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## **MARITAL RAPE: A STATE SANCTIONED CRIME**

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### **ABSTRACT**

This research paper explores the legal and societal dimensions of marital rape in India, critically examining its status within the framework of Indian jurisprudence. The primary objectives are to analyze the existing rape laws and highlight the distinctions of marital rape within these legal boundaries, and to evaluate the evolution of female rights in Indian law. Through a doctrinal research approach, the study reveals that current matrimonial laws are inadequate in addressing marital rape. The paper advocates for the addition of marital rape as a separate criminal offense in the Bharatiya Nyaya Sanhita 2023, arguing that present remedies under Section 86 and the Protection of Women Against Domestic Violence Act of 2005 are insufficient.

The research advocates for significant reforms, including the establishment of specialized forensic systems to handle evidentiary challenges, and the elimination of leniency based on marital status in sentencing. Furthermore, it emphasizes the need for marital rape to be explicitly recognized as grounds for divorce and calls for uniform statutory regulations to prevent inconsistencies across jurisdictions. The study also underscores the importance of societal awareness and educational initiatives to foster respect and equality from an early age, as well as the recruitment of more female police officers and increased sensitivity training to improve the handling of such cases. Finally, it urges the judiciary to interpret laws with greater humanitarian consideration to uphold justice effectively.

## INTRODUCTION

Marriage, according to Hinduism, is the sacred joining of two souls. It is thought that there is implicit agreement to participate in sexual behaviors after the wedding has taken place. This definition of marriage has been used to hide the unattractive realities of marriage, such as domestic abuse, marital rape, cruelty, and other horrible crimes against women. There are laws in place to protect women in the United States from horrendous crimes such as rape, but domestic rape has never been addressed.

Since ancient times, women have been responsible for all household responsibilities, while men leave the home to provide for their families. As a result, it has grown into a pervasive illusion of masculine authority. Men in our culture believe they should control their wives in every aspect of their lives, including their professional, emotional, and sexual relationships and patriarchy is a key barrier to eradicating discrimination against women. The definition of marital rape under Indian law is "Implied Consent," which serves as a model. It is assumed that when two people get married, they consent to having sexual relations. Marital rape is when a husband engages in sexual activity with his wife without her consent; it is horrible and cruel to women. The second exception under Section 64 of the Bharatiya Nyaya Sanhita (hence referred to as the "BNS") reveals that in India, marital rape is *de facto* rather than *de jure*. Rape is a felony under Section 64 of the BNS; however, under Section 64 Exception 2, forced sexual assault in a marriage is only a criminal if the victim is under the age of 18. In *Independent Thought v. Union of India*, however, the Supreme Court ruled that forced sexual violence in marriage is illegal when the wife is under the age of 18. In India, neither the legislative nor judicial institutions consider spouse rape a crime, hence justifying and normalizing domestic sex abuse. In contrast, changes to make marital rape a crime in the United States began in the mid-1970s, and by 1993, all 50 states had adopted identical legislation. In this paper, the researcher will look at why marital sexual violence has become so common, the laws that it violates, the growing need to make such acts illegal, a comparison of the legal systems of the United States and India, and a conclusion on the research's recommendations and findings.

## STATEMENT OF PROBLEM

Physical, psychological, and mental health concerns are caused by spousal rape, harming the victim's emotional as well as physical health in the long run. It is terribly unfair and a blatant

violation to discriminate against women based merely on their marital status as the Part III of the Indian constitution that provides for fundamental rights which advocate for anti-discrimination policies on the basis of gender. The right to equality is one of the fundamental rights that comprise the foundation of fundamental rights. In circumstances of such rapes, state immunity is a substantial barrier to obtaining justice.

## **RESEARCH OBJECTIVES**

1. To study the laws in place for rape in the country and how marital rape is different.
2. To study the developments in various areas of female rights through Indian jurisprudence

## **RESEARCH QUESTIONS**

1. Why is marital rape given immunity and what theories have feminists coined on the same matter?
2. What objective the law serves in a socio-legal dynamic when such cases are concerned?
3. How can the system provide ease to victims and what changes can be made?

## **RESEARCH METHODOLOGY**

The research is primarily doctrinal in nature.

