Supreme Court stipulated that Section 498A is being used as a weapon by disgruntled wives rather than a shield.<sup>77</sup> Supporters of this argument have consistently failed to provide empirical evidence in defense of their claims.<sup>78</sup>

The argument that women misuse laws enacted for their protection stems from the statistics that only about fifteen percent of dowry-related cases under the Dowry Prohibition Act and about fourteenth percent of cases under Indian Penal Code Section 498A

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72. Committee on the Elimination of Discrimination Against Women, *Concluding observations on the combined fourth and fifth periodic reports of India*, § 10(a), CEDAW/C/IND/CO/4-5 (July 18, 2014) [hereinafter *Concluding Observations*].

73. Ministry of Health and Family Welfare Government of India, National Family Health Survey, NFHS-3 at 95-96 (2005-06); NIGAM, *supra* note 22, at 10.

74. National Family Health Survey, *supra* note 73, at 98.

75. Mandal, *supra* note 22, at 257; *see* NIGAM, *supra* note 22, at 1.

76. Mandal, *supra* note 22, at 262; *see* NIGAM, *supra* note 22, at 1; Rajesh Sharma & Ors. v. State of UP and Anr., (2017) 1265 SCC (India).

77. *Arnesh Kumar v. State of Bihar*, (2014) 9127 SCC (India); NIGAM, *supra* note 22, at 15.

78. Mandal, *supra* note 22, at 262.

result in convictions.<sup>79</sup> Contrary evidence is provided by the National Family Health Survey, which revealed that two out of every five women in India are victims of physical, sexual or emotional domestic violence.<sup>80</sup> The discrepancies between survey results and conviction rates indicate that the number of convictions do not always portray the reality of the situation.

Furthermore, low conviction rates often stem from poorly led investigations, improperly collected evidence, and omissions of witness statements.<sup>81</sup> What proponents of the misuse argument fail to acknowledge is that limited resources, accessibility to the legal system and debilitating stigma all pose barriers to women actually achieving justice under these laws. The legal process for women to bring a case against her husband is long, arduous, and embarrassing with remedies being difficult and rare to obtain.<sup>82</sup> Registering a case with the police often leads to intrusive and insensitive questions, while judicial decisions indicate a hostility towards women bringing claims against their husbands.<sup>83</sup> Oftentimes, after filing a case, women are advised to withdraw their complaints.<sup>84</sup>

Additionally, the argument that illiteracy, poverty and lack of education in India make the concept of marital rape unworkable in the country directly contradicts the argument that criminalization of marital rape would lead to misuse.<sup>85</sup> If women are not educated or resourced enough to allow proper implementation of such a law, it follows that they would be just as ill-equipped to misuse the law. Other hurdles include many women's low economic standing as well as rural

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79. Gabreil Domínguez, *Misuse of anti-dowry law 'exposes failure of Indian authorities'*, DEUTSCHE WELLE (July 7, 2014), <http://www.dw.com/en/misuse-of-anti-dowry-law-exposes-failure-of-indian-authorities/a-17762685> [<https://perma.cc/EX3S-ERGJ>]; Rajesh Sharma & Ors. v. State of UP and Anr, 1265 SCC.

80. *Women to the Supreme Court: "We Are Not Liars," Protest Against Dilution of § 498A*, INVISIBLE LAWYER (July 31, 2017), <http://www.lawyerscollective.org/the-invisible-lawyer/women-supreme-court-not-liars> [<https://perma.cc/57B2-T5CF>]; MINISTRY OF HEALTH AND FAMILY WELFARE - GOVERNMENT OF INDIA, GENDER EQUALITY AND WOMEN'S EMPOWERMENT IN INDIA 95-96 (2009), available at [http://rchiips.org/nfhs/a\\_subject\\_report\\_gender\\_for\\_website.pdf](http://rchiips.org/nfhs/a_subject_report_gender_for_website.pdf) [<https://perma.cc/3T7F-T7LC>]; NIGAM, *supra* note 22, at 10.

81. *Women to the Supreme Court*, *supra* note 80.

82. Mandal, *supra* note 22, at 262; *Women to the Supreme Court*, *supra* note 80.

83. Mandal, *supra* note 22, at 262; *Women to the Supreme Court*, *supra* note 80; *see also* Agnes, *supra* note 71. *See also* Sachdev, *supra* note 1 (explaining how the Supreme Court of India rejected two separate pleas asking for an amendment to the marital rape claim based on the reasoning that since the petition was by an individual, the Court would not intervene).

