
CRIMINALISATION OF MARITAL RAPE: A COST-BENEFIT ANALYSIS FROM A UTILITARIAN PERSPECTIVE

Dhara Mittal & Ksheerja Srivastava, Gujarat National Law University

ABSTRACT

The criminalisation of marital rape remains a pressing legal and ethical issue, particularly in India, where existing laws provide immunity to husbands for non-consensual sexual acts within marriage. This paper looks at the issue from a utilitarian point of view, employing a cost-benefit analysis to evaluate the social, legal, and economic implications of criminalising marital rape. By drawing on the works of Jeremy Bentham and John Stuart Mill, the paper argues that legal recognition of marital rape is essential to maximizing societal well-being and ensuring justice for survivors. The study highlights key benefits of criminalisation, including the protection of individual rights, upholding bodily autonomy, reducing gender-based violence, and promoting public health. Additionally, it underscores the potential economic benefits, such as increased workforce participation of women and reduced healthcare costs associated with intimate partner violence. The paper also examines legal inconsistencies in Indian jurisprudence, where rape is criminalised outside marriage but permitted within it, contradicting constitutional guarantees of equality and dignity. At the same time, the research acknowledges the costs of criminalisation, including potential disruptions to traditional marital institutions, increased divorce rates, and resistance from conservative societal groups. It also considers concerns about the misuse of legal provisions and the additional burden on the already overburdened judicial system. However, through an international comparative analysis of countries that have successfully criminalised marital rape, the paper demonstrates that these challenges can be mitigated through appropriate legal safeguards and institutional support. Ultimately, this study concludes that the benefits of criminalising marital rape far outweigh the costs. It advocates for the removal of Exception 2 of Section 63 of the Bharatiya Nyaya Sanhita and the implementation of policies supporting survivors through legal aid, rehabilitation, and financial assistance. Criminalising marital rape is not just a legal necessity but a moral imperative for a just and equitable society.

Introduction

What is Marital Rape?

Marital rape refers to having sex with one's spouse without their permission. While there may or may not be the involvement of physical abuse, the absence of consent remains a necessary factor.¹ Before 1970s, sexual intercourse during marriage was not regarded as rape since it was deemed to fall within the purview of conjugal rights of spouses. Nonetheless, the second wave of feminism, which emphasized self-determination rights and women's control over their bodies, began to change this idea.² Marital rape is now recognised to be a form of domestic abuse and sexual violence by many countries across the world and necessary steps have been taken by them to criminalise this act. Moreover, this heinous act has been renounced by various international conventions as well which push for such legal reforms to align with human rights standards and to achieve protection for women from violence based on gender. Some international conventions, such as The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), outline in GR 19 for state parties to combat violence against women by formulating laws which would effectively help in combating this practice, through civil remedies and criminal sanctions. Further, GR 35 obliges states to define sexual acts, and includes marital rape in the same, given the lack of free consent. Failure to criminalise marital rape violates due diligence obligation of the states as it permits this offence.³

Criminalisation of Marital Rape

The Indian Scenario

There remain 36 countries in the world, including India that legally allow marital rape.⁴ In India, *Exception 2 of Section 63 of IPC Bhartiya Nyaya Sanhita*, BNS (*Exception 2 of Section 375, IPC*) states that a man's sexual acts with his wife, provided she is above 15 years of age,

¹Bhagyashikha Saptarshi, *Marital Rape and Law*, Manupatra (Mar. 23, 2025, 11:21 PM), <https://articles.manupatra.com/article-details/Marital-Rape-and-Law>.

² Rithika Panicker & Parav Patel, *A Study of Marital Rape and Laws in Different Countries*, 1, J. Legal Developments and Allied Issues, 232 (2011).

³ Surya Rajkumar, *International Law, Right to Privacy and Marital Rape in India*, Oxford Human Rights Hub (Mar. 23, 2024, 11:34 PM), <https://ohrh.law.ox.ac.uk/international-law-right-to-privacy-and-marital-rape-in-india>.

⁴ *Marital Rape in India: 36 countries where marital rape is not a crime*, India Today, (Mar. 23, 2025, 11:37 PM), <https://www.indiatoday.in/education-today/gk-current-affairs/story/marital-rape-312955-2016-03-12>.

do not constitute rape.⁵ This creates an unreasonable classification between married and unmarried women, thus violating Articles 14 and 21 of the Indian Constitution.

