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Marital Rape and its Struggle with Law in India

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ABSTRACT

Marital rape, as the name suggests refers to non-consensual sexual intercourse with one's spouse. It is rape that occurs within the "sacrosanct" institution of marriage. Unlike rape that is criminalised in India under section 64 of the Bhartiya Nyaya Sanhita, 2023, the Indian law does not recognise marital rape as a crime. There have been continuing debates and discussion around marital rape in the social and legal arena, however, the status of marital rape in India remains the same. This paper delves into the longstanding struggle of marital rape with law and society and the dire need to criminalise marital rape in India. The author depicts this struggle through Law Commission reports, Parliamentary debates and Judicial decisions. In this paper, the author has attempted to depict the journey of marital rape in the legal field, from the marital rape exception in the criminal law, arguments advanced against marital rape to the present realities that demand the recognition of marital rape as a crime. Further, the author discusses the data available on marital rape, highlighting the distress and cry for help when there is a lack of remedies if a woman is raped by her husband. The paper concludes on the note that criminalising marital rape in India is an indispensable need of the hour, and it is high time for India to take action for the plight of married Indian women.

Keywords: *Marital Rape, Women, Wife, Marriage.*

I. INTRODUCTION

Marital rape refers to rape where the victim is the perpetrator's spouse.[2] The absence of consent is the most important element which makes the sexual intercourse between a husband and wife, marital rape. Undoubtedly, marital rape affects both men and women, but given the societal realities today, it impacts women more frequently leaving the wives more vulnerable to marital rape. Traditionally, the sexual relationship between a married couple assumes intercourse as a "right" of the husband over his wife. The traditional notions of marriage regarding gender roles and authority of husbands over wives are evidently prevalent even today and continues to grow which is the main cause of marital rape and the struggle of its

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[2] Since this paper is in the Indian context, the author assumes that the perpetrator is the husband, and the victim is the wife.

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recognition as a crime. As the society becomes more aware of the various layers of sexual violence against women, the demand for criminalising marital rape is getting stronger. There has been growing debates, discussions and international conventions regarding sexual violence within matrimony (specifically against women). However, despite the widely evident injustice of an unwanted sexual intercourse, marital rape remains conveniently tolerated and outside the scope of criminal law in India.

India is among the 36 countries where marital rape is not yet criminalised.[3] The status of marital rape in India is that it has always been an exception to rape. Exception 2 of section 375 of the Indian Penal Code, 1860, provides for an exclusion of sexual intercourse of sexual acts between a husband and wife from the definition of rape.[4] The new criminal laws applicable in India presently draws a similar exception in Section 63 of the Bharatiya Nyaya Sanhita which states that "*Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape*."[5] Such an exception (referred to as 'marital rape exception') conveniently excludes the atrocities that a married women goes through within the institution of marriage.

The main arguments of the Union of India for not criminalising marital rape says that it would be "excessively harsh" and "disproportionate".[6] The debate in India is deeply rooted in social moral and cultural perspectives. Traditionally, women, upon entering into a marriage is viewed as a dependent of her husband with no autonomy over property or even her own body. This perception made its way to legal interpretations which saw women as the property of her husband and gave rise to the presumption of the wife's consent to all sexual acts within marriage.[7] Women were seen as their husband's chattel which deprived them of their marital rights.[8] The woman in a marriage is expected to dutifully provide her husband with sexual access even if she does not consent.

The paper further discusses the trajectory of marital rape right from the time when India's first criminal law the Indian Penal Code came into force to when the issue of marital rape finally

[3] Anusha Agarwal, *Only 36 Countries Have Not Criminalised Marital Rape, India Is One of Them*, THE LEAFLET (Dec. 10, 2024, 11:37 PM), https://theleaflet.in/analysis/only-36-countries-have-not-criminalised-marital-rape-india-is-one-of-them.
[4] Indian Penal Code, 1860, §375, No. 45, Act of Parliament, 1860 (India).
[5] Bharatiya Nyaya Sanhita, 2023, §63, No. 45, Act of Parliament, 2023 (India).
[6] Ananthakrishnan G, *Centre argues against labeling marital rape as 'rape,' says it is 'disproportionate' and 'harsh*, INDIAN EXPRESS (Dec.11, 2024, 6:40 PM), https://indianexpress.com/article/india/centre-sc-criminalising-marital-rape-9602198/.
[7] Akshita Kaushik, *Constitutional Imperatives: Addressing Marital Rape within Legal Frameworks*, TSCLD (Dec. 11, 2024, 7:01 PM), https://www.tscld.com/marital-rape-india-criminal-justice-reform.
[8] Anne Dailey, *To Have and To Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99 Harv. L. Rev. 1255, 1256 (1986).