84. Mandal, *supra* note 22, at 262.

85. NIGAM, *supra* note 22, at 4.



women's lack of access to courts and transportation.<sup>86</sup> Considering the various obstacles women face in bringing claims against their husbands, manipulating the system in their favor is a privilege that is seldom bestowed to women in India.<sup>87</sup>

### *B. Arguments for Criminalization of Marital Rape*

There are various arguments put forth by courts as well as non-governmental organizations that support the criminalization of marital rape in India. The marital rape exception can be seen as being contrary to many of India's national laws. The exception is also argued to be a violation of various constitutional guarantees. Furthermore, the marital rape exception violates a number of India's international law obligations. Aside from legal arguments under national laws, the Constitution, and international law, arguments are also made about the repercussions of marital rape on a woman physically and psychologically. Lastly, the underlying justifications offered for the exception to marital rape reflect old and outdated notions that have been rejected by various courts around the globe.

#### 1. In Contravention of Other National Laws

Allowing an exception to marital rape to persist is irrational when looking at the bigger picture of national laws in India. Husbands can be held accountable for other, lesser crimes against their wives with the exception of rape.<sup>88</sup> Under the national laws of India, a husband can be held accountable for voluntarily causing hurt,<sup>89</sup> voluntarily causing hurt by dangerous weapons or means,<sup>90</sup> voluntarily causing grievous

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86. Mandal, *supra* note 22, at 262.

87. Mandal, *supra* note 22, at 262.

88. See PEN. CODE §§ 323-325, 354, 354A, 354B, 354C, 354D (India).

89. See PEN. CODE § 323 (India). ("Punishment for voluntarily causing hurt: Whoever, except in the case provided for by § 334, voluntarily causes hurt, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.")

90. See PEN. CODE § 324 (India).

Voluntarily causing hurt by dangerous weapons or means: Whoever, except in the case provided for by § 334, voluntarily causes hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished

hurt,<sup>91</sup> assault with the intention of outraging her modesty,<sup>92</sup> sexual harassment,<sup>93</sup> assault with the intent to disrobe,<sup>94</sup> voyeurism,<sup>95</sup> and stalking.<sup>96</sup> If all of these acts can be criminal even in a marital

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with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

*Id.*

91. *See* PEN. CODE § 325 (India) (“Punishment for voluntarily causing grievous hurt: Whoever, except in the case provided for by § 335, voluntarily causes grievous hurt, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.”).

92. *See* PEN. CODE § 354 (India) (“Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will there by outrage her modesty.”).

93. *See* PEN. CODE § 354A (India).

Sexual harassment and punishment for sexual harassment: (1) A man committing any of the following acts—

- (i) physical contact and advances involving unwelcome and explicit sexual overtures; or (ii) a demand or request for sexual favours; or
  - (iii) showing pornography against the will of a woman; or
  - (iv) making sexually coloured remarks
- shall be guilty of the offence of sexual harassment.

*Id.*

94. *See* PEN. CODE § 354B (India).

Assault or use of criminal force to woman with 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.

*Id.*

95. *See* PEN. CODE § 354C (India).

Voyeurism: Any man who watches, or captures the image of a woman engaging in a private act in circumstances where she would usually have the expectation of not being observed either by the perpetrator or by any other person at the behest of the perpetrator or disseminates such image shall be punished on first conviction with imprisonment of either description for a term which shall not be less than one year, but which may extend to three years, and shall also be liable to fine, and be punished on a second or subsequent conviction, 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.

*Id.*

96. *See* PEN. CODE § 354D (India).

Stalking: (1) Any man who

relationship, it is contradictory to purport that criminalizing marital rape is not feasible in India. It is also discriminatory and contradictory to only provide an exception for rape, while still criminalizing various other offenses. Furthermore, maintaining the spousal exception is in contravention to the Protection of Human Rights Act of 1993. The Act defines human rights to include right to life, liberty, equality, and dignity.<sup>97</sup> The Court in *Independent Thought* stipulated that forced sexual intercourse with a girl child by her husband violates her rights protected under the Protection of Human Rights Act.<sup>98</sup> The Protection of Human Rights Act does not limit its protection to children. As such, it reasonably follows that any forced intercourse would violate an individual's rights under the Protection of Human Rights Act. A similar argument can be made regarding the Protection of Women from Domestic Violence Act, 2005.<sup>99</sup> Allowing the marital rape exception to stand even when it is shown to harm and injure women physically and emotionally directly violates the rights protected under the Domestic Violence Act.

