

## SEXUAL VIOLENCE IN PRIVATE: MARITAL RAPE IN INDIA “A LICENSED CRIME”

*Written by Yasir Pathan*

*3rd Year Student of Maharashtra National Law University, Aurangabad, Maharashtra, India*

---

### ABSTRACT

The demands for criminalization of marital rape in the recent past have evoked polarized responses in the community. The idea of marital rape has been neglected for quite a long time due to the philosophy that advances men reserve the option to regard their spouses as they wish and the wife must give her significant other every one of his requirements. Today with the progressions and advancements in the ideas of marriage, the expansion in the consciousness of the general public and the comprehension of the thought of brutality against ladies; it has been perceived that sex ought to be commonly wanted by the two players of the wedded couple. The dignity of an individual, sexual autonomy, institution of marriage and respect to the theories of criminalization has been identified as the key policy considerations. This paper is in furtherance of the argument that unmindful enactment of criminal law results in over-criminalization. The other important aspect which is and needs to be considered before undertaking the question of criminalization is to understand the ‘judicial pulse’. The precedents and the mindset of judges are crucial in determining the efficacy of the law. The paper discuss how judiciary is tasked with the implementation of law and therefore, in order to predict, how judiciary will react to criminalization of marital rape, an attempt has been made to decide the judicial approach in understanding existing rape laws. Based on judicial attitude, policy considerations and existing legislative framework to deal with rape offences, this chapter present the challenges and prospects in criminalizing marital rape in India.

## MARITAL RAPE – EXISTING STRUCTURES OF LAW

This part of the chapter looks at the existing structures of law to deal with the problem of marital rape. It looks at the existing remedies and assesses their adequacy while considering the gravity and nature of the offence.

Marital rape is rape by the husband with his wife.<sup>i</sup> Exemption 2 of Section 375 of the Indian Penal Code sets out that the spouse can't be blamed for submitting a rape with his lawfully married wife, in case she is over the age of 18 years.<sup>ii</sup> The conjugal rape special case is seemingly founded on the shared wedding contract which denies a spouse the option to withdraw her conjugal agree to participate in sexual intercourse with her better half.<sup>iii</sup> The contention of unavoidable conjugal assent has beginning in the proclamation of Sir Matthew Hale who said 'yet the spouse can't be blameworthy of rape submitted without help from anyone else upon his legally wedded wife, for by their common wedding assent and understanding the wife hath surrendered herself in this sort to her significant other, which she can't pull out.'<sup>iv</sup> T.B. Macaulay likewise is by all accounts impacted by Hale's guideline. Proviso 359 of the Draft of the Indian Penal Code gave that 'Sexual intercourse by a man with his significant other is no case rape.'<sup>v</sup> Select Committee notwithstanding qualified this special case by giving the period of spouse to be over 10 years. Consequently, Exception 2 of Section 375 of the Code as it was sanctioned in the 1860 read as, 'Sexual intercourse by a man with his better half, the spouse not being under 10 years old, isn't rape.'<sup>vi</sup> The age was enhanced to 15 years by way of Criminal Law Amendment Act, 1840.<sup>vii</sup> Now with the passing of the Protection of Children from Sexual Offences Act, 2012 ('POCSO Act'), age is de facto increased to 18 years.<sup>viii</sup> To explain the position, the Supreme Court of India on account of Independent Thought v. Association of India, read down Exception 2 to Section 375 IPC 'to acquire it consonance with the Constitution just as POCSO'<sup>ix</sup>

It is not the case that marital rape is remediless. The dissatisfaction with the present state of law is that it doesn't penalize it adequately so as to bring it *at par* with general offence of rape. Rape of a wife below the age of 18 years or during the judicial separation already amounts to rape. The prosecution for the offence of outraging the modesty of women, using criminal force, causing hurt or grievous hurt can still be launched against the husband. Furthermore,

the wife can also seek divorce on the grounds of cruelty under the relevant marriage law. A separate provision not only penalizes the act but also sends a message to society that the act of marital rape is condemned and disapproved by society in the strongest terms. Moreover, a separate provision helps in dismantling the patriarchal and archaic notions about women in society. In this sense, criminal law performs a moral function by educating society about right and wrong. It is this aspect of desirability of a separate penal provision which this chapter intends to examine.