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made its way to the deliberations in the apex court of the country. Further an analysis into the various law commission reports, committee reports and bills is discussed to carve out the arguments made in the discussion of criminalisation of marital rape. In addition to this, the paper delves into the breach of fundamental rights caused by marital rape, the paper also discusses the present data available through research on marital rape and the limitations of the argued alternative remedies to the issue of marital rape, all of which point to the urgent need of criminalisation of marital rape in India. Finally, in conclusion the paper highlights that criminalisation of marital rape is a continued struggle to find its footing with law.

II. THE TRAJECTORY OF MARITAL RAPE IN INDIA

The chronology of the marital rape exception dates back to 1860 when the Indian Penal Code (IPC) came into force which limited the application of this exception to women above 10 years of age. The IPC was amended in 1940 to make this exception available to women above 15 years of age. However, the issue of marital rape did not reach the Indian courts until 2016 when the first petition challenging the marital rape exception was filed in Delhi High Court on 11th January, 2016. The hon'ble High Court issued notice to the centre seeking its stand on the issue. On 29th August, 2017, the Centre filed an affidavit stating that marital rape cannot be made a criminal offence, and so the continuing debate on the criminalisation of marital rape began.

The central government took its stand opposing the criminalisation of marital rape in an affidavit filed before the Delhi High Court in August 2017, stating that the criminalisation could have a "*destabilising effect on the institution of marriage*" and has the potential to become an "*easy tool for harassing husbands*".[9] An important event in this trajectory is when the Hon'ble Supreme Court in 2017, in the case of **Independent Thought v. Union of India**[10] read down the marital rape exception and held that "*Sexual intercourse or sexual acts by a man with his wife, the wife not being under eighteen years of age, is not rape*."

Finally in 2022, the Delhi High Court began hearing the petitions seeking criminalisation of marital rape. To this, the centre filed an additional affidavit stating that it was considering a "constructive approach" to the issue of marital rape and sought suggestions from the stakeholders including the state governments and the UTs and sought more time to present its stand. However, the Delhi High court reversed its verdict on petitions, a month later after

[9] Bhadra Sinha, *In 2017, govt said criminalising marital rape would harm marriage. Now it's reviewing stance*, THE PRINT, (Dec. 11, 2024, 7:43 PM), https://theprint.in/judiciary/in-2017-govt-said-criminalising-marital-rape-would-harm-marriage-now-its-reviewing-stance/819853/.
[10] Independent Thought v. Union of India, AIR 2017 SC 4904.

refusing to grant more time to the centre. Justice Rajiv Shakdher headed the division bench and favoured that the marital rape exception be struck down terming it as "unconstitutional" and said that it would be "tragic if a married woman's call for justice is not heard even after 162 years" since the IPC was enacted[11] while Justice Hari Shankar said that the exception was based on "intelligible criteria".[12] In May 2022, The Delhi High Court delivered a split verdict on the matter and granted leave to the parties to file an appeal before the Hon'ble Supreme Court.

Then in March 2022, the Karnataka High Court refused to quash a rape charge against a man accused of raping his wife and keeping his wife as a sex slave. The Karnataka High Court observed that "A man is a man; an act is an act; rape is a rape, be it performed by a man the 'husband' on the woman 'wife'"[13] However, in July 2022, the Hon'ble Supreme Court put a stay on this order, although the Karnataka government had supported the High Court judgement in an affidavit in the apex court.