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(i) follows a woman and contacts, or attempts to contact such woman to foster personal interaction repeatedly despite a clear indication of disinterest by such woman; or

(ii) monitors the use by a woman of the internet, email or any other form of electronic communication,  
commits the offence of stalking:

Provided that such conduct shall not amount to stalking if the man who pursued it proves that—

(i) it was pursued for the purpose of preventing or detecting crime and the man accused of stalking had been entrusted with the responsibility of prevention and detection of crime by the State; or

(ii) it was pursued under any law or to comply with any condition or requirement imposed by any person under any law; or

(iii) in the particular circumstances such conduct was reasonable and justified.

*Id.*

97. The Protection of Human Rights Act, No. 10 of 1993, PEN. CODE § 2(d); *Independent Thought*, 382 SCC at 22.

98. *Independent Thought*, 382 SCC at 22.

99. *See Independent Thought*, 382 SCC at 22.

## 2. Violation of Constitutional Guarantees

Preserving Exception 2 to Section 375 of the Indian Penal Code violates rights and protections guaranteed by the Indian Constitution, specifically Article 14, 15(3), and 21. Article 14 of the Constitution of India is an equal protection clause that guarantees equality before the law and prohibits discrimination on the grounds of religion, race, caste, sex or place of birth.<sup>100</sup> Article 15(3) allows the State to make special provisions for women and children.<sup>101</sup> Article 21 of the Constitution establishes protection of life and personal liberty.<sup>102</sup>

Article 14 provides two facets—equality before law and equal protection of law.<sup>103</sup> Equality before the law includes aspects such as the denial of any privileged class or person as well as the State's obligation to bring about a more equal society as envisioned by the preamble and part IV of the Constitution through jurisprudence.<sup>104</sup> In interpreting Article 14, the Supreme Court of India has stated that “all persons similarly circumstanced shall be treated alike in privileges conferred and liabilities imposed.”<sup>105</sup> Furthermore, the test under Article 14 is one of reasonable classification made with the object of achieving a certain end.<sup>106</sup> As such, legislation that is based on an unreasonable and discriminatory classification should be struck down under Article 14 of the Constitution.<sup>107</sup> The marital rape exception, which is now applicable to married women eighteen years of age and older can be seen as arbitrary and discriminatory as it provides for an unsupported distinction between married and unmarried women even though both may be subject to the exact same maltreatment.

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100. INDIA CONST., art. 14. *See generally* Sri Srinivasa Theatre v. Govt. of Tamil Nadu, (1992) SCR 164 (India).

101. INDIA CONST., art. 15(3); Independent Thought, 382 SCC at 4, 33, 114 (Supreme Court argues that the distinction between married and unmarried girl children violates the ethos of Article 15(3)). Similarly, the distinction between married and unmarried adult women would violate the spirit of Article 15(3).

102. INDIA CONST., art. 21; Independent Thought, 382 SCC at 113; Riya Jain, *Article 21 of the Constitution of India – Right to Life and Personal Liberty*, ACADEMIKE (Nov. 13, 2015), <https://www.lawctopus.com/academike/article-21-of-the-constitution-of-india-right-to-life-and-personal-liberty/> [https://perma.cc/8QQ5-C39S].

103. *See* Jain, *supra* note 102. *See generally* Sri Srinivasa Theatre v. Govt. of Tamil Nadu, SCR 164.

104. Jain, *supra* note 102. *See generally* Sri Srinivasa, SCR 164.

105. Re: Special Courts Bill v. Unknown, (1978) 380 SCC (India); *see* Jain, *supra* note 102.

106. Independent Thought, 382 SCC at 109-10. *See generally* Sri Srinivasa Theatre, SCR 164; Re: Special Courts Bill, 380 SCC.