## **POLICY CONSIDERATIONS**

The starting point for any debate on criminalization of ‘non-consensual sexual inter- course or sexual activity by the husband with his wife’ is the woman’s dignity vis-à-vis the institution of marriage. Any question of criminalization of such an act must address both, the concern of dignity as well as future of marriage as an institution in Indian society. Another important concern is the appropriateness of criminal law to address matrimonial discords. For invoking criminal law, the arguments which need to be addressed include *firstly*, criminal law should not concern itself with what happens inside the four **walls**;<sup>x</sup> *secondly*, criminal law affects the dignity of an individual and has a tendency to stigmatize, and *thirdly*, criminal law is one of the powerful weapons in the armory of the State, and it must be used as a substance of last recourse.

However, this chapter does not aim to discuss the contours of criminal law vis-à-vis marital rape. The idea of individual liberty which lies at the core of criminal liberal theory is to be **examined**.<sup>xii</sup> I have my disagreements with the liberal theory of the criminal **law**, but still individual liberty lies at the cornerstone of any criminal law and is also a fundamental value in our Constitution. Thus, individual liberty is argued in this chapter to be an important policy consideration because it ensures that nobody is unfairly and unnecessarily criminalized.

Whether or not to protect the institution of marriage is another important policy consideration in such debate. The issue is of particular importance because of decriminalization of **adultery**,<sup>xiii</sup> recognition and popularity of live-in-**relationships**<sup>xiii</sup> and decriminalization of what is termed as ‘unnatural’ sex under Section 377 of the Indian Penal

**Code.**<sup>xiv</sup> Sexual relationships outside marriage, sexual relationships without marriage and sexual relationships among persons of the same sex, have all radically impacted the deep-rooted conception of marriage and its sacredness/**sanctity**. It is to be considered in such debates that if the institution of marriage is to be diluted to an extent where this institution itself becomes immaterial, one may also argue that preservation of the institution of marriage is important for the existence of **civilization**.<sup>xv</sup> Here, the institution of marriage argument is not brought in to support the contract theory or property **theory** to justify non-criminalization, but to advance an argument that it is on the shoulders of this institute that the just and orderly society thrives. A weak institute of marriage would lead to chaos on issues of succession, inheritance, legitimacy and so forth. On the one hand, one may also be tempted to argue that after decriminalization of adultery (Section 498A of IPC) and homosexual sex (parts of Section 377 IPC), the criminalization of non-consensual sexual intercourse or movement by the spouse would be the last nail in the casket for the foundation of marriage. Then again, a more customary view stays that conjugal rape can't be condemned as of the consecrated idea of marriage in Hinduism and how condemning conjugal rape would upset the organization of marriage.

However; a more objective approach should be adopted to balance both the arguments. The debate around the institution of marriage is not to undermine the gravity of the offence of marital rape. The idea is not to brush aside the allegations of marital rape under the carpet of marriage. The thrust of this policy consideration is that when the legislature or judiciary criminalize or decriminalize any act, there are also certain repercussions outside the boundaries of criminal law. The legislators shall be conscious to recognize these outside effects and then take a reasoned decision on criminalization or decriminalization.

The other policy consideration is the dignity of an **individual**.<sup>xvi</sup> The term 'dignity' is all encompassing to include sexual autonomy and rejects the notion of treatment of a woman as a **chattel**.<sup>xvii</sup> In the landmark case of *Joseph Shine v. Union of India*,<sup>xviii</sup> Justice Chandrachud has observed that 'Sexual independence establishes a sacred center of the pride of each person. At the focal point of the ensured rights ensured to every individual is a tendency of choice and the chance to control one's exercises. Restricting the sexual opportunity of a woman or

expecting the shortfall of consent once she enters a marriage is in opposition to her sacred qualities.' The nobility of an individual is fundamental.<sup>xxix</sup> It is a constitutional guarantee under Article 21.<sup>xxx</sup> Any non-consensual sex seriously impairs a woman's dignity.<sup>xxxi</sup> In an uncommon judgment, a family court in Delhi has noticed, 'Albeit in our country conjugal assault isn't considered as an offense, it establishes exacting mental cold-bloodedness as it hints absence of regard, pride and affectability towards the spouse and disregards the privilege to life and freedom as cherished in the Constitution of India.' The injury of the lady in conjugal assault is significantly more ruthless, sincerely difficult and hurtful than assault executed by an outsider, as it incorporates actual brutality as well as the infringement of trust between a spouse/accomplice and wife. Given the nature of the marital relationship, a wife is forced to live with the perpetrator<sup>xxii</sup>

