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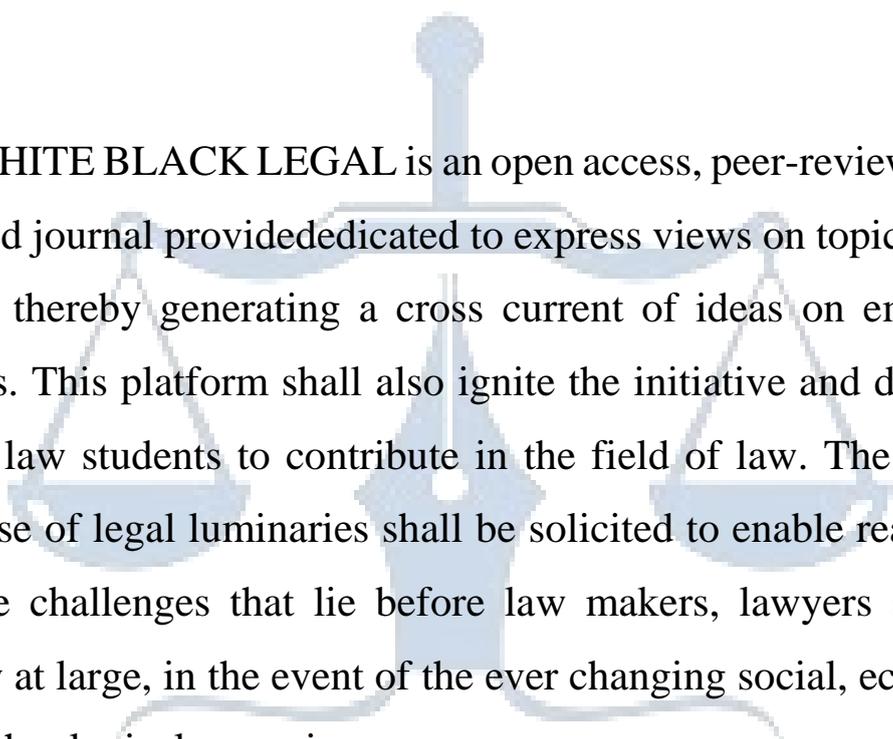


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With this thought, we hereby present to you

W H I T E B L A C K
L E G A L

THE FUTURE OF CRIMINALIZATION OF MARITAL RAPE IN INDIA: A COMPARATIVE ANALYSIS WITH GERMANY

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1) ABSTRACT

Rape in every form is considered heinous and must be criminalized with the strictest of the strictest punishments. However, the entire concept of the criminalization of marital rape seems to be flawed. The debate about the criminalization of marital rape has been an ongoing one for decades together in India. The Indian notion of marital rape needs reforms, as the Indian society, the Legislature, and the Judiciary, seem to overlook the seriousness of rape in a marital relationship. The Indian notion of criminalizing marital rape is yet to consider the fact that a woman before sexual intercourse must explicitly give her consent, irrespective of whether she is married or no. This paper seeks to draw a comparison between India's marital rape laws and the rape laws in Germany. The comparison seeks to present the development of marital rape laws in Germany's criminal code, and how India still has a long way to go before it can reach that stage of criminalization. The article further seeks to emphasize the constant attempts made by law committees, judges, and even the Indian public to recognize the urgency of criminalizing marital rape and making the legislature realize the same. The criminalization of marital rape in India still seems to be a bleak possibility due to the difficulty in proving the burden of proof and the age-old mindset of the Indian Judiciary. The reasons for why criminalizing marital rape is a serious matter, have been enumerated in the paper along with drawing persuasiveness from Germany and its rape laws¹.

Keywords: Comparison, Judiciary, Legislature, Notion, Traditional

¹ Gayatri Lakshmanan, 'Criminalizing Marital Rape in India: A Bright or a Bleak Future?', Oct. 9, 2024, 4:53 PM), <https://salrj.thelawbrigade.com/articles/criminalizing-marital-rape-in-india-a-bright-or-a-bleak-future/>.

2) STATEMENT OF PROBLEM

The existing gap that this paper aims to fill is analyzing the future criminalization of marital rape holds in India, and further seeks to look into the history and other precedents that have shaped the Indian marital rape laws into what they are today. Furthermore, this research paper also aims to compare the development of marital rape laws with that of Germany and India and identify the problems occurring while implementing the same in India.