107. Independent Thought, 382 SCC at 109-10.

Article 21 of the Constitution bestows the right to life and the right to personal liberty.<sup>108</sup> Under *Munn v. Illinois*, the US Supreme Court recognized that the right to life is more than a mere animal existence.<sup>109</sup> This interpretation was later affirmed by the Supreme Court of India under *Bandhua Mukti Morcha v. Union of India*.<sup>110</sup> The Court affirmed that the right to life protected under Article 21 preserves the right to life with human dignity.<sup>111</sup> The Supreme Court of India has additionally affirmed that rape infringes on the right to live life with dignity.<sup>112</sup> As such, allowing for an exception to marital rape infringes on the right to life protected under Article 21 of the Constitution.<sup>113</sup>

Furthermore, the Supreme Court has recognized that although the right to privacy is not specifically mentioned in the Indian Constitution, the right is protected under Article 21 of the Constitution under the umbrella of personal liberty.<sup>114</sup> Again, the Court has acknowledged that sexual violence is an intrusion into the right to privacy of a female.<sup>115</sup> Under *State of Maharashtra v. Madhkar Narayan*, the Supreme Court held that every woman is entitled to sexual privacy.<sup>116</sup> Hence, legalizing rape in the context of marriage violates a woman's right to privacy guaranteed under Article 21 of the Constitution.

Additionally, the Supreme Court of India has interpreted Article 21 to encompass the right to good health under the right to life.<sup>117</sup> Rape, in any context, is known to cause a plethora of physical and psychological damage. Sexual violence is known to cause depression, anxiety, pregnancy complications, sexual transmitted diseases as well

108. INDIA CONST., art. 21. *Maneka Gandhi v. Union of India*, (1978) SCR 621 (India).

109. *Munn v. Illinois*, 94 U.S. 113 (1877).

110. *Bandhua Mukti Morcha v. Union of India*, (1984) SCR (India); Dr. Bhavish Gupta & Dr. Meenu Gupta, *Marital Rape: - Current Legal Framework in India and the Need for Change*, 1 GALGOTIAS J. OF LEGAL STUD. 16, 26 (2013).

111. Gupta & Gupta, *supra* note 110; *The Chairman, Railway Board v. Chandrima Das*, (2000) SCC 988 (India).

112. *Independent Thought*, 382 SCC at 22; *The Chairman, Railway Board*, (2000) SCC; Gupta & Gupta, *supra* note 110, at 27.

113. INDIA CONST., art. 21.

114. *Kharak Singh v. State of U.P.*, AIR 1963 SC 1295 (India); *Govind v. State of Madhya Pradesh*, AIR 1975 SC 1378 (India); Gupta & Gupta, *supra* note 110, at 27.

115. *Independent Thought*, 382 SCC at 22; *Karnataka v. Krishnappa* (2000) SCC (India); *State of Maharashtra v. Madhukar Narayan Mardikar*, AIR 1991 SC 207 (India).

116. *Madhukar Narayan Mardikar*, AIR 1991 SC 207; Gupta & Gupta, *supra* note 110, at 27.

117. *CESC Ltd. v. Subhash Chandra*, (1992) SCR (India); Gupta & Gupta, *supra* note 110, at 28.

as various other physical and mental repercussions.<sup>118</sup> The Court has recognized on multiple occasions that rape inevitably causes serious physical and psychological harm.<sup>119</sup> Under *Independent Thought*, where the Court struck down the marital rape exception for child brides, they also conceded that the traumatic consequences of rape affect adult victims as well.<sup>120</sup> Consequentially, in light of the Court's recognition of the right to good health as a fundamental right protected under the right to life in Article 21 of the Constitution and the Court's assertion that rape inevitably causes physical and psychological consequences, it reasonably follows that the exception to marital rape in Section 375 of the Indian Penal Code violates the Constitution of India.

### 3. In Contravention of International Law Obligations

India has ratified the Convention on the Elimination of All Forms of Discrimination Against Women, the International Covenant on Civil and Political Rights ("ICCPR"), and the International Covenant on Economic, Social and Cultural Rights ("ICESCR").<sup>121</sup> India is also a signatory of the Universal Declaration of Human Rights ("UDHR").<sup>122</sup> The CEDAW Committee has identified that gender-based violence nullifies various other rights guaranteed under international treaties, including the right to be free from discrimination, the right to life, right to liberty and security, right to equality in the family, and right to health and well-being.<sup>123</sup>

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118. Melanie Randall & Vasanthi Venkatesh, *The Right to No: The Crime of Marital Rape, Women's Human Rights, and International Law*, 41 *BROOK. J. INT'L L.* 153, 194 (2015); WORLD HEALTH ORG., UNDERSTANDING AND ADDRESSING VIOLENCE AGAINST WOMEN 7 (2012).