If we contend that marriage is no more sacred or important for our civilization, then we have to give way to individual liberty and declare non-consensual sex by husband as rape which is to be subjected to. The pure liberal approach giving 'autonomy to body' would lead to increase in abortions which may further result in highly un-proportional sex ratio, infidelity, increase in demand of flesh trade and so forth While non-consensual sex goes against the dignity of the very person against whom it is committed, undesirable criminalization is also antithesis to individual dignity and personal liberty.<sup>xxiii</sup> The Supreme Court in *Sunil Batra (II) v. Delhi Administration*<sup>xxiv</sup> observed that prisoners are also persons and possess fundamental rights. The court observed,

Are detainees people? Indeed, obviously. To reply in the negative, is to convict the country besides, the Structure of dehumanization and to excuse the world legitimate solicitation, which by and by recognizes advantages of prisoners in the International Covenant on Prisoners' Rights to which India has denoted its assent. In *Batra case*, (1978) 4 SCC 494 1978 In-law SC 289 this Court has excused the hands-off guideline and it has been administrated that crucial rights don't get away from the individual as he enters the jail however they may endure decrease required by detainment.

In a similar fashion Vivien Stern argues that human rights are extended even to the detenu as they are also human beings. He noticed that it is a fundamental precept of global basic



freedoms law that nothing can put an individual past the compass of certain common liberties insurances. A few group might be less meriting than others. Some may lose a few of their privileges by having been detained through appropriate and lawful activities. Yet, the principal rights to life, wellbeing, decency and equity, compassionate lead, nobility and security from abuse or torment remain.<sup>xxv</sup> He concludes that ‘there is a minimum standard for the way a state treats people, who- ever they are. No one should fall below it’.<sup>xxvi</sup> Therefore, it can be reasonably said that the concept of dignity is pervasive enough to apply to a person who is accused or suspected of committing a crime.

## **DETERMINING CONSENT – JUDICIAL APPROACH**

There is no doubt that criminalization of non-consensual sex will always be desirable. However, for that it is also important to understand the precise nuances of what consent is. The whole discussion of rape revolves around ‘consent’. However, the term ‘consent’ has not been explicitly defined in the law. The exact purport of consent has troubled both the legislators and judiciary alike in the rape trials. Whether a sexual act amounts to ‘consensual sexual act’ on ‘non-consensual act’ depends on the judges’ understanding of what is essential and what is not in the marriage. Despite this wide space available for divergent and liberal views, we find that judges are consistently agreeing that sexual relationship is one of the essentials of marriage and absence of sex in marriage is a good reason for ending the marriage, though their reasons for doing so differ. In fact, in the plethora of judgments by different high courts and the Supreme Court, the refusal to engage in sexual intercourse has been regarded as mental cruelty on the husband.<sup>xxvii</sup> The majority of acquittals in rape trials happen because of the lack of clarity on the aspect of consent.<sup>xxviii</sup> Therefore in the following section, some of the judgments have been examined in order to determine the judicial attitude in such cases.

In a situation where a husband engages in a non-consensual sexual relationship with his wife and even though the wife does not resist and submits her body to her husband out of fear, it will merely be a passive submission and in such situations, the wife cannot be said to have consented for the same. There is no doubt that such acts should not be legitimized by the law.

In the landmark case of *Tukaram and Anr v. State of Maharashtra*,<sup>xxix</sup> the Supreme Court observed that ‘mere passive submission or helpless surrender cannot be equated with desire or will’. Further, in the case of *State of Himachal Pradesh v. Mango Ram*,<sup>xxx</sup> the Supreme held that the submission of the body under the fear of terror cannot be construed as a consented sexual act.