As per the 2015-16 National Family Health Survey, 83% of married women aged 15-49 reported their husbands as offenders of sexual violence. Further, 4% women were coerced into intercourse, 2.1% into other sexual acts, and 3% were threatened when refused. A 2017 study by the International Center for Research on Women and the UN Population Fund found out that 17% of wives reported sexual violence and 31% of men admitted to committing it.⁶

However, this practice is not without scrutiny. In *Independent Thought v. Union of India*, the Supreme Court observed that sexual relations with a wife under the age of 18 constitutes rape. This was done after addressing the constitutional validity of Exception 2 regarding child marriages and aligning IPC with child protection laws. However, marital rape remains legal for adult women.⁷

Thus, marital rape in India does not remain a crime. In order to propose for criminalisation of marital rape, it is important that we look at other countries that have criminalised marital rape.

An International Perspective

According to data by Amnesty International, 42% of 185 countries have criminalised marital rape with the help legislation. In the remaining nations, either a separate legislation for the same has not been created or it has been excluded completely from the purview of rape. Ten countries namely Ghana, India, Indonesia, Jordan, Lesotho, Nigeria, Oman, Singapore, Sri Lanka and Tanzania explicitly allow the rape of a married woman or girl by her husband. Countries that have been criminalising marital rape usually share a robust framework for gender equality, strong judicial activism and regular movements to bring about change. For instance, countries like United Kingdom and South Korea have abolished marital rape through judicial rulings, emphasizing bodily autonomy and Right to Privacy. India specifically lacks in this aspect due to the entrenched societal norms and patriarchal mindsets, separating personal laws from criminal laws. While judiciary has taken up cases involving privacy and bodily autonomy, it has failed to deliver a judgement criminalising marital rape, often deferring to the

⁵ Bharatiya Nyaya Sanhita, § 63, No. 45, Acts of Parliament, 2023 (India).

⁶ Keerthi Krishna, Krati Purwar, *Marital Rape in India*, Investigative Project Print, Asian College of Journalism.

⁷ *Independent Thought vs UOI*, (2017) 10 SCC 800: AIR 2017 SC 4904.

legislature. We will now look at specific countries and their provisions for criminalising marital rape.⁸

England

Historically, husbands were exempted from being prosecuted if they raped their wives, as per the British common law on the basis of implied consent. Women were considered their husband's property, and the very concept of marital rape was unfathomable. However, on October 23, 1991, the House of Lords unanimously held that marital exemption from rape was no longer part of English law, recognizing marriage as a union of equals.⁹ The Sexual Offences Act 2003, includes spousal rape as sexual assault under it.

It is important to note that Indian law, influenced by British colonial rule, has still not criminalised marital rape under IPC. England's legal reform highlights the archaic nature of Indian laws and the lack of modern legislative frameworks to protect married women from sexual abuse. Further, Indian jurisprudence is heavily influenced by the English Common Law system. Thus, Indian courts should intervene in matters of marital rape and push for its criminalisation through a single, uniform judgement instead of differing judgements by different High Courts. While the Delhi High Court delivered a split verdict regarding criminalisation of marital rape, the Chattisgarh High Court concluded that sexual intercourse without the consent of the wife would not amount to marital rape.

United States of America

While the first state to criminalise marital rape was Nebraska, it was in *People Vs. Liberta*¹⁰ where it was held that no distinction needs to be made between non-marital and marital rape. The court abolished the spousal exemption from the legislation for violating the Constitution of states and federations.¹¹

At the moment, all 50 states criminalise marital rape, but few states have still not criminalised

⁸ Priyali Prakash, Dhriti Mankatalia, *Marital Rape in India: The history of legal exception*, The Hindu (Jan. 09, 2023, 3:51 PM), <https://www.thehindu.com/news/national/explained-marital-rape-in-india-the-history-of-the-legal-exception/article65404106.ece>.

⁹ Panicker & Patel, *supra* note 2, at 233.

¹⁰ *People v. Liberta*, (1984) 64 NY 2d 152.

¹¹ Caroline Johnston Polisi, *Spousal Rape Laws Continue to Evolve*, WeNews commentator (Mar. 23, 2025, 12:21 PM), <http://womensenews.org/story/rape/090701/spousal-rape-laws-continue-evolve>.

this act. Some states such as California define marital rape as a separate offense. Despite being a populous country, the USA has managed to criminalise marital rape. This can be taken by India as a lesson to criminalise this heinous act despite its huge population.