119. *Independent Thought*, 382 SCC at 42. *See generally* *State of Punjab v. Gurmit Singh*, (1996) 2 SCC 384.

120. *Independent Thought*, 382 SCC at 43.

121. *Independent Thought*, 382 SCC at 25-26; *Core International Human Rights Treaties, Optional Protocols & Core ILO Conventions Ratified by India*, in NAT'L HUMAN RIGHTS COMMISSION, INDIA, A HANDBOOK ON INTERNATIONAL HUMAN RIGHTS CONVENTION 22-25 (2012), *available at* [http://nhrc.nic.in/sites/default/files/A\\_Handbook\\_on\\_International\\_HR\\_Conventions.pdf](http://nhrc.nic.in/sites/default/files/A_Handbook_on_International_HR_Conventions.pdf) [<https://perma.cc/A4VW-ZXQU>] [hereinafter A HANDBOOK ON INTERNATIONAL HUMAN RIGHTS].

122. A HANDBOOK ON INTERNATIONAL HUMAN RIGHTS CONVENTION, *supra* note 121.

123. Through General Recommendation No. 19 (11th session, 1992), art. 7, the CEDAW Committee stated:

The due diligence requirement under international law treaties, specifically under CEDAW, requires states to “take all appropriate measures” to eliminate all forms of discrimination against women.<sup>124</sup> Furthermore, Article 2(b) of CEDAW mandates states to adopt all legislation necessary to eliminate all forms of discrimination against women.<sup>125</sup> Discrimination against women has been defined to include gender-based violence including acts that inflict physical, mental, or sexual harm.<sup>126</sup> Moreover, the obligation under Article 2 of CEDAW specifies that the state is required to take all appropriate measures to eliminate discrimination against women not only on behalf of the Government, but also to eliminate discrimination perpetrated by any person or organization.<sup>127</sup> Under the international obligation regarding prevention of violence against women, states are required to prevent, investigate, prosecute, and compensate with due diligence.<sup>128</sup> As such, it has been established that the due diligence requirement under CEDAW requires the criminalization of marital rape under national law.<sup>129</sup>

Furthermore, allowing an exception for marital rape infringes on a woman’s right to be free from discrimination under international

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Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention. These rights and freedoms include: (a) The right to life; (b) The right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment; (c) The right to equal protection according to humanitarian norms in time of international or internal armed conflict; (d) The right to liberty and security of person; (e) The right to equal protection under the law; (f) The right to equality in the family; (g) The right to the highest standard attainable of physical and mental health; (h) The right to just and favourable conditions of work.

*See also*, Randall & Venkatesh, *supra* note 118, at 166.

124. Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, A/HRC/29/27, art. 22. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, art. 2 [hereinafter CEDAW].

125. CEDAW, *supra* note 124, art. 2(b). Report of the Special Rapporteur on violence against women, *supra* note 124, art. 22.

126. CEDAW, *supra* note 124, art. 1. CEDAW General Recommendation No. 19 (11th session, 1992), art. 6.

127. CEDAW, *supra* note 124, art. 2(e). CEDAW General Recommendation No. 19 (11th session, 1992), art. 9.

128. Randall & Venkatesh, *supra* note 118, at 166; CEDAW General Recommendation No. 19 (11th session, 1992); Declaration on the Elimination of Violence Against Women, art. 4(c), U.N. Doc. A/RES/48/104 (Dec. 20, 1993).