3) METHODOLOGY

This research adopts a doctrinal and qualitative approach, delving into primary sources like working papers and statutes for critical analysis. Secondary sources such as books, law commission reports, German marital rape legislations and statutes, and Indian precedents are utilized to address how the criminalization of marital rape has been addressed in India but has still failed when looking at its practicality. Furthermore, German laws and legislations on marital rape are also an important source in this research paper, to draw a comparison between how the marital rape laws in Germany have significantly developed, and how the Indian legislature can use it as a model as an attempt to criminalize marital rape.

4) RESEARCH QUESTIONS

1. What is the historical evolution behind criminalizing marital rape in India?
2. What have been the contemporary attempts made to criminalize marital rape in India and to what extent have they been successful?
3. What have been the developments in marital rape laws in Germany's criminal code, and how can such developments be a strong base and model for shaping India's marital rape laws?
4. What seems to be the plausible future of the criminalization of marital rape in India, and whether such a change can be foreseen in the near future?

5) RESEARCH OBJECTIVES

1. Analyze the historical evolution of criminalizing marital rape in India with the help of statutes, and law commission reports.
2. Critically examine the attempts made to criminalize marital rape in India and analyze the extent to which these attempts are successful.

3. Compare Germany's marital rape laws with that of India and analyze the developments in the same.
4. Draw a conclusion on whether the future of criminalization of marital rape in India seems bleak or bright.

6) DATA COLLECTION

6.1) INTRODUCTION

Rape in all forms is considered a heinous crime in India and is met with the most stringent punishments enshrined under the Indian criminal codes. The offense of rape is one of the most recurring offenses in India and is met with punishments as heinous as the offense in itself. From the Nirbhaya case in 2012 to the R.G. Kar Medical College incident in 2024, the offense of rape and the rights of a woman have been strictly upheld and defended, especially by the citizens of India. Whilst, the general offense of rape is faced with stringent and extremely statutory strict punishments, rape in a marital relationship is still yet to be criminalized in India. The issue of marital rape has been one that has always been faced with contradicting opinions from jurists, retired and sitting judges of Indian courts, and the Indian Legislature. From a historical perspective, this issue of marital rape stems from the colonial-era legislation, the Indian Penal Code (IPC), 1860, that refused to criminalize marital rape under its provisions. The provision for marital rape under the IPC provides immunity to the husband, with consent as a backing. The majority of the judgments under the marital rape provision in the IPC have been against the criminalization of marital rape, wherein the Honorable sitting judges of the court have stated the aspect of implied consent to sexual intercourse when a woman gets married. This research paper critically analyses the very same judgments in detail and the age-old notion opined by the sitting judge(s).

Furthermore, the contemporary legislation, the Bharatiya Nyaya Sanhita, 2023, that replaced the IPC, 1860, also does not seem to criminalize marital rape. This has also been subsequently challenged in the Honorable Supreme Court of India. To elaborate further, there have been law committee reports, like the J.S. Verma Committee Report in 2012 that sought to criminalize marital rape, stating that the consent of a woman should be considered of utmost importance irrespective of her marital status. Despite the legitimate ground that backed such a recommendation, the Indian Legislature under the Criminal Law (Amendment) Bill, 2012, did not include a provision for criminalizing marital rape. The attempts made to criminalize marital

rape in India are numerous, but the increasing burden of proof on the prosecution and the court's ability to adjudge such a case have always been a bone of contention amongst jurists, sitting and retired judges, and the citizens of India. These opinions and precedents are what have shaped India's marital rape laws to what they are today.

Though the criminalization of India has majorly been faced with criticisms and controversies, there have been few instances that have seen support for such criminalization. This research paper will elaborate on certain articles wherein the authors have showcased their support for the criminalization of marital rape and emphasized the importance of consent that a woman possesses even in a marriage. Furthermore, in the Protection of Women from Domestic Violence Act, of 2005, although not explicitly stated as marital rape, any sexual violence committed against a woman in a marital relationship will be met with civil consequences. One of the prominent and well-known support showed in the history of criminalizing marital rape is in the case of *Hrishikesh Sahoo v. State of Karnataka*, wherein Hon'ble Justice Nagaprasanna, delivered one of the most controversial judgments in favour of marital rape, stating that the husband was convicted under the general provisions of rape, opining that an offense will constitute rape if the consent of the woman is forced, irrespective of her marital status.

To further provide a backing to the criminalization of marital rape, this research paper also brings out a comparative analysis of the marital rape laws under the German Criminal Code, 1871. Germany's marital rape laws have undergone a similar history to that of India, but despite initial denials to criminalize marital rape, Germany has criminalized marital rape, considering the heinous nature of the offense committed. This research paper will conclude with plausible recommendations and suggestions that the Indian Legislature can implement to criminalize marital rape, taking suggestions from Germany's marital rape laws, and effectively predict the future of criminalization of marital rape in India.