Pakistan

Marital rape was excluded under *Section 375 of the Indian Penal Code, 1860* in Pakistan, and later reinforced by the Offence of Zina Ordinance, 1979, which did not include married individuals in the offence of rape. The *Protection of Women Act, 2006*, repealed this ordinance rape was reinstated under Section 375 without any specific reference to marriage, implying marital rape could be included. In 2021, an amendment defined "consent," broadening the law's applicability. In 2024 finally, a man was convicted for having non- consensual sex with his wife by a Karachi sessions court.¹² India's neighbors, Bhutan and Nepal, have also criminalised marital rape, further highlighting India's outdated legal stance.

South Korea: Realising the Judiciary's Role

While no specific statute criminalises marital rape in South Korea, the Supreme Court of South Korea ruled in 2013 that marital rape is illegal.¹³ The punishment for rape ranges from three years to life imprisonment, subject to specific circumstances. This also sets a precedent for a common law country like India where despite the lack of legislations, the courts have an added responsibility to take up this matter and formulate certain guidelines. Courts, through judicial activism, have taken up important cases in the past, such as in *Vishaka v. State of Rajasthan*, formulating guidelines on prevention of workplace harassment. Such activism is not only a welcome, but a much-needed step by the higher courts of India.¹⁴

Utilitarianism

Marital rape as a crime has not been assigned legal recognition in India. This results in unjust outcomes, depriving victims of legal recourse and protection. Viewing this from a utilitarian perspective, the law must analyse and ensure that maximum good occurs and formulate or

¹²International Bar Association, <https://www.ibanet.org/The-IBAHRI-commends-Pakistans-landmark-ruling-in-marital-rape-case> (last visited Mar. 24, 2025).

¹³ Supreme Court en banc Decision 2012Do14788.

¹⁴ *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241.

amend the legislation based on it.

It was first introduced by Bentham in his work, 'An Introduction to the Principles of Morals and Legislation' (1789)¹⁵ and developed upon in the work 'Utilitarianism' (1863)¹⁶ by Mill. Both Bentham and Mill are key figures in classical utilitarianism. Their discussions also provide an ethical framework for law and policy making. This principle ultimately emphasises on overall welfare which aligns with the ultimate objective of law making. Their works showcase the development of the theory by Bentham and refinement of the loopholes by Mill.

Utilitarianism is an ethical theory that believes in evaluating the morality of actions based on their consequences. The basic premise for the principle of utilitarianism is that, mankind is governed by two sovereign masters, pleasure and pain¹⁷. Being a consequentialist theory, the principle of utility governs the actions based on the outcomes that may occur keeping the two sovereign masters in mind. Utilitarianism, essentially, functions on the analysis of whether a certain action will result in overall pleasure or pain. The theory states that only those actions should be performed which may cause happiness for the maximum amount of people or rather, the actions that have more of a tendency to increase the happiness of the society instead of diminishing it.

In his work, Bentham discussed about several aspects of utilitarianism. He introduced hedonic calculus which quantified pleasure. This belief helped in evaluation of an action and its consequences. He explained that these calculations were dependent on four circumstances: intensity, duration, certainty and remoteness. He treated all kinds of pleasures equally and based his decision on whether a particular action will derive more pleasure or pain. He alienated the idea of natural rights from utilitarianism as the ultimate end is maximum happiness for the whole society collectively. Bentham also discussed the need of accounting public attitude into lawmaking but the end goal of making the society better and towards greater utility should not be lost. He also acknowledges that punishment for crimes is justified if it effectively prevents harm and does not cause greater suffering than the harm caused.

Developing upon this, Mill integrated the qualitative aspect of different pleasures. Mill instead proposed a hierarchy with higher pleasures such as intellectual or moral pursuits over lower

¹⁵Jeremy Bentham, *An Introduction to the Principles and Morals of Legislation* (Batoche Books Kitchener 2000).

¹⁶ John Stuart Mill, *Utilitarianism* (Random House Publishing 2002).

¹⁷ Bentham, *supra* note 1, at 14.

pleasures such as bodily satisfaction. He filled in the gaps visible in Bentham's theory and advocated for recognition of natural rights and freedom of individuals within the understanding of this theory. He believed that by recognising these rights, a path towards social advancement can remain open. The ultimate aim of the theory remained same. He argued that justice is subset of utility. He states that moral wrongs must be compensated by punishment in order to achieve justice. He recognised that social perception of justice is bound to evolve and laws should not be slanted towards outdated norms.