129. Randall & Venkatesh, *supra* note 118, at 165-66; *See also* CEDAW General Recommendation No. 19 (11th session, 1992), art. 24(b).

law.<sup>130</sup> As stated above, freedom from discrimination is protected under CEDAW.<sup>131</sup> It is also implicitly protected under the ICECSR since it is recognized that intimate partner violence weakens the ability of an individual to meaningfully benefit from economic, social and cultural rights.<sup>132</sup>

Marital rape is an infringement on the right to life.<sup>133</sup> The right to life is an essential right guaranteed by all human rights treaties and customary international law.<sup>134</sup> Specific guarantees to the right to life can be found in the ICCPT<sup>135</sup> and the UDHR.<sup>136</sup> Violence against women in the context of intimate partner violence has been recognized as a leading cause of death around the globe.<sup>137</sup> Marital rape also equates to other consequences that infringe on the right to life including increases in miscarriages, complications during pregnancies, unsafe abortion practices, and the higher likelihood of contracting sexual transmitted diseases, all of which can lead to fatal results.<sup>138</sup> As a result, criminalization of marital rape is a fundamental obligation states must undertake in order to meet their international law obligations.

Marital rape also violates the right to liberty and security of person.<sup>139</sup> The right to liberty is again guaranteed by the ICCPR<sup>140</sup> and UDHR.<sup>141</sup> Article 9 of the ICCPR requires State parties to respond appropriately to patterns of violence against women.<sup>142</sup> Violence against women in the form of marital rape can potentially continue relentlessly throughout the relationship. As such, under international

130. CEDAW General Recommendation No. 19 (11th session, 1992), art. 7; Randall & Venkatesh, *supra* note 118, at 189.

131. CEDAW, *supra* note 124, art. 1; Randall & Venkatesh, *supra* note 118, at 189.

132. Randall & Venkatesh, *supra* note 118, at 190.

133. CEDAW General Recommendation No. 19 (11th session, 1992), art. 7. Randall & Venkatesh, *supra* note 118, at 184.

134. Randall & Venkatesh, *supra* note 118, at 184.

135. International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171, art. 6 [hereinafter ICCPR]. Randall & Venkatesh, *supra* note 118, at 184.

136. Universal Declaration of Human Rights, G.A. Res. 217a (III), U.N. Doc. A/810 at 71 (1948), art. 3 [hereinafter UDHR]. Randall & Venkatesh, *supra* note 118, at 184.

137. Randall & Venkatesh, *supra* note 118, at 184; U.N. SECRETARY-GENERAL, ENDING VIOLENCE AGAINST WOMEN 43-45 (2006).

138. Randall & Venkatesh, *supra* note 118, at 184; WORLD HEALTH ORG., UNDERSTANDING AND ADDRESSING VIOLENCE AGAINST WOMEN, *supra* note 118, at 7.

139. CEDAW General Recommendation No. 19 (11th session, 1992), art. 7; Randall & Venkatesh, *supra* note 118, at 186.

140. ICCPR, *supra* note 135, art. 9. Randall & Venkatesh, *supra* note 118, at 186.

141. UDHR, *supra* note 136, arts. 3, 9. Randall & Venkatesh, *supra* note 118, at 186.

142. Randall & Venkatesh, *supra* note 118, at 187. ICCPR, *supra* note 135, art. 9.



law, States are required to recognize marital rape as a pattern of violence against women and take appropriate measures to criminalize and penalize such behavior.

Additionally, gender-based violence infringes on the right to equality in the family guaranteed under international obligations.<sup>143</sup> Under the CEDAW, States are required to change social and cultural patterns in order to eliminate prejudices that perpetuate stereotypes between men and women.<sup>144</sup> Maintaining an exception for marital rape perpetuates stereotypes that a woman is the sexual property of her husband negating any semblance of equality within the family.<sup>145</sup> Criminalizing marital rape refutes the idea that women are the sexual property of their husbands and indicates that marriage should be built on equal grounds between both spouses.<sup>146</sup> As such, eradicating the exception to marital rape is necessary to uphold India's obligation to promote equality within the family.

Lastly, criminalizing marital rape is tantamount in upholding India's international obligation to protect the right to health and well-being. Protection of health and well-being is mandated by the UDHR<sup>147</sup> and ICESCR.<sup>148</sup> The Committee on Economic, Social, and Cultural Rights goes further to specify that under Article 12 of ICESCR, States are required to diminish women's health risks by protecting them from domestic violence.<sup>149</sup> Intimate partner sexual violence can cause a number of health consequences physically and psychologically.<sup>150</sup> Physical consequences can include miscarriages, bladder infections, infertility, and potential contraction of sexual transmitted diseases.<sup>151</sup> Psychological consequences can comprise of depression, anxiety,

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143. CEDAW General Recommendation No. 19 (11th session, 1992), art. 7. Randall & Venkatesh, *supra* note 118, at 192.