The fact that there might not be any marks of violence in cases lying in the above situation; it cannot be disregarded that such acts would also amount to rape. However, it is argued that till the time society comes to the level of maturity where such cases are welcomed by the society and courts with a clear unbiased mind, we need to adapt sequential model of criminalizing marital rape. In cases where the judiciary does not deal with such cases with an open mind, the whole process of going to court and seeking justice will only compound to the harassment of the victim. In the case of *Deepak Gulati v. State of Haryana*,<sup>xxxi</sup> the Supreme Court while arriving at the conclusion that the accused in the given case has not committed an offence of rape considered various facts including the past relationship of the victim with the accused and the fact that the victim went with the accused to places pre-decided by them. The Court has also assumed that since the girl was 19 years old, she was very well capable of understanding the complications of her act. Now, assuming that the victim and accused are in a marital relationship in a similar situation, these considerations cannot be the factor of determining ‘rape’ since these are some of the considerations that will always be present in case of any accusation of marital rape. Therefore, it is needless to say that such facts cannot be the relevant considerations for the Court to determine the offence of ‘rape’.

It is contended that ‘one rationale for supporting the exemption is that in marital rape cases, witnesses are unlikely to be found, and lack of consent is often difficult to prove’.<sup>xxxii</sup> Further, time makes proof of the offense difficult to acquire.<sup>xxxiii</sup> While in most cases involving strangers, the sole testimony of the prosecutrix is sufficient to convict the accused; in the case of live-in-relationships or other failed relationships, courts have looked into other pieces of circumstantial evidence like length of relationship, nature of relationship, motive and so forth. The criminalization of the alleged non-consensual sex by the husband will present more complexities. It may also require examination into what kind of sexual relationship parties shared with each other. Most couples in Indian society are still reluctant to speak openly about

their sex life with their partner. It is regarded as private space. It is to be considered how much of the encroachment of the State will be justified in this restricted space.

## **NAVTEJ SINGH JOHAR CASE – DECRIMINALIZED THE CRIMINALIZED PART OF MARITAL RAPE?**

One more important thing which requires some elucidation is the impact of the decriminalization of sodomy in the marriage context, especially in light of the 2013 amendment of rape laws.<sup>xxxiv</sup> Exception 2 is carved out in the widest terms to include not only sexual intercourse but, also sexual acts. The term ‘sexual acts’ was not used in this exception before the 2013 amendment. The term has been used in light of the enumeration of what would constitute actus reus for the offence of rape. This enumeration of actus reus was meant to extend the definition and conception of rape as vaginal penetration. In fact, this extended meaning given to actus reus of rape has been recognized in concurring judgment of Nariman J. in *Navtej Singh Johar*<sup>xxxv</sup> to propel a contention for unlawfulness of Section 377. Nariman J. noticed, ‘when Section 375 was changed in order to incorporate butt-centric and certain different sorts of sexual between course between a man and a lady, which would not be condemned as rape in the event that it was between consenting grown-ups, unmistakably if Section 377 keeps on punishing such sex, an atypical position would result. A man enjoying such sex would not be at risk to be arraigned for rape yet would be responsible to be indicted under Section 377.’<sup>xxxvi</sup> Since consent is immaterial in cases of matrimonial sexual intercourse or sexual activity, the impact of Exception 2 on this expansive definition is that husband can commit non-consensual sodomy or oral sex with her wife.

Though there have been arguments that the 2013 amendment would override Section 377 of the IPC, in light of the Gujarat High Court judgment,<sup>xxxvii</sup> this would have still constituted as an offence being the ‘unnatural acts’. The judgment in *Navtej Singh Johar* was later and therefore, the High Court of Gujarat didn’t have the benefit to refer the same. The position would be different post *Navtej Singh Johar* as the judgment has washed away this distinction between natural and unnatural sexual acts. This distinction was particularly important in the marriage context because, what is termed as ‘marital rape’ is supposed to be justified on the



ground that the purpose of marriage is consummation and procreation.

## **APPLICATION OF POLICY CONSIDERATIONS TO DETERMINE THE QUESTION OF CRIMINALIZATION OF MARITAL RAPE**

Any attempt towards criminalizing non-consensual sexual intercourse or sexual activity between husband and wife should be wary of the aforementioned policy considerations. The Supreme Court has taken a progressive step in partly reading down Exception 2 to Section 375 IPC by increasing the age of wife from 15 to 18 years.<sup>xxxviii</sup> However, its ratio in *Navtej Singh Johar* to extend exception of marital rape to include sodomy and so forth is regressive.<sup>xxxix</sup> In fact, it was an opportunity for them to correct the mischief which was created by the 2013 amendment.