On the basis of explanations by both these thinkers, it is evident that societal progress or advancement is closely linked with laws. Societal advancement is inevitable and failure to adapt our laws in a manner that enables these changes leads to leaving people at a disadvantage. While laws cannot completely change the perception of society, it can however empower people, grant protection and legal recourses, and provide justice.

Rule Utilitarianism, a form of this ethical theory, advocates for a rule or law to be brought to increase the extent of happiness instead of relying on analysis of per situation. This helps in maintaining the consistency of justice and happiness.

Cost-Benefit Analysis

Cost Benefit Analysis is a method of evaluation of benefits over costs associated with any policy or action. This mechanism is deeply rooted in utilitarian principles. It helps in defining a structured manner to assist in decision making. The significance of the method in lawmaking is evident as it helps in determining the effectiveness of laws, ensuring greatest good for greatest number. This approach translates moral and ethical consideration into quantifiable terms allowing policymakers to make rational decisions aligning with social welfare.

Application of cost benefit analysis to the issue of marital rape criminalisation will provide a rational and necessary conclusion to a deeply contested issue. A utilitarian approach will allow a systematic evaluation of the impact that criminalisation will create. This method will involve assessment of social, economic and psychological consideration in order to reach a definite answer. The cost benefit analysis will help in understanding the long-term and short-term implications and the effects of criminalisation on various stakeholders such as the survivors, perpetrators, law enforcement, society, etc.

Furthermore, this analysis will enable rule utilitarianism's presence in law making as it supports stability in and justice by establishing a legal provision. This method will help in reinforcing societal values and fundamental rights and contribute to a just society.

By grounding the issue of criminalisation of marital rape in a framework of cost benefit analysis, the lawmakers can move from discussions based on moral and ethical debates and focus on a rational analysis that will ultimately lead to a framework that upholds human rights and justice by using utilitarian principles. This method will help in analysing if the benefits of marital rape criminalisation in fact outweigh the costs by applying utilitarian principles.

Costs of Criminalising of Marital Rape: Balancing Rights with Realities

Criminalising marital rape is not without its costs. Such a landmark decision would entail social, cultural as well as economic costs which need to be understood before taking an important step to criminalise it.

Conflict of Private Rights and Conjugal Rights

In the current stage, it becomes crucial to understand the scope of conjugal rights. Conjugal rights can be defined as *"rights and privileges arising from the marriage relationship, including the mutual rights of companionship, support, and sexual relations."*¹⁸

As per conjugal rights, the husband and the wife do not only enjoy the right to their own private property (private property here referring to their bodily autonomy), but also certain sexual rights over each other. In case of marital rape, due to lack of consent on part of the wife, there a conflict of rights exists between the two parties. The man, who is exercising his conjugal rights and the woman, who is exercising her right to private property.¹⁹

Thus, it seems like that the costs of of marital rape would primarily entail costs for the husband, and not for the wife specifically. It would take away the husband's entitled right over the wife's private property and bodily autonomy, thereby minimizing his happiness. This aligns with Bentham's idea as a consequentialist, whereby a morally correct act or omission is one that

¹⁸ *Conjugal Rights*, Garner's Dictionary of Legal Usage (3rd ed. 2011).

¹⁹ Cheta Sheth and Bedanta Chakraborty, *Economic Analysis of Marital Rape*, Manupatra, http://docs.manupatra.in/newsline/articles/Upload/F2B511A3-E594-4E20-B94E-C3A7B5CECD63.1-E_Criminal.pdf.

results in a good outcome. Since marital rape is not morally wrong from the husband's viewpoint, its criminalisation would diminish overall happiness, given the restriction on his perceived rights over his wife. Hence, the costs of criminalisation would outweigh the benefits for the "maximum mass."