144. CEDAW, *supra* note 124, art. 5(a). Randall & Venkatesh, *supra* note 118, at 193.

145. Randall & Venkatesh, *supra* note 118, at 192.

146. Randall & Venkatesh, *supra* note 118, at 193.

147. UDHR, *supra* note 136, art. 25(1). Randall & Venkatesh, *supra* note 118, at 194.

148. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-10, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3, art. 12 [hereinafter ICESCR]. Randall & Venkatesh, *supra* note 118, at 192.

149. Randall & Venkatesh, *supra* note 118, at 194.

150. Randall & Venkatesh, *supra* note 118, at 194; WORLD HEALTH ORG., UNDERSTANDING AND ADDRESSING VIOLENCE AGAINST WOMEN, *supra* note 118, at 7.

151. U.N. Econ. & Soc. Council, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social, and Cultural Rights, General Comment No. 14 (2000)*, ¶ 21, E/C.12/2000/4 (Aug. 11, 2000); Randall & Venkatesh, *supra* note 118, at 195; WORLD HEALTH ORG., UNDERSTANDING AND ADDRESSING VIOLENCE AGAINST WOMEN, *supra* note 118, at 7.

shock, post-traumatic stress disorder, and suicidal thoughts.<sup>152</sup> Maintaining an exception to marital rape clearly infringes on a state's obligation to protect the health and well-being of women.

#### *IV. CONTINUING EFFORTS TO COMBAT MARITAL RAPE*

It is evident that marital rape is a prevalent issue facing India and there are several actions that need to be taken in order to properly combat its pervasiveness. At the very least, the marital rape exception needs to be eliminated making rape within a marriage a criminal offense and effectively removing marriage as a defense to rape. Criminalizing marital rape is only the first step that needs to be taken. In order to completely eradicate marital rape, there are still various economic, social, and legal barriers that need to be addressed in order to provide women who face sexual violence in marriage with an effective remedy. Gender-sensitivity training needs to be provided to various vocations including the police and the judiciary. Furthermore, centers and sanctuaries should be provided by the State in order to aid women in removing themselves from violent environments and providing them with necessary support services. Lastly, the State needs to adopt a national policy towards eradicating pervasive stereotypes and stigma against women generally and married women specifically.

##### *A. Repeal the Marital Rape Exception*

First off, it is imperative that the marital rape exception be entirely eradicated from the Indian Penal Code.<sup>153</sup> Similarly, the Code should affirmatively define marital rape as a criminal offense, which would also effectively prevent marriage from being used as a defense to rape claims.<sup>154</sup> Laws are enacted in order to punish unsocial behaviors, provide deterrent against socially unacceptable actions, and generally educate society regarding the overarching consensus on moral and

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152. Randall & Venkatesh, *supra* note 118, at 194; WORLD HEALTH ORG., UNDERSTANDING AND ADDRESSING VIOLENCE AGAINST WOMEN, *supra* note 118, at 7.

153. *Concluding Observations*, *supra* note 72, at 3; NIGAM, *supra* note 22, at 18.

154. *Concluding Observations*, *supra* note 72, at 3; Pranesh Prasad, *A Strategy For Criminalizing Marital Rape in India*, HUFFINGTON POST (Sept. 25, 2016), [https://www.huffingtonpost.in/pranesh-prasad/a-strategy-for-criminalizing-marital-rape-in-india\\_a\\_21478727/](https://www.huffingtonpost.in/pranesh-prasad/a-strategy-for-criminalizing-marital-rape-in-india_a_21478727/) [<https://perma.cc/DUS4-BX7A>].

social conduct.<sup>155</sup> By not criminalizing such conduct and providing marriage as an affirmative defense to rape allegations, the State effectively relates to society that forced conjugal relations, even violent encounters, are socially acceptable behaviors.<sup>156</sup> It also perpetuates stereotypes and biases against married women including the idea that consent is implied by marriage and that women lose their bodily autonomy when entering into the marital relationship.<sup>157</sup>