6.2) THE HISTORY OF CRIMINALIZING MARITAL RAPE IN INDIA

Marriage as a social institution has evolved since 500 C.E., in India, making it one of the purest and most revered forms of institution. Marriage is constituted by merging multiple elements, of which intimacy and consent play a vital role. The consent given for marriage constitutes the consent for various situations arising in a marital relationship. The consent for intimacy is also one that arises from the overall consent to a marriage. Consent for such intimacy has been

generally discussed in Indian statutes like Section 375² of the Indian Penal Code (IPC), 1860³ (presently, the Bharatiya Nyaya Sanhita, 2023⁴), wherein a woman who is subject to sexual intercourse against her will, will constitute an offense of rape. But, concerning marital rape particularly, the Indian laws have remained silent on it. Nevertheless, the concept of marital rape has been sufficiently discussed by the Indian legislature and the judiciary. Multiple judgments of the Supreme Court and various other courts across India have touched upon the question of criminalizing marital rape in India.

The constitutionality of marital rape has been challenged in multiple judgments that have seen a split opinion from the sitting judges. In contrast, marital rape has civil remedies under the Protection of Women from Domestic Violence Act, of 2005⁵, under the provision of sexual violence as a part of domestic violence. But the entire debate on the criminalization of marital rape arises from an exception provided by the Indian legislature in the Indian Penal Code under Exception Clause 2 of Section 375⁶ that states that sexual intercourse or any sexual act carried out by a man with his own wife will not constitute the offense of rape. This exception has sparked multiple contrasting opinions from high court judges, union ministers, and parliamentary standing committees⁷. The judicial opinions put forth are mainly centered around privacy, an integral element of a marital relationship. Such opinions have especially raised concerns about a woman's privacy in a marital relationship, emphasizing such privacy as a pathway for a woman to exercise her rights in a marriage. Further, criminalizing marital rape not just raises questions on the privacy of a woman or the family, but questions the entire social institution of marriage. Marriage has been long seen as an intimate relationship between a husband and a wife, to which the law can exercise its control only to a limited extent. The state can exercise its control in the domestic sphere to prevent incidents of domestic abuse or violence, but Justice Hari Shankar, a permanent sitting judge of the Delhi High Court, takes the opinion that the state does not have the leverage to interfere in the intimacy and privacy of a marital relationship⁸. The critics of criminalizing marital rape have centered their opinions and arguments on the sanctity of marriage and the aspect of privacy in a marital relationship.

²Indian Penal Code, 1860, §375.

³Indian Penal Code, 1860. (October 6, 1860).

⁴Bharatiya Nyaya Sanhita, 2023 (December 25, 2023).

⁵Protection of Women from Domestic Violence Act, 2005 (September 13, 2005).

⁶Indian Penal Code 1860, §375 Exception cl. 2.

⁷Saumya Uma, 'Why the Marital Rape Exemption in Criminal Law Must Go' (2023), (Oct. 9, 2024, 9:44 AM), <https://thewire.in/rights/why-the-marital-rape-exemption-in-criminal-law-must-go>.

⁸*Id.*

Criminalizing marital rape might seem a way to further stress the importance of consent in a marriage. However, the state's limits with interfering in the privacy of a marital relationship far outweigh the essence of consent. Further, the state alone cannot be blamed for overlooking the aspect of consent in a marriage. The manner in which societal mindset is shaped plays a crucial role in determining the future of the criminalization of marital rape in India. Indian society still follows the patriarchal notion that a woman automatically consents to sexual intercourse after marriage which undermines her autonomy and consent as a woman. The debate on criminalizing marital rape goes both ways. Despite there being critics who strongly deny such criminalization, there are also a few who show their support⁹.

6.3) ATTEMPTS MADE TO CRIMINALIZE MARITAL RAPE IN INDIA

In the year 2012, Justice J.S. Verma, a former retired judge of the Supreme Court, constituted the Verma Committee under his guidance, which advocated the criminalization of marital rape, and subsequently submitted its report in 2013. The committee reasoned that the age-old notion of a woman implicitly and automatically consenting to the sexual needs of her husband in a marriage cannot be a ground that the legislature and the judiciary can take for not regarding marital rape as a form of rape¹⁰. The committee opined that the exception clause be repealed and the aspect of consent cannot be blatantly overlooked just because the man and woman share a marital relationship. Despite the recommendations of the Verma Committee, the Criminal Law (Amendment) Bill, 2012¹¹, introduced by the Parliamentary Standing Committee, did not seem to include any provision that criminalized marital rape. They reasoned that this would undermine the sanctity of marriage and essentially put the entire family under a reasonable amount of stress¹².