Changing Family Structures: A Cost Entailed by Women

It is pertinent to note that criminalisation of marital rape may also lead to a shift from joint to nuclear family structures, if women initiate legal action against their husbands. While nuclear families seem to offer women greater autonomy and career opportunities, they are not without their own set of challenges. This is because women are expected to take up the dual role of earning for the family and fulfill traditional roles at home. While being employed outside the house, they are presumed to primarily be responsible for the family without getting proper support, thus facing greater struggles with maintaining work-life balance.²⁰ Furthermore, societal pressure to remarry along with balancing demanding jobs and household responsibilities, facing both workplace discrimination and traditional family expectations adds to the burdens women face.²¹ Here one also needs to look at the domestic situation and the position of women within Indian households. According to the 2011 Census, only 27 million households (11% of the total) are female headed, highlighting male dominance within Indian families. We have already seen above the consequences faced by women who are economically independent and initiate action against their husbands for marital rape. At the same time, women who are economically dependent would also find it difficult to file action against their husbands for marital rape as that would entail severe social and financial consequences. This shows that criminalisation of marital rape would not just affect men but have social costs for both financially dependent and independent women as well.

Customary Norms, Family Law, and the Challenge of Criminalisation

The criminalisation of marital rape would inevitably impact traditional marital institutions, particularly in the Indian society where arranged marriages are prevalent and a wife's consent is often not considered. In such a context, coming up with a legislation to define marital rape

²⁰ Aparajita Chowdhury, *Gender and Generations perspective in Understanding Indian Family Life*, 1, Asian Academic Research Journal of Social Science and Humanities, 137 (2015).

²¹ Sujata Charan, *The Changing Pattern of the Indian Family Structure: A review of the position of women*, 3, International Journal of Multidisciplinary Trends, 23 (2021).

becomes challenging, as consent is not always a foundational aspect of even marriage itself. Moreover, criminalisation of marital rape has potential to disrupt contemporary Indian families. Its presence is not simply confined to the shackles of arranged marriage but extend outside the scope of this marital institution alone, which could potentially reshape societal norms around marriage and consent.²² It would lead to criminalisation of family law, which remains a contested issue in itself. Article 44 of our Constitution states that:

“The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.”²³

The debate for a uniform civil code is still riddled with difficulties. The institution of marriage is deeply rooted to traditions that regulate sexual relations and procreation. This control also extends to notions of prohibited degrees of relationship. With the arrival of caste panchayats and other religious institutions created specifically for the enforcement of rules on punishment, evidence and transgression, these customs have further solidified. Particularly prevalent in rural India, these informal bodies advocate against seeking legal recourse in cases of marital rape, as they prioritize communal harmony and family honour over constitutional guarantees under Article 14 and 21 of the Constitution. Criminalisation of marital rape, which challenges these already existing customs would be unfavourable to such ideals of the community and would thus receive backlash from the rural community as well.²⁴

It is inevitable that given these familial changes and changes in the institutions of religion, culture and society, there would be an increase in the divorce rates between couples. Such divorce cases would ultimately give rise to more court cases, increasing the burden on courts. Further, the possibility of registration of fake cases increases after the criminalisation of marital rape and bringing in such legislation. As a result, both these factors would ultimately increase the burden and the already crowded Indian judicial system.

Benefits of Criminalisation: Protecting Rights, Ensuring Justice, and Upholding Consent

Moving onto the second part of the cost benefit analysis, this section will evaluate the benefits

²² *Marriage and Rape: We Need a Law on Marital Rape but Such Acts Cannot Be Separated from the Structure of the Indian Family*, 48, Economic and Political Weekly, 7 (2013).

²³ India Const. art. 44.

²⁴ Dhagamwar, Vasudha, *Invasion of Criminal Law by Religion, Custom and Family Law*, 38, Economic and Political Weekly, 1484 (2003).

of criminalisation of marital rape. This evaluation will attempt to consider social, economic and legal factors linked to marital rape.

The analysis identifies 5 key benefits to criminalisation of marital rape.

Protection of Individual Rights

Historically, an environment discriminatory against women has been observed. Several discriminatory practices such as dowry, female foeticides, unequal voting rights, etc., have prevailed and exhibit the same. The progress towards legally granting rights and recourses to women have assisted in reduction of these practices. The constant struggle persists around the fact that individual rights of women need protection.

Mill said that the freedom to do what one wants for their own good as long as they don't harm others is the only freedom that matters.²⁵ Laws reflect this notion by granting rights to citizens of their jurisdiction. Every person must be granted the right to bodily autonomy. Bodily autonomy, essentially, is the power to control your own actions without fear of violence. It is universally considered to be a fundamental right.²⁶

A sexual activity innately requires consent by the people involved in it. It is well understood in Indian jurisprudence that lack of consent is rape and thus, rape is criminalised under the Bharatiya Nyaya Sanhita²⁷. The sections criminalising rape imply that the bodily autonomy of the women has not been protected and thus, the perpetrator must be punished. However, the exception of marital rape leaves one to question the right of bodily autonomy of a married woman in a situation where she is raped by her husband. This infringement of her bodily autonomy leaves the woman in a situation with no legal recourse and no protection. The constitution fails to grant the basic rights in such scenarios.