### *B. Establish Efficient Police Practices*

Secondly, the State needs to bolster efficient police practices.<sup>158</sup> Antagonistic police practices are a large hurdle that discourage women from reporting violence in the first place. Furthermore, law enforcement discretion allows police officers to refuse to file cases, posing another barrier for women reporting sexual violence in marital relationships.<sup>159</sup> Specifically, the State needs to establish Standard Procedures for the police regarding cases of violence against girls and women.<sup>160</sup> Gender-sensitive training needs to be mandated and provided to ensure proper treatment of victims and witnesses as well as efficient investigations and case-filings.<sup>161</sup>

### *C. Remedy Hostile Judicial Practices*

Furthermore, the hostility portrayed by the judiciary in previous marital violence cases where the bench has consistently underplayed the seriousness of marital rape also needs to be challenged.<sup>162</sup> Such practices can be efficiently combatted by providing sentencing guidelines to courts regarding marital sexual violence cases. It is also imperative to provide gender-sensitive training to judicial officials.<sup>163</sup>

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155. NIGAM, *supra* note 22, at 7; Melanie Randall & Vasanthi Venkatesh, *Symposium on the International Legal Obligation to Criminalize Marital Rape Criminalizing Sexual Violence Against Women in Intimate Relationships: State Obligations Under Human Rights Law*, 109 AMER. J. INT'L L. 189, 195 (2015).

156. NIGAM, *supra* note 22, at 7. Prasad, *supra* note 154.

157. NIGAM, *supra* note 22, at 7.

158. *Concluding Observations*, *supra* note 72, at 3.

159. Randall & Venkatesh, *supra* note 155, at 195.

160. *Concluding Observations*, *supra* note 72, at 3.

161. *Concluding Observations*, *supra* note 72, at 3-4; Ram Kishor Deora & Mukul Krishna Vyas, *Marital Rape – A Blot on Socio-Legal Machinery*, 2 HUM. RTS. INT'L RES. J. 27, 31-32 (2014). Randall & Venkatesh, *supra* note 155, at 195-96.

162. Mandal, *supra* note 22, at 257.

163. *Concluding Observations*, *supra* note 72, at 4.

*D. Establish Accessible Crisis Centers*

Moreover, an important aspect of ensuring that marital violence against women is appropriately prevented, the State needs to ensure that women have access to important support mechanisms. Many women, particularly in rural areas of India will not report sexual violence to authorities because of their financial dependency on their husbands.<sup>164</sup> They fear that if they are separated from their husbands, they will be left with no alternative support system. As such, the State should establish widespread and accessible crisis centers where female victims of violence and rape can receive shelter, medical and psychological attention, legal assistance, and other needed support services.<sup>165</sup>

*E. Combat Damaging Stereotypes*

Lastly, persistence of marital rape in India can be attributed to the ingrained patriarchal mindsets as well as debilitating social and economic structures prevalent throughout the country. Women are less likely to report instances of rape within their marriage because of the social stigma attached to rape victims in India as well as the disrepute that attacks women who fail in “making their marriage work.”<sup>166</sup> As such, an essential factor in combatting marital rape is the fight against deep-rooted stigma and stereotypes concerning women.<sup>167</sup> Specifically, it is imperative to educate the masses that marriage does not indicate that a woman’s legal and sexual autonomy have ceased to exist.<sup>168</sup> Elimination of these and other stereotypes can be served by widespread education and dissemination of information regarding women’s equality in social, political and economic institutions as well as women’s bodily autonomy before and after marriage. The State needs to prioritize a national movement to fight and eliminate patriarchal stereotypes by targeted awareness-raising campaigns.<sup>169</sup> Along with educating girls on their rights, it is imperative to involve

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164. Sutirtha Sahariah, *Indian Courts Finally Consider Making Marital Rape Illegal*, GLOBAL CITIZEN (Dec. 1, 2017), <https://www.globalcitizen.org/en/content/marital-rape-india-criminal-offense/> [<https://perma.cc/T7XR-BQDQ>].

165. *Concluding Observations*, *supra* note 72, at 3; Randall & Venkatesh, *supra* note 155, at 196.

166. Singh, *supra* note 56, at 24.

167. NIGAM, *supra* note 22, at 18.

168. Deora & Vyas, *supra* note 161, at 32.

169. *Concluding Observations*, *supra* note 72, at 7.

and educate men and boys in the effort to combat marital rape as well as the overarching goal of attaining gender equality in India.<sup>170</sup>

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170. U.N. Population Fund, *A Year of Renewal* 28 (2014).