Section 3 of the Protection of Women from Domestic Violence Act, 2005, which defines 'Domestic Violence' to include sexual abuse<sup>xl</sup> also does not address some of the issues arising from marital rape.<sup>xli</sup> The objective of this Act is to provide civil remedies by passing the protection order.<sup>xlii</sup> There are no provisions for penalizing the offender under this Act. Further, the epithet 'rape' continues to bring with it a high degree of moral and social opprobrium, which is not conveyed by the words 'sexual abuse'.<sup>xliii</sup> By removing the epithet 'rape', there exists a risk of diluting the extent of moral condemnation. The benefit of this method is that it preserves the moral censure attached to the general understanding of rape.<sup>xliv</sup> Section 354 and Section 498A providing punishment for outraging the modesty of women and cruelty, respectively, also don't fully address the concerns arising from marital rape. However, the argument that if a woman wishes to prosecute marital rape then it would destroy the institution of marriage is misplaced.<sup>xlv</sup> Right to prosecution itself can't put the institution of marriage in jeopardy as this right already exists in the form of Sections 354 and 498A of IPC and Section 3 of the Domestic Violence Act.<sup>xlvi</sup> Since sexual violence deeply impacts the dignity of women as compared to physical violence, considering the doctrine of proportionality, the punishment should be more severe.

If we see criminal laws to perform this function, it would indeed make the institution of

marriage stronger and would lay its foundations on values of equality, autonomy and individual dignity. In all cases it would be wrong to look at criminal law in a negative manner. But, while addressing the issue of criminalization the dignity of individuals who will be subjected to criminal law also needs to be considered and thought of. Therefore, it is proposed that criminalization of marital rape should happen in a sequential manner.

Justice Pardiwala recognized two kinds of marital rape in his judgment.<sup>xlvi</sup>The first kind is *sexual coercion by nonphysical means* which includes 'making bogus guarantees, taking steps to cut off the marital friendship, lies, not adjusting to the casualty's fights to stop, and so forth and second sort of marital rape is constrained sex which includes the utilization of actual power to go into sex with a reluctant lady.<sup>xlvi</sup> It includes battering rape; force only rape and obsessive rape.'<sup>xlvi</sup> In battering rape, ladies experience both physical and sexual savagery in the relationship and they experience this brutality differently. Some are mishandled through the sexual savagery, or the rape may trail a truly rough occasion where the spouse needs to have sex and powers his better half to have sex without wanting to.<sup>1</sup> A large portion of marital rape preys fall under this class. That is known as a 'power just rape', spouses utilize power important to pressure their wives; beating may not be component of these connections.<sup>li</sup> The attacks are characteristically after the female has denied sexual intercourse. This women experience labeled as sadistic or *obsessive rape*; these assaults involve cruelty and/or perverse sexual acts and are often bodily violence.

All those cases where 'it is against her will' and force or violence is used can easily be criminalized. For instance, in 1979, the Brussels Court of Appeal recognized marital rape and found that a husband who used serious violence to coerce his wife into having sex against her wishes was guilty of the criminal offense of rape. The reasoning of the court was that, though the husband did possess a 'right' to have intercourse with his wife, he cannot use forcefulness to claim it, as Belgian laws did not permit people enjoy rights by violence. In 1989, laws were amended and the definition of rape was broadened, and marital rape is treated the same as other forms of rape. Moreover, in such cases, there would hardly be any chances of false implication of the husband for any ulterior motive. Therefore, the policy consideration of unnecessary criminalization of husband and dignity of wife is respected. In such cases, there is no question of impact on the institution of marriage because of the fact that there is an

abusive and violent relationship between the parties and which is also indicative of the fact of irretrievable breakdown of marriage.<sup>lii</sup>

For the reasons cited above, the cases which are based solely on the consent and the quality of consent are tricky and can be considered for criminalization in the next stage. One view can be that the grey area of consent should not be meddled with as it would result in too much interference of the State in private space. Sexual life between spouses can't be put in strict jacket formulae of consent or no-consent. The complete criminalization in one go can also create an element of distrust in the minds of spouses and may adversely impact the sexual life of the spouses.

## CONCLUSION

This chapter discussed various policy considerations that shall be taken into account before taking up the question of marital rape. These policy considerations have been identified as dignity of an individual, sexual autonomy, institution of marriage and undesirable criminalization. Based on the policy considerations and definition of marital rape given by Justice Pardiwala it is suggested in the chapter that forced rape, non- consensual unnatural offences and so forth can be easily criminalized. Nonetheless, as far as sex against once consent is in subject it is desirable to criminalize the same. However, the same is problematic because of difficulty in proving consent of an act committed in a private space and the present judicial attitude. While arguing about the criminalization of 'non-consensual sex' by the husband, one has to consider in what cases and circumstances will the situation generally arise; when the wife is compelled to take the extreme step to go to the police station or court to lodge a complaint. In all such cases, the uniform pattern one would find would be that of violence plus an abusive and broken relationship. There would be hardly a few cases where the general pattern of deteriorating relationship is absent and the allegation is solely based on the 'non-consensual' act. This we have argued as the grey area of 'marital rape' because, as discussed above the dynamics of consent are complex to destruct especially when it involves the relationship of two people living under the same roof. In these cases, it is difficult to draw the balance between three policy considerations which we referred above, that is, institution

of marriage and its purpose, dignity of women and undesirable criminalization.

## ENDNOTES

- <sup>i</sup> See, Jill Elaine Hasday, *Consent and Contest: A Legal History of Marital Rape*, 88 CALIF L REV 1373 (2000).
- <sup>ii</sup> *Independent Thought v. Union of India*, (2017) 10 SCC 800.
- <sup>iii</sup> K.L. Vibhute, *Rape within Marriage in India: Revisited*, 27 IND BAR REV 167 (2000).
- <sup>iv</sup> MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN, Vol. 1, 629 (1736).
- <sup>v</sup> Draft Penal Code, Cl. 359.
- <sup>vi</sup> Indian Penal Code, 1860, Exception 2 of Section 375.
- <sup>vii</sup> Criminal Law Amendment Act, 1840.
- <sup>viii</sup> The Protection of Children from Sexual Offences Act, 2012 ('POCSO Act'), Ss. 3 and 5. 'Under POCSO Act it a statutory rape to have sexual intercourse with "any child" below the age of eighteen years.'
- <sup>ix</sup> *Supra* note 3 at 127.
- <sup>x</sup> KATHERINE O' DONOVAN, SEXUAL DIVISIONS IN LAW 59, 82 (1985).
- <sup>xi</sup> ALAN NORRIE, CRIME, REASON AND HISTORY: A CRITICAL INTRODUCTION TO CRIMINAL LAW 223 (2001).
- <sup>xii</sup> *Joseph Shine v. Union of India*, (2019) 3 SCC 39.
- <sup>xiii</sup> *Indra Sharma v. V.K.V. Sarma*, (2013) 15 SCC 755; *Bharatha Matha v. R. Vijaya Renganathan* (2010) 11 SCC 483; *Badri Prasad v. Director of Consolidation* (1978) 3 SCC 527; *Madan Mohan Singh v. Rajni Kant* (2010) 9 SCC 209
- <sup>xiv</sup> *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1 ("Navtej Singh Johar").
- <sup>xv</sup> *Maynard et al. v. Hill*, 125 U.S. 190, 205 (1988); *Murphy v. Ramsey*, 114 U.S. at 45; *Satvir Singh and Ors. v. State of Punjab and Anr.* 1998 CriLJ 405; *Miron v. Trude* [1995] 2 SCR 418.
- <sup>xvi</sup> *K.S. Puttaswamy and Anr. v. Union of India and Others* (2017) 10 SCC 1 at para 525.
- <sup>xvii</sup> Lord Denning, *The Due Process of Law* 212 (1980).
- <sup>xviii</sup> *Supra* note 15 at 4.
- <sup>xix</sup> *Common Cause (A Regd. Society) v. Union of India and Ors.* AIR 2018 SC 1665 at para 150 and 172; *Shakti Vahini v. Union of India* AIR 2018 SC 1601 at para 45 as cited in *Navtej Singh Johar* at para 319.
- <sup>xx</sup> *K.S. Puttaswamy and Another v. Union of India and Others* (2017) 10 SCC 1 at para 108, 119, 298 and 525; *State of Madhya Pradesh v. Madan Lal* (2015) 7 SCC 681; *Prahlad v. State of Haryana*, 2015 (8) SCC 688 at para 17; *Francis Coralie Mullin v. Administrator, Union Territory of Delhi and Ors.* (1981) 1 SCC 608 at para 8.
- <sup>xxi</sup> *Nimeshbhai Bharatbhai Desai v. State of Gujarat*, (2018) SCC OnLine Guj 732 at paras 110, 115; *Suchita Srivastava v. Chandigarh Administration*, (2009) 9 SCC 1 at para 22.
- <sup>xxii</sup> Anne Dailey, *To Have and To Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99 HARV L REV 1255, 1262 (1986).
- <sup>xxiii</sup> *In Re: Inhuman Conditions in 1382 Prisons*, (2016) 3 SCC 700.
- <sup>xxiv</sup> *Sunil Batra (II) v. Delhi Administration*, (1980) 3 SCC 488.
- <sup>xxv</sup> VIVIEN STERN, *A SIN AGAINST THE FUTURE: IMPRISONMENT IN THE WORLD* 192 (1998).
- <sup>xxvi</sup> *Id.*
- <sup>xxvii</sup> *Shakuntla Kumari v. Om Prakash Ghai*, AIR 1983 Delhi 53 (Del HC).
- <sup>xxviii</sup> *Mahmood Farooqui v. State (Govt. of NCT of Delhi)* 2018 CriLJ 3457.
- <sup>xxix</sup> *Tukaram and Anr. v. State of Maharashtra*, (1979) 2 SCC 143.
- <sup>xxx</sup> *State of Himachal Pradesh v. Mango Ram*, (2000) 7 SCC 224.
- <sup>xxxi</sup> *Deepak Gulati v. State of Haryana*, (2013) 7 SCC 675.
- <sup>xxxii</sup> *Id.*
- <sup>xxxiii</sup> Jennifer Temkin, *Towards a Modern Law of Rape*, 45 MOD L REV 399, 409 (1982).
- <sup>xxxiv</sup> *Navtej Singh Johar's Case.*
- <sup>xxxv</sup> *Id.*
- <sup>xxxvi</sup> *Id.* at para 94.