Unlike medieval times where the wife was seen as the property or chattel of the husband, who could use her as a sexual object and force her consent whenever he wished to, the opinions of legal jurists stem from the modern era that have evolved from the traditional notion of viewing a wife as the property of her husband. The concept of marital rape has emerged to protect the integrity of a woman in a marriage rather than shelter the interests of the man through his wife.

⁹*supra* note 1. at 1.

¹⁰Swarati Sabhapandit, 'Criminalising Marital Rape in India', 2023, (Oct. 9, 2024, 9:45 AM), <https://www.theindiaforum.in/law/criminalising-marital-rape-india>.

¹¹The Criminal Law (Amendment) Bill, 2012, Bill No. 130 of 2012, (December 4, 2012).

¹²Saumya Uma, 'Women's Rights in the Balance as India Weighs Criminalizing Marital Rape' (2023), (Oct. 8, 2024, 01:20 AM), <https://thediplomat.com/2023/11/womens-rights-in-the-balance-as-india-weighs-criminalizing-marital-rape/>.

The modern-day assumption opined by legal jurists is that in a marital relationship, consent should go both ways and the husband must essentially not get immunity under Indian criminal law for forcibly obtaining consent from his wife. The consent that the wife gives during a marriage is one that shows her consent to intercourse, but not for each sexual intercourse, and the husband must ensure that his wife consents willingly to every sexual intercourse. Nevertheless, such attempts remain attempts due to the age-old notion followed by the Indian legal system that assumes when a woman gets married, she consents to overall sexual intercourse with her husband, which includes implied consent for every intercourse irrespective of whether the consent is obtained willingly or unwillingly¹³.

6.4) THE COMPARATIVE ANALYSIS WITH GERMANY

The position in Germany runs on parallel lines to the United States of America (USA). Until 1997, Germany had criminalized all forms of rape except marital rape. But in 1997, due to constant protests and requests by women's rights feminists and public opinion, marital rape was criminalized in Germany under Section 177¹⁴ of the German Criminal Code, 1871¹⁵, wherein the exception to marital rape was removed, and a “no means no” law was passed, categorizing the offense as rape, irrespective of the marital status. However, there was an additional condition attached to prosecuting the perpetrator; the rape victim had to resist the perpetrator or fight to protect herself. But, in 2016, a majority of the House also removed this condition, and it was only required for the perpetrator to have defied the mere will of the victim¹⁶. The marital rape laws have only developed from then, ensuring that consent is compulsorily obtained. Germany's criminal laws have ensured that the perpetrator does not escape punishment and Section 177 of the German Criminal Code awards punishment that ranges from a period of imprisonment from 6 months to 10 years, depending on how heinous the rape committed is. The present marital rape laws in Germany have mainly been shaped due to the public opinions of the citizens. The German marital rape laws are a clear indicator and proof of as to how public opinion can shape and influence the opinions of the legislature as well.

The process of criminalizing marital rape in Germany was not an easy one either. Initially,

¹³ Gayatri Lakshmanan, 'Criminalizing Marital Rape in India: A Bright or a Bleak Future?', Oct. 9, 2024, 4:53 PM), <https://salrj.thelawbrigade.com/articles/criminalizing-marital-rape-in-india-a-bright-or-a-bleak-future/>.

¹⁴ German Criminal Code, 1871, §177.

¹⁵ German Criminal Code, 1871 (May 15, 1871).

¹⁶ Ben Rosen, 'How tough is Germany's new rape law?' (2016), (Oct. 9, 2024, 3:56 PM), <https://www.csmonitor.com/World/Global-News/2016/0707/How-tough-is-Germany-s-new-rape-law>.