The belief of consent for all future sexual activities when the woman has, in fact, only agreed to the marriage also implies the outdated norm of considering a woman to be the property of her husband. The report by the Justice JS Verma Committee²⁸ also supports that such law can

²⁵ John Stuart Mill, *On Liberty* 16 (Batoche Books Kitchener 2001).

²⁶ United Nations Population Fund, <https://www.unfpa.org/press/bodily-autonomy-fundamental-right> (last visited Mar 23, 2025).

²⁷ Bharatiya Nyaya Sanhita, § 63, No. 45, Acts of Parliament, 2023 (India).

²⁸ JS Verma Committee, *Report of the Committee on Amendments to Criminal Law*, 113, Ministry of Home Affairs, 2013.

lead to an implication of a woman being considered a property of her husband is an injury to her dignity. It is a blow to her rights under article 21. The unequal position granted to the husband and wife in this situation also violates article 14.

Aside from this, the different legal recourses for rape again are problematic. The only way marital rape differs from rape is in the status of relationship between the victim and the rapist. Since this is the main distinction, it can be said that the harm that falls on a victim of marital rape is around the same magnitude as that on a victim of rape. The marital rape exception however could lead one to believe that bodily autonomy of an unmarried woman and a married woman are different. However, the crime of rape is still acknowledged when a married woman is raped by another man who is not her husband. A married man who commits rape should also be held to the status of a criminal. There is no reasonable explanation to make a class of married woman separate from unmarried woman and a married man separate from an unmarried man.

Public Health and Psychological Well-Being

Public health is a field concerned with the health of the society as a whole instead of health of particular individuals. It is concerned with promoting healthy lifestyles, preventing diseases and making sure the public health constantly improves.

Marital rape is another form of gender-based violence, especially when the consent of the wife is specifically regarded as irrelevant. The sexual activities are implied to occur at the whims of the husband. Gender-based violence has been associated to be one of the common factors of spread of STDs amongst women.²⁹ Another study conducted in India also concluded that married women who have faced sexual violence are at risk of STDs.³⁰ This, in fact, is detrimental to the public health of the society.

Marital rape is usually a situation where women are stuck often for extended periods due to lack of legal recourses and stigma in the society. The husband exerts sexual control over their wives for this time period. One such manner includes contraceptives not being used during the rape. This often leads to unwanted pregnancies. Sexual violence during the period of pregnancy also leads to miscarriages. Unwanted abortions may also be performed. These have an adverse

²⁹ Silverman JG, *Key to prevent HIV in women: reduce gender-based violence*, 376 The Lancet, 6-7 (2010).

³⁰ Weiss HA, Patel V, West B, *et al*, *Spousal sexual violence and poverty are risk factors for sexually transmitted infections in women: a longitudinal study of women in Goa, India*, 84 Sexually Transmitted Infections, 133-139 (2008).

effect on the health of the women. Sexual violence has led women to suffer from poor access to prenatal healthcare, pelvic inflammatory diseases and stillbirths.³¹ Moving onto the mental health effects, many victims of marital rape have reported to be suffering from nervousness, tension and suicidal ideation.³² Reports of adverse mental health effects are closely reflected by victims of intimate partner violence. Several of the victims suffer from post-traumatic stress disorder after the rape.

Overall, it can be said that the public health as well as the psychological well-being of the society, if considered collectively, cannot be at the best condition with the current legal system. The economic factors related to public health will be considered in a later section. However, the improvement in the public health can be brought in by criminalising marital rape and helping the women find a way out of their marriages. A change in the legal framework will be followed by developments to assist marital rape victims with support and other necessary formalities required to report their husbands for the crime.

Empowerment and Support for Survivors

Law and society simultaneously influence each other. Laws improve as society's mindset changes but law takes a step ahead instead to provide social justice at times. This balance is maintained to ensure that there's no wrong occurring in the society. Legal recognition of marital rape as an offense will act in the same manner.