In the landmark judgement on the termination of pregnancy under the Medical Termination of Pregnancy (MTP) Act, the Hon'ble Supreme Court observed that the definition of 'rape' will include marital rape to save women from pregnancy resulting from non-consensual sex with her husband.[14]

It took seven years for the issue of marital rape to reach the doorstep of the apex court of the country when the Hon'ble Supreme Court commenced the hearing of pleas relating to the question of legal protection to a man for forcing his wife, who is not a minor, to have sex with him in September 2024. The bench comprised of the then Chief Justice of India, Justice DY Chandrachud, Justice JB Pardiwala and Justice Manoj Misra. The final hearing of the case had opened on 17th October, 2024, however, the CJI deferred the case by four weeks meaning that the matter would be taken up by a new bench in view of his retirement. With this adjournment, the question of criminalisation of marital rape remains unsolved and the struggle lives on.

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[11] OUTLOOK, https://www.outlookindia.com/national/marital-rape-in-india-the-history-of-challenging-the-exception-news-304055 (last visited Dec. 12, 2024).

[12] NDTV, https://www.ndtv.com/india-news/on-criminalisation-of-marital-rape-split-verdict-from-delhi-high-court-2965530 (last visited Dec. 12, 2024).

[13] THE HINDU, https://www.thehindu.com/news/national/supreme-court-says-govt-may-argue-on-law-if-it-chooses-not-to-file-a-counter-to-pleas-to-criminalise-marital-rape/article68654811.ece (last visited Dec. 12, 2024).

[14] Nalini Sharma, Sanjay Sharma, *Supreme Court takes cognizance of marital rape under abortion law*, INDIA TODAY, (Dec. 12, 2024, 6:20 PM), https://www.indiatoday.in/law/story/supreme-court-abortion-law-medical-terminal-act-marital-rape-is-rape-2006148-2022-09-29.

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III. THE LONGSTANDING DEBATE

The subject of marital rape has been in the arena of legislative and legal debates for a long time now and a careful analysis of such debates aids us in developing an understanding of the various viewpoints surrounding the marital rape exception.

The issue of marital rape was dealt by the 42nd Law Commission Report[15] for the first time in June 1971. This report is important to understand the Law Commission's take on marital rape. The report talks about the marital rape exception and makes two suggestions in this regard. The first suggestion was regarding the sexual intercourse by a man with his wife aged between twelve and fifteen.[16] It recommended that it would be desirable to take this offence out of the ambit of section 375 altogether and to not term it as rape even in a "technical sense".[17] This suggestion reveals that the Law Commission was not inclined towards classifying marital rape as rape, instead, at best it could be termed as "marital misbehaviour".[18] Secondly, the report noted that this exception must not apply when the husband and wife are judicially separated or living apart by mutual agreement.[19] Under such circumstances, the report stated "sexual intercourse by a man with his wife without her consent should be punishable as rape".[20] The rationale behind this was that in such a situation, a marriage technically subsists. It implies that consent of the wife is presumed where the husband and wife live together and cannot be presumed if the do not live together. The report, however, did not make any observation on whether the exception clause be retained or deleted.

The 172nd Law Commission Report[21] reviewed the rape laws and was directly faced with the argument of deletion of the exception clause. In this report, the Law Commission rejected the argument that when the husband is punishable in other instances of violence towards the wife under appropriate offences and the fact that he is the husband of the victim was not a mitigating factor recognised by law, there was no reason for any exception in the offence of rape or sexual assault.[22] The Law Commission stated that it was not satisfied to recommend the deletion of the exception clause as it feared that doing so would amount to "excessive

[15] LAW COMMISSION OF INDIA, https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022082456.pdf (last visited Dec. 20, 2024).
[16] *Id.* ¶16.115.
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] LAW COMMISSION OF INDIA, https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022082487.pdf (last visited Dec. 20, 2024).
[22] *Id.* ¶3.1.2.1

interference with the marital relationship".[23] This report made it clear that the idea of marriage as a 'sacrosanct' institution was the greatest hurdle to criminalise marital rape in India.