under German law, marital rape was not considered an offense for several years. Victims of marital rape had only the option of prosecuting their husbands for coercion, battery, or libel¹⁷. Though the legal status of marital rape was widely discussed and debated throughout the 1980s, the breakthrough occurred only in 1997, when the German Criminal Code of 1871, introduced a provision criminalizing marital rape under Section 177. West Germany, in particular, was extremely active in propagating women's rights and later went on to sign the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW), in 1980. The criminalization of marital rape in Germany defied the patriarchal norms that were deep-rooted in society, which gave men the upper hand to have the final say in their families and relationships¹⁸. The German marital rape law reformed this notion into a broader one that aims at protecting woman's rights, especially in a marital relationship. Female activists and jurists fought for over 25 years to shape what the German marital rape law is today. Initially, there was a clause that essentially made a woman drop the charges against her husband, but this was subsequently repealed as it was seen as a way in which the husband could forcibly make or coerce his wife into dropping the charges against him. Official statistics show that from the year 1993, more than 350,000 men have raped their wives under the garb of marriage¹⁹. The punishment for marital rape extends up to 6 months to 10 years of imprisonment enshrined under Section 177 of the German Criminal Code, 1871.

Germany's marital rape laws follow a "No Means No" ideology, that strictly upholds a woman's consent during sexual intercourse. The marital rape laws have become stringent wherein all forms of non-consensual aspects including physical or verbal cues from the woman are strictly looked into²⁰. The criminalization of marital rape in Germany has been a struggle throughout the years, but is now being implemented effectively, protecting the rights of the wife in her marriage. The Indian Legislature can and should consider the procedure adopted by Germany in criminalizing marital rape despite plausible challenges and varied opinions, and attempt to implement the same in India. With cases of domestic violence and sexual abuse constantly on the rise, the Indian legislature must seriously consider the criminalization of marital rape, and the German Criminal Code of 1871 and Germany's evolution of its marital

¹⁷ Deborah F. Hellman, Max W. Kinninger, and Soren Kliem, 'Sexual Violence against Women in Germany: Prevalence and Risk Markers', (Oct. 9. 4:01 PM) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6121316/>.

¹⁸ Jane Freeland, 'Marital Rape and Women's Rights in the Federal Republic of Germany', (Oct. 9, 2024, 3:30 PM), <https://hsl.hypotheses.org/1685>.

¹⁹ Feminist Majority Foundation Blog, 'German Law Criminalizes Marital Rape', (Oct. 8, 2024, 10:20 PM), <https://feminist.org/news/german-law-criminalizes-marital-rape/>.

²⁰ *supra* note 2 at. 16.

rape laws can be a strong model and inspiration to the same.

7) CONCLUSION: THE FUTURE OF MARITAL RAPE LAWS IN INDIA

The current position of India with respect to marital rape laws in India seems slightly unsatisfactory if compared with Germany. Both countries have evolved from their age-old notion of viewing the aspect of consent to be impliedly given at all times in a marriage, and have respectively specified statutory provisions that criminalize marital rape. This development to criminalize marital rape still has a long way to go in India. Multiple debates and discussions have touched upon this issue, but the end result remains one. Numerous instances in recent times also are an indicator of how the Indian legislature and judiciary still follow the age-old notion of implied consent to reason why marital rape cannot be considered an offense. Current judicial cases have also brought up the topic of marital rape but the court's reasoning was nevertheless in favour of the exception. A recent judgment passed was in the case of *Manish Sahu v. State of Madhya Pradesh*²¹ in the Madhya Pradesh High Court, wherein a single-judge bench led by Justice G.S. Ahluwalia quashed an F.I.R. filed by a wife against her husband under Section 377 stating unnatural sexual intercourse and threats of divorce. Justice G.S. Ahluwalia stated that unnatural sex or even sexual intercourse for that matter between a married couple could not be considered marital rape, since its legality comes into question. Marital rape is not yet considered an offense under Indian laws, and an F.I.R. filed in respect to that cannot be considered and is subsequently quashed. In this case, the husband was rewarded with acquittal, receiving immunity from exception clause 2 of Section 375 of the IPC. Similarly, in the case of *Umang Singhar v. State of Madhya Pradesh*²², the Jabalpur Bench had the same reasoning as in the above case *Manish Sahu v. State of Madhya Pradesh*²³. It quashed an F.I.R. accusing MLA Umang Singhar of marital rape under Section 377 of the IPC. The Court further opined that marital rape is not a crime in India and according to the IPC, the perpetrator can only be convicted for marital rape if the victim is below the age of 15, classifying her as a minor.

The IPC has been recently replaced with a new criminal code, the Bharatiya Nyaya Sanhita (BNS), 2023, that has replaced and amended a few provisions from the former IPC. However, the exception to criminalizing marital rape still stays the same. Under the new BNS 2023,

²¹*Manish Sahu v. State of Madhya Pradesh*, AIR 2024 SCC OnLine MP 2603 (India).