## **CHAPTERIZATION**

CHAPTER 1: MARITAL RAPE: A CONTRADICTION IN ITSELF

CHAPTER 2: FEMALE SEXUAL AUTONOMY IN A MARRIAGE

CHAPTER 3: DOMESTIC RAPE AND REALITIES AROUND REPORTING

CHAPTER 4: CONCLUSION AND RECOMMENDATION

## CHAPTER 1: MARITAL RAPE: A CONTRADICTION IN ITSELF

*“Virtuous women, like young girls, are unconsenting, virginal, rapable. Unvirtuous women, like wives and prostitutes, are consenting, whores, unrapable”*. - Catharine A. MacKinnon<sup>1</sup>

Any unwelcome sexual behaviour or sexual assault that takes place between two people who are married or in a close relationship is referred to as marital rape. It entails forcing someone to engage in sexual activity against their spouse or partner's will by using force, coercion, or threats of damage. Marital rape is a form of domestic violence that infringes on a victim's right to bodily privacy and sexual refusal. It is seen as a serious violation of human rights and a criminal act in many countries.

The marital rape exemption arose from comments made by Sir Mathew Hale, the Chief Justice of England, in the 1600s. According to him, he opined, "The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife hath given herself in kind unto the husband, whom she cannot retract."<sup>2</sup> So, it is not shocking that laws prohibiting rape did not apply to married women.

Babylon passed its first rape legislation in 1900 BC. According to the Hammurabi Code, a man should be punished if he coerces another man's wife or a virgin lady who "is residing in her father's house" into having sexual relations. Because women were considered property at the period, this set the legal precedent that rape was essentially a kind of robbery and vandalism. So it was determined that a husband has the legal authority to "force sexual intercourse" on his wife. Rape was considered ethically abhorrent in ancient culture because it undermined masculine honour rather than injuring the victim's feelings. Raped women were considered by society as impure and unsuitable for marriage. Winnie Tomm concludes that "by contrast, rape of a single lady without strong ties to a father or husband caused no great concern" in response to the belief that rape was solely a case of one man breaking another man's property. In cases of marital rape, India has maintained this viewpoint as of 2024, referring to women as her man's property. Forced sex is no longer illegal when a couple is legally married, according to an Indian judge. As a result, they are free from the rape laws.

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<sup>1</sup> MacKinnon CA, *Toward a feminist theory of the State* (Harvard University Press 1991)

<sup>2</sup> *R v R* (1991) 4 481 (<https://www.casemine.com/judgement/uk/5a8ff8c960d03e7f57ecd66c>)

The judge, Virender Bhat, was hearing a case<sup>3</sup> in which a lady claimed she did not consent to the marriage or the extramarital sex because she was drugged, forced to get married, and then raped. This is really worrying. Bhat asserted that the accuser was not under the influence of drugs and that, even if the woman's husband, who had sex with her against her will, it would not have been a rape under Indian law. Even after the Nirbhaya incident, when laws addressing crimes against women were toughened, marital rape was not considered a felony.

Statistics paint a dismal picture of the status of married women in our country. Following the rape and murder of a student in Delhi in 2012, a committee led by former Supreme Court Chief Justice J.S. Verma has issued a number of proposals for revising India's rape laws, including eliminating the marital rape exception. According to the Verma Committee's report, sexual conduct without authorization is prohibited under the Indian Penal Code. Unwanted sexual activity between a husband and wife is an exemption to the rape crime, nonetheless. The Committee recommended doing away with the marital rape exception. Marriage shouldn't be seen as an unqualified consent to engage in sexual activity.

We must comprehend what motivates the conduct and what has added to the literature of the crime in order to engage in the discussion of why marital rape constitutes a serious violation of women's rights.

### **1.1 IDEA OF CONSENT**

The concept of consent is often at least somewhat based on how rape is understood in both social and legal contexts. To agree to anything is to contradict a presumption about what is and is not permitted. Most of the time, there is a presumption that one has no right to use another person's body, goods, personal information, or other aspects of their private property. However, when (and for as long as) the other provides such access, the presumption is reversed. As a result, consent changes the distribution of rights and responsibilities between two or more people.

The question then becomes what constitutes consent, assuming for the time being that rape occurs in sexual interactions in which consent is not provided. Women's sexual consent has often been defined broadly, as simply the absence of objection or denial. Feminists have

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<sup>3</sup> SC No.131/13; Unique Case ID No. 02405R0075252013.

criticized this viewpoint because, among other negative implications, it views unconscious women to be consenting<sup>4</sup>. A woman's appearance, attire, status, location, prior sexual experience, or relationship to the guy in question have all too frequently been interpreted as stand-ins for consent (i.e., "asking for it") or rendering her assent unnecessary or redundant. The feminist movement has made it a priority to challenge and debunk such views, saying that a woman's appearance, where she travels and who she is with, as well as her previous sexual decisions, have no influence on whether or not she should be regarded to have consented to sex on any specific occasion. From a feminist standpoint, the issue is especially important because it is expected that in a patriarchal society, men frequently hold positions of social, legal, and/or institutional power over women, allowing them to deny those women important benefits while also threatening harm and punishment if they refuse sexual access.

Consent is still a contentious issue in India. The Delhi High Court's decision to clear M.F. Farooqui<sup>5</sup>, who had been convicted of raping an American researcher, has led to criticism of the 2013 amendment's non-derived judicial justification for consent. The amendment underlines that the absence of resistance does not imply consent and defines "consent" as an unambiguous agreement to engage in a specific sexual act. The idea of "affirmative consent" is turned on its head by court reasoning in this case. In order to accomplish this, it doubts the woman's evidence although acknowledging that it is "sterling" because informed women are believed to have higher levels of consent.

The court ruled that a woman's degree of consent would differ if she is conservative (that is, if she is not attracted to a married man), and it further ruled that when "parties are in an unlawful relationship," "little or no opposition" along with a "feeble no" do not establish "denial of consent." When the Court attempts to explain why the prosecutrix's "no" was actually a "yes," it contradicts itself in the process and goes against the positive paradigm of consent. As a result, the Court assigned the prosecutrix the burden of proving that the woman said "no," rather than the accused, who had the burden of proving that the woman said "yes." There is no alternative option or even a gray area of permission when it comes to marital rape because it relies on the assumption that a woman would always be willing to have sex with her husband at his whim.

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<sup>4</sup> Catharine A MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (1988).

<sup>5</sup> CrI. A. 944/2016; Mahmood Farooqui vs. State (Govt. of NCT of Delhi)

In an interview<sup>6</sup>, American radical feminist Alice MacKinnon believed that marital rape should always be deemed a crime, regardless of the victim's age. According to her, a youngster should not marry an adult. They aren't mature enough and sexual intercourse with a child is ultimately rape. She added that in case of adults, marriage makes no promises regarding the equality or reciprocity of sex. If there is a law against rape in marriage, it indicates that their marital status prevents it from being classified as rape, regardless of how much force is used. Although it is presumed that they are intimate, the degree of impunity that results from that intimacy must end.

Throwing light on privacy to play a role in these circumstances she talks about the public-private space by saying that if a woman is violated in private, she is essentially prohibited to go public about it as subordination in private is considered a "personal matter". That implies that all men need to do to avoid punishment is to sexually assault women in private.

## 1.2 FEMINIST APPROCHES TO RAPE: VOILENCE OR DOMINANCE?

*"If sexuality is central to woman's definition and forced sex is central to sexuality, rape is indie genius, not exceptional to woman's social condition"*<sup>7</sup>

According to McKinnon, rape is an act of terrorism and torture committed in a systematic environment of collective objection, similar to a light lynching, rather than a single incidence, moral transgression, or individual interchange gone wrong. The fact that the state considers rape a crime raises problems regarding how the state views rape in light of its position on gender equality.<sup>8</sup>

She continues by stating that according to the legal viewpoint, rape is considered a sexual offense that is not considered illegal when it resembles intercourse. Rape is generally defined by the law as unconsented sexual contact that is forced or coerced. This is all too frequently the case when men are in charge. The phrases with force and without consent seem unnecessary in a condemnation of male power because permission is lacking, there is force.

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<sup>6</sup> "Interview with Catharine A. MacKinnon" *The Journal of Indian Law and Society Blog* <<https://jils.blog/2019/02/27/interview-with-katherine-mackinnon/>> accessed March 15, 2023.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

Radical and feminist arguments show that rape is basically an aggressive act rather than a sexual one, and that its dynamics and motive result from hostility rather than a sexual urge.<sup>9</sup>

The purpose of rape, according to Brownmiller, is "nothing more or less than a conscious technique of intimidation, through which all men maintain every woman in condition of terror," and that all rape is an exercise in power.<sup>10</sup>

According to Dr. Russell, wife rape is the result of two male problems: generalized violence and predatory male sexuality. She contends that men commit the vast majority of violence, and that male sexuality is geared toward conquest and dominion.<sup>11</sup>

According to the theories on based on rape, I comprehend that rather than being a technique to obtain sexual pleasure, it is a way to demonstrate to women their place in society or in the four walls of the domestic home. According to Hindu mythology's "pati parmeshwar," India's position on placing the marital rape immunity shows that the state has rendered women a vulnerable species and a separate class if married, susceptible to helplessness, and willing to adapt in abusive situations. God is supreme and pure, so how can he commit a sin?

## **CHAPTER 2: FEMALE SEXUAL AUTONOMY IN A MARRIAGE**

Even more so for married women, the taboo surrounding women's sexuality denies them the room to express their sexual urges that go beyond reproduction. In addition, the family and society's moral evaluations of a woman's character regarding sexual behavior are exclusively based on her marital status. While unmarried women are actively discouraged and criticized for being sexually active, the status of sexual activity abruptly changes when their title changes from Miss to Mrs. Your sexual behavior is now deliberately encouraged by society just for childbearing purposes. This irony is, to say the least, perplexing. In some demographic and health surveys, while developing an index of autonomy, indications such as "is a husband justified in assaulting or abusing his wife if she refuses to have sex with him" were included. This is a regrettable situation. This simply perpetuates the notion that issues such as domestic and sexual violence and marital rape are subject to situational conditions, as opposed to

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<sup>9</sup> Connell Noreen and Cassandra Wilson, *Rape: The First Source Book for Women* (1974) <<https://archive.org/details/rapefirstsourceb00newy>>.

<sup>10</sup> Susan Brownmiller, *Against Our Will: Men, Women, and Rape* (Ballantine Books 1993).

<sup>11</sup> Diana E Russell, *Rape in Marriage* (1990).



prohibiting these types of violence and seeing them as horrible crimes that violate human rights and everything humanity stands for.

## 2.1 STATE'S IMMUNITY AND MARITAL VOILENCE

In 2013, the Delhi high court while rejecting a plea petition of a husband sodomising his wife called out the hypocrisy. Additional Sessions Judge Kamini Lau, said "It is unfortunate that we in India are yet to recognize woman's right to control marital intercourse as a core component of equality". Adding to that she also said that "gross violation of the acknowledgment of a women's right of self-determination i.e. control on all matters relating to her body and criminalization of marital rape."<sup>12</sup>

In August 2017, while the Delhi High Court was hearing three petitions, a public official remarked under oath that it must be guaranteed that marital rape does not become a "easy mechanism for badgering the spouses" and does not weaken the institution of marriage. "What may have all the earmarks of constituting marital rape to a single spouse, it may not show up in the same way to other people," it continued. In the case of Independent Thought<sup>13</sup>, the Supreme Court overturned the unique instance for minor couples involving marital rape. AIDWA's director, Rahul Narayan, stated, "I believe the case for knocking it down should also apply to adult women." In putting forward the arguments for AIDWA and RIT, Advocate Karuna Nandy said that "protection should not be veil to mask centric ideas" quoting from the Puttuswamy<sup>14</sup> judgement. Joseph Shine v. Union of India<sup>15</sup> from October 2018, is another notable ruling that has provided relief is that of a five-judge panel of the Supreme Court of India, which declared adultery to be a crime. Taking these examples into consideration, it was asked that marital rape be criminalized.

According to Diana E. H. Russell, a feminist writer and activist, in her book Rape in Marriage, various theories have been proposed as the basis of the marital right or privilege of rape: the "unity of person" common-law doctrine, which states that the legal identity of a woman merged with that of her husband upon marriage, making rape by her husband legally impossible

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<sup>12</sup> "Delhi Court Raps Hypocrisy on Marital Rape" *Hindustan Times* <<https://www.hindustantimes.com/delhi/court-raps-hypocrisy-on-marital-rape/story-QRusQQc96jetUTbjBoR45J.html>> accessed March 15, 2023.

<sup>13</sup> (2017) 10 SCC 800

<sup>14</sup> (2017) 10 SCC 1

<sup>15</sup> 2018 SCC OnLine SC 1676

because he could not rape himself; the position of women in society; and the position of women in the family. She emphasizes that this supports Hale's "matrimonial consent" position. Russell defines wife rape as oral, anal, or vaginal penetration caused by coercion, intimidation, or the victim's powerlessness. She claims that if women resisted unwanted sex instead of consenting to it, they would be raped more frequently. Because the exception states that women do not have the legal or socially acceptable right to refuse their husband's sexual advances, wife rape affects all women. She contends that wife rape is inherently more traumatic than stranger rape because of the victim's sense of betrayal and the social, economic, and psychological hurdles to leaving the abusive relationship.<sup>16</sup>

The legalization of wife rape perpetuates and contributes to the problem since both men and women believe it is acceptable. Making it a crime would generate some deterrence by exposing males to the reality that it is a violation for which they may be punished and dragged through the courts. It would also raise public awareness that women have a say in their sexual decisions, whether or not they are married. Recognizing that women have equal rights regardless of their relationship status would place them on level with men and might bring about a profound shift in the mentalities of families that perpetuate the notion that a woman's body is either a target for exploitation or a tool for reproduction. The notions that a woman is either immoral or devout will progressively begin to slip away, if not totally disappear.

## **2.2 INDIAN JUDICIARY QUASHING GENDER BIAS**

It is commonly asserted that women's access to justice, which is a fundamental human right and a crucial method of implementing other human rights, is accidentally restricted by the patriarchal and ignorant Indian legal system. Yet, the Indian Courts have made significant strides in incorporating feminist jurisprudence into its decisions in 2022.

In October 2022, the Supreme Court reaffirmed the ban on the "Two-Finger Test" in rape cases and issued a warning that those conducting such tests will be held accountable for misbehavior. "It is terrible that the "two-finger test" is still administered today," the court noted as it reinstated the conviction in a rape case. "This court has often criticized the use of the two-finger test in alleged rape and sexual assault cases. The test has no scientific foundation. It re-victimizes and re-traumatizes women instead. The two-finger test should not be administered...

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<sup>16</sup> Ibid.

The test's premise that a sexually active woman cannot be raped is wrong. There is nothing further from the truth ", the bench remarked before issuing the verdict.<sup>17</sup>

In September 2022, Supreme Court ruled that unmarried women with a consenting pregnancy between 20 and 24 weeks were permitted to obtain an abortion. The court also held that the term of 'rape' under the Medical Termination of Pregnancy Act and Regulations must include 'marital rape,' and that doctors are not compelled to report the identity of any young girl seeking an abortion to the police. During the discussion of the reproductive and bodily autonomy of women, the court stated that the term "women" also encompassed individuals who identified as any other gender but required access to reproductive healthcare. In addition to recognizing that the right to reproductive choice is firmly anchored in a person's bodily autonomy and is a vital component of Article 21 of the Indian Constitution, the ruling also emphasized the positive responsibility of the State in relation to this right.<sup>18</sup>

Also in June 2022, affirming that the basic protection of human decency and dignity applies to sex workers, the Supreme Court ordered police to treat sex workers with respect and refrain from verbal or physical abuse.<sup>19</sup>

In February 2022, noted that the limitation on the number of female performers stemmed from gender-based prejudices. The bench remarked, "Gender stereotypes and paternalism have no place in modern society, as they are rooted in historical prejudice." The court observed that such restrictions limit or completely prohibit women's hobby selection.<sup>20</sup>

In October 2022, the Kerala High court said that the victim's attire cannot be utilized as a legal justification to exonerate someone accused of outraging a woman's modesty. It observed– "The right to wear any attire is a logical extension of the personal freedom granted by the Constitution and a component of Article 21's fundamental right. Even if a lady wears a provocative garment, a male is not permitted to offend her modesty."<sup>21</sup>

The courts have therefore comes forward leap and bounds in the area of upholding women's rights be it banning the two-finger test or gender bias when it comes to serving alcohol in bars.

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<sup>17</sup> Criminal Appeal No 1441 of 2022

<sup>18</sup> Civil Appeal No 5802 of 2022 (Arising out of SLP (C) No 12612 of 2022

<sup>19</sup> Criminal Appeal No(s).135/2010; 19-05-2022

<sup>20</sup> SLP NO. 13764 OF 2012

<sup>21</sup> CRL.MC NO. 5791 OF 2022

In the case where abortion was upheld for all women, married or unmarried the court made sure to state that “marital rape would be a ground for seeking abortion” it is obvious that now this offence is not seen in isolation and is also a valid reason to enforce right in statutory acts such as MTP Act and wives impregnated as a result of rape in marriage can seek abortion. Therefore, the hypocrisy in immunizing the crime is more evident. The cloak of “family as a sacred space” seems to be fading away. According to Locke, the social contract theory which stated that citizens give away to rights to the sovereign in barter of security is not holding ground here where females, precisely married women make a class that is blatantly discriminated and a grave violation under Article 14 of the Constitution.

### CHAPTER 3: DOMESTIC RAPE AND REALITIES AROUND REPORTING

When the state fails to stop a violent offender, various ramifications result. Traditional cultural backgrounds, traditional views, rape myths, male dominance, and legal gaps are all plausible causes of India's indifference for domestic abuse. However, there is a lack of empirical evidence that indicates an increasing number of rape myths related with domestic violence in India.<sup>22</sup> If organizations approach survivors of domestic violence insensitively, the survivors' emotions of powerlessness and guilt can be exacerbated.<sup>23</sup> Moreover, family concerns are viewed as private, therefore outsiders should not intrude. There is a "culture of silence" surrounding domestic abuse<sup>24</sup>. This frequently results in a callous and insensitive response from the criminal justice system to victims<sup>25</sup>. Socio-cultural practices and interactions with several societal institutions and agencies, including family, religion, school, health care, political parties, the media, the criminal justice system, and the state, exacerbate survivors' revictimization experiences.<sup>26</sup> The Indian Criminal Code proposes the most extensive legal definition of domestic violence (BNS). Section 85 of the Bharatiya Nyaya Sanhita (BNS) defines the penal law on domestic violence in India. It only applies to marriages among heterosexual couples and ignores domestic VAW violations in other relationships.<sup>27</sup>

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<sup>22</sup> Meghna Bhat and Sarah E Ullman, “Examining Marital Violence in India: Review and Recommendations for Future Research and Practice” (2015) 15 *Trauma, Violence and Abuse* <<https://www.jstor.org/stable/26638333>>.

<sup>23</sup> “Responding to Domestic Violence” (*SAGE Publications Inc*, March 5, 2023) <<https://us.sagepub.com/en-us/nam/responding-to-domestic-violence/book265892>>.

<sup>24</sup> Shriwadkar S., *Family Violence in India : Human Rights, Issues, Actions and International Comparisons*.

<sup>25</sup> S Prasad, *Medico Legal Response to Violence against Women in India* (Violence Against Women 1999).

<sup>26</sup> *Ibid*.

<sup>27</sup> “India Second NGO Shadow Report on CEDAW” (2006) <[http://pldindia.org/wp-content/uploads/2013/06/CEDAW\\_-Second-Shadow\\_report\\_2006.pdf](http://pldindia.org/wp-content/uploads/2013/06/CEDAW_-Second-Shadow_report_2006.pdf)> accessed March 15, 2023.

While they seek aid and justice, survivors frequently face secondary revictimization<sup>28</sup>.

Thus, women's subjugated and subordinate role within a male-dominated framework, combined with limited family dynamics, is likely to worsen domestic violence in India.

Sexual compulsion between intimate partners is more likely to occur in a marriage in India, where couples are not permitted to date, due to the popular tradition of arranged marriage sanctioned by family elders.<sup>29</sup> As a result, women usually have fewer opportunities to interact socially with people of the other gender.<sup>30</sup> Women who have premarital sex may feel guilty and ashamed because society only tolerates sexual relationships between married couples.<sup>31</sup> Hindu customary law also stress that it is the wife's duty to respect her husband's authority and continue to be under his protection.<sup>32</sup> Apart from the restrictive gender norms and the "double standard" that women are expected to adhere to, laws in India that forbid marital rape worsen the suffering that survivors of such crimes endure, which in turn encourages revictimization.<sup>33</sup> For example, there are major legal loopholes that prevent offenders of marital rape from being adequately punished for their crime.<sup>34</sup> A husband who has nonconsensual sex with a wife who is eighteen years of age or older is not guilty of rape, according per Section 67 of the Bharatiya Nyaya Sanhita (BNS). Marital rape carries a less severe penalty, even in the event that the perpetrator is charged with sexual assault.

Less complaints and police reports may arise from the experiences of survivors who have been told that their victimization is "not a true rape" and who have come across victim-blaming attitudes.<sup>35</sup> Structural barriers such as gender bias, cultural traditions, and social stigmatization

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<sup>28</sup> Courtney E Ahrens, "Being Silenced: The Impact of Negative Social Reactions on the Disclosure of Rape" (*PubMed Central (PMC)*, November 9, 2006) <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1705531/>>.

<sup>29</sup> Lisa Waldner, "Sexual Coercion in India: An Exploratory Analysis Using Demographic Variables" (*PDF Sexual Coercion in India: An Exploratory Analysis Using Demographic Variables | Lisa Waldner - Academia.edu*)

<[https://www.academia.edu/72713490/Sexual\\_Coercion\\_in\\_India\\_An\\_Exploratory\\_Analysis\\_Using\\_Demographic\\_Variables](https://www.academia.edu/72713490/Sexual_Coercion_in_India_An_Exploratory_Analysis_Using_Demographic_Variables)>.

<sup>30</sup> Jaya and Michelle J Hindin, "Premarital Romantic Partnerships: Attitudes and Sexual Experiences of Youth in Delhi, India" (*Premarital Romantic Partnerships: Attitudes and Sexual Experiences of Youth in Delhi, India | Guttmacher Institute*, November 9, 2015) <<https://www.guttmacher.org/journals/ipsrh/2009/06/premarital-romantic-partnerships-attitudes-and-sexual-experiences-youth-delhi>>.

<sup>31</sup> Lekha Subaiya, "Premarital Sex in India: Issues of Class and Gender" (2008) 33 *Economic and Political Weekly* <<https://www.jstor.org/stable/40278237>>.

<sup>32</sup> Flavia Agnes, "Protecting Women against Violence? Review of a Decade of Legislation" (1992) 27 *Economic and Political Weekly* <<https://www.jstor.org/stable/4397795>>.

<sup>33</sup> *Ibid.*

<sup>34</sup> Lance Gable, Lawrence O Gostin and Jr James G. Hodge, "HIV/AIDS, Reproductive and Sexual Health, and the Law" (*PubMed Central (PMC)*, June 3, 2008) <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2636460/>>.

<sup>35</sup> *Ibid.*

prevent women from reporting incidents of sexual abuse, particularly marital rape.<sup>36</sup> A partner who commits a felony against their partner is not subject to legal consequences if the victim is over fifteen. Forced sexual contact is only illegal when the lady and her husband are living apart due to a judicial separation. It should be mentioned that since marital rape occurs inside the home, there are no witnesses to the crime.<sup>37</sup> According to this, forced sexual relations between a husband and his divorced wife who are living apart under a separation decree will be considered a criminal offense with a two-to seven-year jail sentence.

Marital rape an ironic term in itself shows which is not considered as a wrong or bad in the eyes of law makes it evident that women would still be violated for years to come because the state cannot get over the public-private split and cover dark areas with roses of family harmony in the name of sacraments. The amount of abuse women are subjected to in such relationships cannot be measured as it is in abundance. 'Gaslighting' which was termed as the word of the year by Merriam-Webster is just the beginning of the world to be open to a tad bit of what abusive intimacy looks like. Families are the most common topic of discussion in therapy sessions in psychological studies as trauma in domestic spaces is very common. What the exception to married man to rape shows that either woman in India would have to give up on the idea of marriages because they lose self in the process of submitting to the pati pameshwar. The irony lies as soon as women take a stand to live separately in support of a decree of separation or choose to live in a domestic relationship not tying the knot it seems safer for them to not give them away completely.

#### **CHAPTER 4: CONCLUSION AND RECOMMENDATION**

*"Privacy should be violated by sexual assault. I'm not bringing up any other issues. I'm not advocating for the government to place cameras on your property or for the police to have unrestricted access to your home. Fascist, that. What I'm trying to argue is that traditionally, when it comes to the relationship between men and women, the idea of privacy has operated under the assumption that whatever occurs in private is treated equally and that no one is*

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<sup>36</sup> Ibid.

<sup>37</sup> Lilia Blima Schraiber, "Violence against Women: A Statistical Overview, Challenges and Gaps in Data Collection and Methodology and Approaches for Overcoming Them" Expert Group Meeting" (*PDF*) *Violence against women: a statistical overview, challenges and gaps in data collection and methodology and approaches for overcoming them" