

WHY HASN'T MARITAL RAPE BEEN CRIMINALISED IN INDIA YET?

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*In 2017, the Supreme Court, in [Independent Thought v. Union of India](#), refused to delve into the question of marital rape of adult women while examining an exception to Section 375 (rape) of the Indian Penal Code (IPC) which allows a man to force sex on his wife. Recent [rulings by High Courts have been contradictory](#) — one backed marital rape as [a valid ground for divorce](#), while another [granted anticipatory bail to a man](#) while concluding that forcible sex is not an “illegal thing”. Why do differences persist despite the [Justice J.S. Verma Committee recommendation to criminalise marital rape](#)? **Shraddha Chaudhary** and **Manuraj Shunmugasundaram** discuss why marital rape has not been criminalised in India yet, in a conversation moderated by **Sudipta Datta**. Edited excerpts:*

Shraddha Chaudhary: [Section 375 of the IPC](#) defines the offence of rape. It lays down which physical acts are required to make out the offence, and it is a very broad definition. The second important element of this definition is consent. Where these acts are done without the consent of the woman, then the offence of rape is made out. This is the general rule, but there is an exception, which says that sexual acts by a husband with his wife, if she is 18 years of age and above, would not be rape. While the rest of the provision is centred on consent, this exception does not talk about consent at all. It creates the legal fiction that a wife always consents to her husband, which in effect means that her non-consent is irrelevant. It is of course possible for there to be reprieve for [rape within a marriage](#), but not as rape. If there are physical injuries, then there can be reprieve for that separately. Marital rape may be recognised as a form of cruelty, it may be a ground for divorce, but it is not punished as rape, which is a very distinct wrong and has very distinct terms. That is where the lacuna in the law lies. Insofar as fixing it is concerned, either Parliament may legislate and remove this exception, or a constitutional court has to strike it down.

Why hasn't marital rape been criminalised in India yet? | The Hindu Parley podcast

Manuraj Shunmugasundaram: How did we end up here? Partly because we inherited an IPC prior to the enactment of the Constitution, but that doesn't absolve us of the deficiencies in the present legal structure and 'legal fiction', as Ms. Chaudhary says. The so-called marital rape immunity or the exception to rape, as we have structured it in our penal code, has been done away with in other jurisdictions, and rightly so. Marital rape today exists in a very unique sort of stratosphere wherein it can be a ground for cruelty and therefore, for divorce under the personal laws, but it will not render the offender guilty of the offence itself.

Shraddha Chaudhary: Primarily, it should have fallen on Parliament to legislate and remove this exception. But we should also keep in mind that courts have noted the cruelty of this exception and they have acknowledged its problems. They have not gone on to strike it down entirely. As far as Parliament is concerned, it is quite common to leave to the court legislation that may not give very good political returns. We saw this with [Section 377](#) as well. It had to be struck down by the court finally.

Manuraj Shunmugasundaram: Parliament did miss an opportunity to enact changes, as recommended by the Justice Verma Committee. The official response was that they wanted further discussions around marital rape laws before they could enact it because it involves other

questions of law as well. There might be some element of truth to that, but it exposes a vulnerability to issues that may not have political mileage or in fact may have other political ramifications. The Supreme Court missed a fantastic opportunity to go into these matters in the *Independent Thought* case in 2017. Under [Article 142](#), the Supreme Court has powers almost equivalent to that of a lawmaking power. Like with the *Navtej Johar* case (2018) when the Supreme Court missed an opportunity to provide the entire spectrum of civil marital inheritance rights to non-heterosexual couples, the Supreme Court equally missed an opportunity during the course of the *Independent Thought* case to extend its remit to look at all forms of marital rape and not only that restricted to women below 18 years.

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Shraddha Chaudhary: The court made the conscious decision to restrict itself to the question of minors. The case was framed as a question of parity between the IPC on the one hand and the [Protection of Children from Sexual Offences \(POCSO\) Act, 2012](#), on the other. I am sure a lot of constitutional commentators will talk about the merits of judicial restraint, and there is an argument to be made for that.

The issue is sensitive and can be controversial because a lot of people, including educated, seemingly liberal people, still believe that criminalising marital rape will somehow threaten the 'institution of marriage' and will become some sort of a witch-hunt against husbands. These arguments channel the [Victorian morality of the IPC](#), which we have tried to counter but have not quite done it fully, or as well as perhaps we would have liked to. That morality also captured the common law of coverture, under which women had no rights after marriage, their rights were to be exercised by their husbands, so they were completely reduced to the status of chattel, of property.