²²*Umang Singhar v. State of Madhya Pradesh*, AIR 2023 SCC OnLine MP 3221 (India).

²³*supra* note 3 at. 21.

marital rape²⁴ has escaped from the status of an offense under Exception Clause 2 under Section 63. This exception prevents the prosecution of the husband for the forceful consenting of his wife to sexual intercourse. This exception clause was recently challenged before the Supreme Court of India, before the Hon'ble Chief Justice, D.Y. Chandrachud. The petition is brought by the All-India Democratic Women's Association (AIDWA). It is said to be heard by the Chief Justice and other judges of the Supreme Court in July 2024²⁵.

While the decision of the Supreme Court is surely awaited, the Indian legislature could have and still can plausibly take into consideration the urgency and necessity of criminalizing marital rape. One of the suggestions on how this could be executed is for the Indian legislature to take instances from the above-listed countries, especially Germany. The German marital rape law has had a similar history as that of India. The criminalization of marital rape in both countries is a result of multiple and consistent efforts put in by the general public that eventually was recognized by the government. Small and third-world countries like Ghana, Nepal, Chile, Cuba, and many more, have considered marital rape a serious offense and have gone up to the extent of awarding life imprisonment for the offense of marital rape. India can look up to the laws and punishments adopted by such countries. It can start by providing mediocre punishments while gradually increasing the punishment depending on how heinous the rape committed is. Apart from taking ideas from countries worldwide, the Indian legislature can take cognizance of instances from its own country. The extent of discussion on criminalizing marital rape in India on multiple occasions shows the seriousness with which it is looked at. An instance mentioned above in the article is the proposal put forth by the Verma Committee in the year 2012 that advocated for the criminalization of marital rape citing the modern era and the non-practicality of the age-old reasoning of implied consent. Further, in the controversial judgment of *Hrishikesh Sahoo v. State of Karnataka*²⁶, the Karnataka High Court under the guidance of a single-judge bench headed by Justice Nagaprasanna, upheld the charge of rape against the husband under Section 375²⁷ of the IPC. Justice Nagaprasanna opined that Exception 2²⁸ under the section as mentioned above is violative of Article 14²⁹ of the Indian

²⁴SC seeks Centre's stand on plea against marital rape exception in new criminal law' *The Economic Times* (India, Oct. 9, 2024, 4:11 PM).

²⁵ Gayatri Lakshmanan, 'Criminalizing Marital Rape in India: A Bright or a Bleak Future?', Oct. 9, 2024, 4:53 PM), <https://salrj.thelawbrigade.com/articles/criminalizing-marital-rape-in-india-a-bright-or-a-bleak-future/>.

²⁶*Hrishikesh Sahoo v. State of Karnataka*, AIR 2022 SCC OnLine Kar 371 (India).

²⁷*Id.*

²⁸*supra* note 4 at. 6.

²⁹India Const., art. 14.

Constitution³⁰. He further stated that rape committed against a woman irrespective of whether the woman is the wife of the perpetrator, is a heinous offense and the age-old notion of a husband having control over his wife's body cannot be termed a valid reason any longer and must be amended. The court only convicted the husband on the grounds of rape, and not marital rape or the exception³¹.

Despite such developments occurring in the legal sphere, the Indian legislature and judiciary have time and again refused to criminalize marital rape, still fixated on the traditional approach. The future of criminalization of marital rape in India looks bleak, as of now, considering the various attempts made towards its criminalization, but rendering each attempt a failure due to the constant denial and the age-old approach adopted by the Indian legislature and judiciary. Marital rape can only be criminalized if the general public of India consistently keeps urging the government and raising awareness on how heinous it is and can further get. The Indian legislature can gradually, through amendments, add a clause under Section 63 of the BNS, 2023, thereby criminalizing marital rape officially. With cases of domestic violence and sexual abuse constantly on the rise, the Indian legislature must seriously consider the criminalization of marital rape, and the German Criminal Code of 1871 and Germany's evolution of its marital rape laws can be a strong model and inspiration to the same. The concept of marital rape still needs further discussion and debates for it to be recognized as an offense truly and till then, its criminalization seems to be far-fetched³².

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³⁰The Constitution of India, 1950 (January 26, 1950).

³¹ Gayatri Lakshmanan, 'Criminalizing Marital Rape in India: A Bright or a Bleak Future?', Oct. 9, 2024, 4:53 PM), <https://salrj.thelawbrigade.com/articles/criminalizing-marital-rape-in-india-a-bright-or-a-bleak-future/>.

³² *Id.*