Legal education and awareness drives follow criminalisation of the offense. Such can also be seen in the changes brought in after the judgement of Vishaka v. State of Rajasthan. In a society following outdated norms of marriage, understanding that marital rape is a crime will make a difference. Often victims are afraid to report rapes due to the stigma attached. The option that remains for them is a divorce. However, in India, divorce is still viewed as an unfathomable option, especially in rural areas. The victim of the marital rape is then left with the option of either staying with her rapist or going back to a family which insists on her returning to her husband.

³¹ Chowdhary, Neerja & Patel, V., *The effect of spousal violence on women's health: Findings from the Stree Arogya Shodh in Goa, India*, 54 Journal of Postgraduate Medicine, (2008).

³² Deosthali PB, Rege S, Arora S., Women's experiences of marital rape and sexual violence within marriage in India: evidence from service records, 29 Sex Reprod. Health Matters, (2021).

Lack of financial independence is also a huge factor for a woman to not file for a divorce. Women are traditionally assigned household duties and often, their education is left incomplete. This restricts their ability to earn money for themselves leading to their financial dependence on their respective husbands. Criminalising marital rape would also lead the government to introduce schemes to provide support such as basic necessities or legal fees and assistance required. Skill enhancement workshops or training programs would help these women find a way to earn for themselves.

Economic Benefits

While the main focus of criminalisation of the wrong lies in the social benefits received by the woman, other positive outcomes also lie in economic sense. Criminalisation brings awareness and necessary benefits for the victims in forms of social benefit schemes that may be introduced by the government.

It is a well-known fact that many women are afraid to divorce their husbands due to lack of economic independence, and as previously established economic dependency may decrease as and when marital rape is criminalised. Criminalisation would lead to support for women by the government or NGOs, and such financial assistance would allow them to start living separately from their husbands. Employment might be provided to them so as to foster their economic independence.

Marital rape physically and mentally takes a toll on the victims. This would lead to increased absence of the employed female workers. Such authority by the husband over the wife may also lead to the females being forced to quit their job. This leads to reduced workforce participation. On the flip side, the workforce participation would be much better than the present scenario due to deterrence by the punishment imposed on marital rapists. The workforce would also be joined by woman who were able to leave the marriage by reporting their husbands for the rape committed.

In a situation where the victims of marital rape are not left with legal recourses, they remain stuck with their husbands. Due to this, the sexual violence inflicted on them may be for the whole duration of their marriage. This leads to victims being injured physically constantly. The burden of these expenses comes to the government under healthcare and treatment in government hospitals. Bentham supported the theory that punishment of a wrong causes a

deterrence effect on the crime due to fear of punishment. Criminalisation of marital rape, causing a deterrence effect, will reduce this expenditure.

A legal system focused on aiming social justice brings goodwill to the country and encourages other countries to collaborate or sign trade deals leading to a better scope for development. For example, European Union focuses on the human rights in other countries when signing a deal.³³ Thus, by criminalising marital rape, India would stand at par with other countries in regards to human rights making them more likely to sign trade deals.

Economic benefits can be observed clearly by criminalising marital rape. Such benefits will ultimately improve the net income of the country.

It would also establish that the legal system in India is fair and constantly working on improving the safety of people. It would result in trust in the legal system and reinforce the end goal of law-making being justice.

Legal consistency

Rape is established to be a crime under Bharatiya Nyaya Sanhita. However, the exemption of marital rape is also provided. Due to this exemption, legal consistency is not present in the Indian legal system.

Marital rape has been recognised as a wrong under different laws. Protection of Women from Domestic Violence Act (PWDVA) explicitly recognises marital rape as a civil wrong³⁴. The Kerala High Court also stated that marital rape is a ground for divorce and would come cruelty.³⁵

In the case of *X v. The Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi & Anr.*,³⁶ it was observed by the court that it would be negligent of them to not recognise that intimate partner violence can occur and take the form of rape. The court

³³European Commission, https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/eu-position-world-trade_en, (last visited Mar 24, 2025).

³⁴ Protection of Women from Domestic Violence Act, § 3, No. 43, Acts of Parliament, 2005 (India).

³⁵ Sreekumar And Anr. vs Pearly Karun, 1999 [2] ALT (CRI) 77.

³⁶ *X v. The Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi & Anr.*, MANU/SC/1257/2022.

also said that the possibility of pregnancy of a married woman having occurred due to their husbands having raped them is present.

Such recognition of marital rape in the Indian jurisprudence does acknowledge the fact that marital rape can occur and the relationship between the rapist and the victim should not be the factor that negates the intensity or the extent of the wrong that has happened.