In 2012, a committee constituted under Justice J.S. Verma (Retd.) spoke in favour of criminalising marital rape. The committee was formed to look into the possible reforms in the Criminal Law to deal with extreme nature of sexual assault against women. The committee published the 'Report of the Committee on Amendments to Criminal Law'[24] in January 2013. The report explains that the marital rape exception stemmed from an out-dated notion of marriage which considered wives as the property of their husbands and that the wife consented to have intercourse with her husband whenever he fancied.[25] This report made two recommendations in regard to marital rape. First that the marital rape exception be removed.[26] Secondly, it recommended that the law must specify that a marital or other relationship is not a valid defence available to the accused against the crime of rape or sexual violation, this relationship is irrelevant while determining whether the complainant consented to the sexual activity and that it was not to be regarded as a mitigating factor for the purpose of sentencing.[27]

The Criminal Law Amendment Bill, 2012 was drafted post the J.S. Verma Committee Report. The bill incorporated several changes. In context of rape, the word 'rape' was substituted with 'sexual assault' in order to make the offence gender neutral and widen its scope, however, the bill did not make any provision for marital rape.[28] Despite the recommendations of the J.S. Verma Committee, the Criminal Law Amendment Bill, 2012 did not take the committee's recommendations into account. This amendment bill was reviewed by the Parliament Standing Committee on Home Affairs in its 167th Report (Standing Committee Report).[29] It was suggested that there should be some provision for the wife to take up the issue of marital rape.[30] However, the Standing Committee rejected this suggestion stating two reasons for the same. Firstly, the report argued that, "*if the marital rape is brought under the law, the entire family system will be under great stress and the committee may perhaps be doing more injustice*".[31] Secondly, the committee stated that there are other provisions that already exist

[23] *Id.*
[24] SPUWAC, https://spuwac.in/pdf/jsvermacommittereport.pdf (last visited Dec. 20, 2024).
[25] *Id*. at 113.
[26] *Id.* at 117.
[27] *Id.*
[28] PRSINDIA, https://prsindia.org/files/bills_acts/bills_parliament/2012/Criminal_Law_(A)_bill,_2012.pdf (last visited Dec. 23, 2024).
[29] PRSINDIA, https://prsindia.org/files/bills_acts/bills_parliament/2012/SCR_Criminal_Law_Bill.pdf (last visited Dec. 23, 2024).
[30] *Id.* at 47.
[31] *Id*.

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for a woman aggrieved by marital rape to approach the court.[32] The Committee argued that the families themselves are able to resolve the issues and the issue could be dealt with the provision of cruelty that existed in the IPC.[33]

The reluctance towards criminalisation of marital rape revolves around the repetitive argument of protecting the institution of marriage and not interfering with it so that the institution remains sacrosanct. This justification is furthered by the argument that other provisions of law are capable of dealing with the issue and so the criminalisation of marital rape is simply, 'not necessary'.

IV. THE DEMAND OF THE REALITY

In India, Marriage is regarded as a sacred institution that forms the bedrock of the society. The society believes that it is an institution that need not be interfered with. As a result, grave injustices to bodily integrity of women such as marital rape is hidden behind the iron curtain of marriage. The society and law together enforce the denial of women's sexual autonomy and bodily integrity in a marriage. However, the notion of "sacrosanct" institution of marriage runs contrary to the women's perception of reality.

The criminalisation of marital rape is not only the question of domestic law but also of constitutional rights. The lack of criminalisation of marital rape is a breach of fundamental rights of a woman particularly under Articles 14 and 21 of the Constitution of India.

The Right to Equality under Article 14 of the Indian Constitution is based on the principle of equality before the law. Article 14 states that "the State shall not deny to any person equality before the law or equal protection of the laws within the territory of India."[34] The marital rape exception is violative of Article 14 as it discriminates against married women. This exception excludes married women from the protection under the definition of rape. As a result, a two-tier system where unmarried women and married women stand at different levels of protection against sexual violence. This distinction between married and unmarried women ultra vires Article 14 as the stratification has no reasonable link to the elementary object of the statute. The Hon'ble Supreme Court, in the case of Budhan Choudhary v. State of Bihar[35] held that "*any stratification under Article 14 is contingent to a test of reasonableness which can be decreed only when the stratification has some reasonable relation to the object that the act sought to achieve*." However, the marital rape exception defeats the objective of the rape laws

[32] *Id.*
[33] PEN. CODE, § 498A.
[34] INDIA CONST. art. 14.
[35] Budhan Choudhary v. State of Bihar, AIR (1995) SC 191.