---

<sup>xxxvii</sup> *Supra* note 49.

<sup>xxxviii</sup> *Independent Thought v. Union of India*, (2017) 10 SCC 800.

<sup>xxxix</sup> Navtej Singh Johar p. 40 (per Chandrachud J.).

<sup>xl</sup> The Protection of Women from Domestic Violence Act, 2005, Exp. I (ii), Section 3. ‘Sexual Abuse includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman.’

<sup>xli</sup> Shikha Chhibbar, *Sexual Violence in Private Space: Marital Rape in India*, Torkel Opsahl Academic EPublisher FICHL Policy Brief No. 52 (2016) at 3, (04 July 2019; 09:00 PM), <http://www.toaep.org/pbs-pdf/52-chhibbar>.

<sup>xlii</sup> *Narendrakumar @ Nitinbhai Manilal Shah and Ors. v. State of Gujarat*, (2014) 2 GLH 346; *S v. J* (2018) 248 DLT 511.

<sup>xliii</sup> Reports of the Committee on Amendments to Criminal Law; Justice Verma Committee Report (2013), para 65, p. 107.

<sup>xliv</sup> *Id.*

<sup>xlv</sup> *Supra* note 52, para 90 at 57 (per Madan B. Lokur J.).

<sup>xlvi</sup> *Supra* note 49, para 130.6 at 147. *See also*, *Why marital rape must be a crime*, The Hindu (6 September 2019; 11:00 AM), <https://www.thehindu.com/opinion/editorial/criminalising-marital-rape-and-maneka-gandhi/article8352904.ece>.

<sup>xlvii</sup> *Id.*

<sup>xlviii</sup> *Id.*

<sup>xlix</sup> *Id.*

<sup>l</sup> *Id.* at para 99(II)(a) at 128.

<sup>li</sup> *Id.* at para 99(II)(b) at 129.

<sup>lii</sup> *Id.* at para 106 and 107 at 132. Justice Pardiwala observed that ‘a wife accusing her husband of rape and pressing charges only demonstrates that the marriage is irrevocably over’.