

NEXT STEPS AFTER THE 377 JUDGMENT

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The [Supreme Court's verdict on Section 377](#) should be celebrated for ejecting an ugly Victorian norm from the Indian criminal justice system. The landmark decision breaks new ground by removing restrictions that made consensual sexual relations between members of the same sex and the transgender population a crime. The judgment of the Supreme Court will, however, likely have unintended negative consequences for one group that has used Section 377 to protect itself from sexual violence — women.

While Section 377 has indeed been used as a tool to vilify and arbitrarily punish members of the LGBTQ community, it may be surprising for most to learn that an overwhelming majority of those who utilise the section at police stations are abused and physically tormented married women. Utilising new data as well as research conducted at police stations across Bihar, Uttar Pradesh, and Haryana, we find that female complainants invoked most cases of Section 377 in the context of Section 498A (wherein the husband or his relative subjects a wife to cruelty, often within the framework of harassing her for additional dowry post-marriage). Nirvikar Jassal's analysis found that for every hundred Section 377 cases, more than half are filed by women in the context of Section 498A.

Incidentally, Section 498A was diluted by the Supreme Court last year, making it more difficult for women to utilise the one law that had some teeth in deterring husbands from causing harm to their wives. In the Indian criminal justice system, Section 498A has a connotation as a “minor” gendered crime. This is partly why the Supreme Court suggested that first information reports should not be registered immediately after such a case comes before a police officer. The court mandated that no arrests or coercive action based on the law should be carried out until “family welfare committees” had looked into a case under Section 498A, and reconciliation centres had made an effort to resolve the couple's differences. In other words, woman and spouse would be “counselled” before the case was handled by the justice system.

Section 377: Drawing a curtain on the past

However, most dowry harassment cases are anything but “minor” crimes, and invariably involve the vilest and most degrading forms of physical abuse that the legalese of Section 498A is not able to capture on its own. The legal problem is that India, as in large parts of West Asia and Africa, does not recognise marital rape as a crime.

This is where Section 377 comes in. Women who register spousal abuse, especially in the form of Section 498A, often do so as a case of last resort. As we found, in extreme circumstances, women encourage police officers to register an additional case of Section 377 against their husbands. They do this to to elevate the “heinousness” of Section 498A, i.e., to signal to the police that their abuse is not simply “cruelty” but also one of sexual abuse. Section 498A has the lowest conviction rate of any law in India, and by tacking on Section 377, women are potentially able to increase the likelihood of the husband being punished. In a legal context in which marital rape is not recognised, Section 377 emerges as a tool for married women to highlight the “unnatural” abuse they face. Interestingly, the media in Kerala have found that the use of Section 377 is often added to the Protection of Children from Sexual Offences (POCSO) Act to increase POCSO's stringency. We too have found such evidence.

In its recent judgment, the Supreme Court appears to have been conscious of the fact that

Section 377 has been used to protect women but implied that as Section 375 (rape) already criminalises non-consensual acts, Section 377 is redundant when applied to women. The court also implied that Section 377 was obsolete because the Criminal Law (Amendment) Act, 2013 broadened the scope of Section 375 to include non-penile-vaginal penetration, “thereby plugging important gaps in the law governing sexual violence in India”.

Section 377: A greater transformation

However, this is not entirely accurate. There remains a significant gap. An exemption in Section 375 says, “sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.” This is why police officers have to pin Section 377 to many dowry harassment cases that involve sexual violence because those registering a case would not be able to utilise Section 375 if the violation was carried out by the husband.

While Section 377 will now apply to minors and in cases of bestiality, it is unclear whether abused married women will be able to use the law in quite the same way as they did before.

More importantly, they really should not have to. If physically abused by their husbands, wives should be able to register a case without having to use the circuitous paths of employing laws with anachronistic language when they are essentially being raped. A far more effective and progressive strategy would be for the state to now criminalise marital rape. This could be done by passing a new law or merely removing the exemption in Section 375.

In its judgment on Section 377, the Supreme Court stated, “The constitutional courts have to recognize that the constitutional rights would become a dead letter without their dynamic, vibrant and pragmatic interpretation. Therefore, it is necessary for the constitutional courts to inculcate in their judicial interpretation and decision making a sense of engagement and a sense of constitutional morality.”

We fully agree with this sentiment and urge both the political class and the court to give married women full restitution of their rights under the Constitution by making marital rape a heinous crime.

Pradeep Chhibber is a Professor of Political Science at UC Berkeley. Nirvikar Jassal is a doctoral candidate at UC Berkeley and a 2018-19 Jennings Randolph Fellow with the U.S. Institute of Peace

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