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to protect women and penalize those responsible for committing the heinous crime of rape. Exempting husbands from the prosecution of rape of his wife is completely contrary to the objective. Since no reasonable relation can be drawn between the stratification generated by the marital rape exception and the objective of the act, it does not qualify the reasonable test and therefore violates Article 14 of the Indian Constitution. The reluctance and failure to criminalise marital rape undermines substantive equality for women and fails to protect them from sexual violence within marriage.

The Right to Life and Personal Liberty guaranteed under Article 21, which courts have expansively interpreted to include all the aspects which are essential for living a good life. In today's world given the present realities, the courts recognise that an individual has a right to refrain from undesired sexual activities and this aspect is well incorporated in the wider aspect of Article 21. The marital rape exception denies women the right to refuse sexual intercourse within marriage and renders their desire and consent immaterial. The non-criminalisation of marital rape also subjects women to sexual abuse and deprives them of sexual autonomy and dignity.

The present data on marital is nothing short of distressing and raises concern for women's rights in India. The data from the third (2005-06) and the fourth (2015-16) rounds of the National Family Health Survey (NFHS) revealed that the Intimate partner Violence (IPV) against women ranges between 3% to 43% in different states across the country.[36] In 2019-20, the fifth round of survey conducted in 637,000 households in 707 districts of 28 states and eight union territories, suggested that one in three women in India aged between 18 to 49 experience violence from their spouse, with at least 5% to 6% of women reporting sexual violence.[37] A breakdown of the findings revealed that 5.6% of married women were physically forced to have sexual intercourse with their husbands, 2.7% of them were physically forced to perform sexual activities beyond their desire, and 3.7% of the women were forced to perform sexual activities against their will through threats of physical violence. The NFHS data revealed that according to the data collected until 2021, 82% of married men were sexually violent with their wives, as well as 13.7% of former husbands.[38]

The argument that there are remedies in law that already exist that can be taken by the

[36] Garg, P., Das, M., Goyal, *Trends and correlates of intimate partner violence experienced by ever-married women of India: results from National Family Health Survey round III and IV*, BMC PUBLIC HEALTH (Dec. 28, 2024, 8:14 PM), https://bmcpublichealth.biomedcentral.com/articles/10.1186/s12889-021-12028-5 - citeas.
[37] TIMES OF INDIA, https://timesofindia.indiatimes.com/india/nearly-1-in-3-women-have-suffered-spousal-sexual-physical-violence-family-health-survey/articleshow/91491367.cms (last visited Dec. 28, 2024).
[38] UN WOMEN, https://data.unwomen.org/global-database-on-violence-against-women - 2 (last visited Dec. 28, 2024).

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survivors of marital rape is a significant hurdle in criminalisation of marital rape. However, these existing legal frameworks are riddled with significant limitations. The provision of cruelty[39] is often cited as an alternative to the criminalisation of marital rape, but this provision is inadequate to deal with the cases of marital rape for the reason that the very nature and act of rape is distinct from cruelty. Section 86 of the BNS dealing with cruelty criminalises physical, mental and emotional cruelty, however, it does not specifically mention sexual violence or marital rape. Forced sexual intercourse is definitely cruelty but rape is part of a broader pattern of abuse. Moreover, the purpose of criminalising marital rape is to prosecute the perpetrator for the crime committed.

Similarly, there are gaps in the Protection of Women from Domestic Violence Act, 2005 (PWDVA) to address the issue of marital rape. The act offers protection to women from domestic violence including sexual abuse. However, the provision of "sexual abuse" in the act does not provide a strong legal framework needed to address the specific issue of marital rape and the harms it causes. The PWDVA is of civil nature and provides civil remedies and the criminal prosecution for marital rape is not available under this act. Thus, women aggrieved by marital rape may seek civil protection but may not be able to pursue a criminal case against the perpetrator.

Much of the parliamentary debate on the criminalisation of marital rape is based on protecting the institution of marriage rather than the women who are raped behind the iron curtain of marriage by their husbands. In such a scenario, we cannot ignore the role of culture and society in determining the fate of marital rape in the legal field. The interplay between culture and law becomes a key aspect in this debate. The lack of clear provisions addressing marital rape leaves it open to the interpretation of the courts, which may be influenced by traditional notions of marriage and consent which views sexual relations as husband's entitlement. The lack of judicial clarity may lead to bias and delay.

The argument that marital rape is culturally acceptable is an absurd reason to not criminalise it. Throughout history we have seen instances where societal evils that were culturally prevalent and acceptable were prohibited and criminalised. For example, the Dowry Prohibition Act, 1961 prohibited the practice of dowry widely prevalent in India. *Sati*, a deep-rooted cultural practice was a custom of a Hindu widow burning herself to death on the funeral pyre of her husband either voluntarily or by coercion, was also criminalised. Thus, it is not necessary that law cannot interfere with the problematic practices that are permissible by

[39] Bharatiya Nyaya Sanhita, 2023, §86, No. 45, Act of Parliament, 2023 (India).

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the culture. It is the duty of the law to step into the spaces wherever there is injustice and violation of rights, even if such a violation is in the private sphere of matrimony. The legislature and the judiciary should draw motivation from such instances of history and take prompt action for the plight of married women in India.

V. CONCLUSION

Marital rape has been a contentious subject in the legal as well as societal field and it continues to struggle to find its footing in law. Throughout history, marriage has been perceived as an institution where the husband has absolute authority over his wife including the entitlement to sexual relations. This deep-rooted patriarchal aspect has influenced and shaped the legal system in India and around the world, which is the main cause of exclusion of marital rape as crime. However, with time, the changing perspective on marriage, gender equality, women's rights and sexual autonomy leave no reason for the non-criminalisation of marital rape.

Marital rape is a crime wrapped with the dynamics of power, control and violence. It is not about the sanctity of marriage rather it is about coercion and a woman's right to decline an unwanted intercourse even within a legally recognised institution of marriage. Given its clear and devastating impact on the victim, the legal system fails to provide a safe haven to the victims of marital rape. The legal gap shields the perpetrators and sends a message that sexual abuse of married women is justifiable and less significant than other forms of sexual violence.

Despite the increased consciousness and the obvious harms caused by marital rape, the struggle to criminalise it and make it a punishable offence has continuously faced resistance. This is because the law makers of this country are adamant on protecting the institution of marriage and the family system at the cost of the wives being raped by their husbands. Marital rape is perceived as a "private matter" between the spouses rather than a serious criminal offence. The law makers have continuously failed to recognise that marital rape is major gap in law that defeats the constitutional provisions that provide women equality and autonomy. Criminalisation of marital rape is not only a matter of legal reform but one of human rights, dignity and justice for women.

Addressing the issue demands an approach that involves legislative reforms, judicial activism, and awareness campaigns. Abolishing the marital rape exception clause will provide a legal recourse and protection to the victims of marital rape. Legal reforms must be accompanied by an effort for systemic changes in perspective towards marriage, gender and consent. Breaking down cultural barriers is crucial for the acceptance of marital rape as a serious criminal

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offence.

Marital rape should be criminalised for numerous compelling reasons as discussed in this article. The failure to criminalise it fosters an environment where sexual violence within marriage is normalised, accepted and expected. Criminalising marital rape would be a stepping stone towards fostering a culture of consent and mutual respect in a marriage. It would help society move away from the notion that women are expected to provide a sexual access to their husbands as a part of their marital duties.

The gruesome realities where women are supressed and victim blamed for standing up for their rights demand the criminalisation of marital rape. It is ironic that the country that colonised India and gave it its first criminal code has also criminalised marital rape, but India still struggles with the same. It is clear that all the arguments against making marital rape a criminal offence in India do not actually talk about rape happening within a marriage, instead they revolve around keeping the institution of marriage sacrosanct and protected from interference. The struggle of marital rape with Indian rape reflects a battle for gender equality and the recognition of women's rights in private spheres.

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