The legal message

Manuraj Shunmugasundaram: They are extremely relevant in terms of how our own jurisprudence could evolve in the coming years. We have seen how LGBTQ jurisprudence over the last 15 years in other countries has impacted to some extent how India's own jurisprudence from [Navtej Johar](#) has changed with regard to LGBTQ rights. Ultimately, the recognition of the perversity of the marital rape exception must come from within. For that we only need to look towards Article 14. The most compelling argument in support of the marital rape exception as it is prevalent in our statute today is that the institution of marriage is sacrosanct and that it should not be disturbed. But the Constitution places no importance on any particular institution; the Constitution is unequivocal in the significance given to the individual. A person deserves equality, equal protection and autonomy. Therefore, the exception to marital rape in itself is unconstitutional and violative of Article 14. Further, marital rape is an affront to the dignity of the individual, which is protected under Article 21. Just because the nature of the relationship between the victim and the offender is one of marriage, it does not absolve a person of the crime. The argument that is built around the institution of marriage and its sanctity needs to be broken, which is what has happened in other jurisdictions around us. Once we realise that, our society will have no choice but to remove the marital rape exception.

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Shraddha Chaudhary: We can also learn from the experiences of countries which have criminalised marital rape. It did not lead to a witch-hunt against husbands and definitely not to the destruction of marriage. There are socio-economic differences between India and some of the countries that have criminalised marital rape. I was reading that the government has used that as well as a rationale against criminalising marital rape, saying that the poverty, illiteracy

and diversity in this country make the issue complex. But we need to question to what extent these factors map on to criminalising marital rape, and to what extent we can let them hamstring us.

Manuraj Shunmugasundaram: Most acts of sexual violence are away from eyewitnesses, and to lead evidence is a challenge in itself. I don't see why marital rape should be more difficult to report or prove in court than any other sexual offence. The POCSO Act has been an important step in ensuring that there is justice for child sexual abuse victims. Now we know that most offenders of child sexual abuses are within the family, but we don't give them immunity, right? We don't say there's an institution of family, so let's protect offenders who are within the same family. We need to show that it is as absurd to ask for protection of a husband from marital rape as it is to ask for protection of a family member from child sexual abuse.

State on the other side

Shraddha Chaudhary: The marital space does create issues in reporting and prosecuting crime — not because of the nature of the offence or what is being criminalised but because of the way that the functionaries in the criminal justice system think of these things. The police, judges, prosecutors and anyone with whom the complainant will have to interact — it is they who are likely to create, either unwittingly or intentionally, barriers in reporting and prosecution because in their minds, consent being presumed within a marriage may persevere, even if the law happens to have changed.

Manuraj Shunmugasundaram: Societal change is very important. It is not only patriarchy or misogyny that needs to change, we need to challenge notions about the sanctity of marriage. We need to check ourselves every time we indulge in blaming the victim. We also need to challenge our conservative mindsets when it comes to discussing sexual offences or offences that take place within the family. Just going back to POCSO, till date, such crimes are largely under-reported, because most of the abuse is within the family.

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Shraddha Chaudhary: There have existed certain power structures in our society, typically based on caste and gender. When these power structures are challenged by laws, the rhetoric of misuse comes in. That is the strongest kind of weapon operationalised against the implementation of such laws. It's important to counter such narratives as well as to establish that misuse is extremely unlikely. We must believe victims, complainants, and [see this] hullabaloo of misuse as a red herring. We need to counter this [misuse argument] strongly in politics, judgments, civil society.

Manuraj Shunmugasundaram: The roadmap is readily available for either the constitutional courts or Parliament to act on this. We need to frame the discussion around rape as an offence against bodily integrity and we need to emphasise the importance of the rights of the individual, as laid down in Article 14. We need to tell people that every act must be protected with consent.

Manuraj Shunmugasundaram is advocate, Madras High Court, and spokesperson of the DMK; Shraddha Chaudhary is lecturer, Jindal Global Law School, Sonapat, and PhD candidate (law), University of Cambridge

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To reassure Indian Muslims, the PM needs to state that the govt. will not conduct an exercise like NRC

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