Weighing the Scales: A Pragmatic Look at Costs and Benefits

While the criminalisation of marital rape is riddled with complexities, a thorough utilitarian analysis, rooted in the theories of Jeremy Bentham and John Stuart Mill suggests that in the long run, benefits of criminalising marital rape would far outweigh its costs. Opponents of criminalisation believe that it would lead to a disruption of traditional norms and societal customs, entrenched in patriarchal systems. Further, it is argued that marital rape would lead to changing familiar structures, i.e., a shift from joint to nuclear families, which would ultimately be harmful to women. Moreover, it is presumed by opponents that criminalisation of marital rape would lead to an increase in divorce rates and as a result, overburden the courts with divorce cases. This is a means to say that it would lead to the dissatisfaction of maximum people. However, when one looks at the long-term benefits, it is clear that overall societal happiness would indeed be enhanced through criminalisation of marital rape.

We begin by looking at Bentham's consequentialist perspective which stresses that moral actions should actually be judged by their consequences or outcomes. From this perspective, a legal system that protects the bodily autonomy and upholds the rights of individuals, which is also enshrined in Article 21 of the Indian Constitution, would be one leading to maximum happiness. Furthermore, according to Mill, moral wrongs must be compensated by punishment in order to achieve justice. He believed that laws should not be slated towards outdated norms with the evolving perception of social justice. Given that equating consent to marriage to stripping away of bodily autonomy in an outdated norm, this concept also suggests for criminalisation of marital rape.

Second, it is not correct to say that denying husbands the conjugal right to property over their wives would cost the maximum of happiness. Survivors of marital rape often undergo sexually transmitted infections, unwanted pregnancies, miscarriages, and other reproductive health complications. This leads to complications during childbirth and deformities in children. As a

result, even if there is a conflict of interest (in conjugal rights) between two parties during marital rape, its consequences entail dissatisfaction for third parties as well. In such a scenario, criminalisation would be a much safer option than risking the health of both the woman and the child.

Pursuant to this, the physical and psychological trauma suffered by women ultimately leads to a strain on health resources, impacting the larger society with multiple parties and stakeholders. Criminalising this act would allow women legal recourse against marital rape, reducing financial dependency on husbands, contributing to a healthier workforce, and thereby increasing the economic growth of the country. This would ultimately enhance the happiness of the overall populace.

Fourth, if we look at official data of the *National Crime Records Bureau's (NCRB) crime in India report (2020)*, fewer than 8% of all rape cases under investigation were found to be false. While no official statistics of marital rape cases are available (partly because it is not criminalised and hence is not reported), this evidence clearly questions the claim about increase in the number of fake cases that would be filed by women with regard to being raped by their husbands. Moreover, there remains no official data that could link criminalisation of marital rape with increased divorce rates and burden on judicial cases, even in countries that have criminalised this act.

Thus, while the costs associated with criminalisation of marital rape seem daunting in the short-term, its long-term benefits far outweigh its costs. A strong legal framework criminalising this act would not only lead to upholding the dignity and bodily autonomy of women, but it would also lead to a more fruitful economy and adequate utilisation of health resources. All of these would ultimately align with Bentham and Mill's idea of utilitarianism, thereby ensuring maximum happiness of the maximum number.

Conclusion

The paper has analysed the discourse on criminalisation of marital rape from a utilitarian perspective. Social, religious and economic costs and benefits have been analysed to understand the Indian jurisprudence on the topic. This analysis resulted in realising that benefits in fact, outweigh the costs. Thus, a change in the law of India is required. The change may be brought by a legislature or by judiciary but a change is the need of hour.

The constraint of this research lies in the methodology as it is a doctrinal research paper. New findings may be attained by empirical research or a pilot study by implementing a change in the legal system of only one state. The changes in the society can be better analysed in such a research and act as a better advocacy for the amendments in the law of India.

The rule utilitarian perspective can be practically applied by introducing the changes. A change in the law such as striking down the Exception 2 from BNS section 63 is recommended. The wrong of marital rape must be assigned a status of a crime, not a civil wrong. Schemes to support the victims and survivors of marital rape are also welcome. Such assistance will encourage victims to finally file an FIR against their husbands.

The criminalization of marital rape is not merely a legal necessity but a moral imperative. A just society must not shield perpetrators under the guise of marriage but must uphold the fundamental rights and dignity of all individuals.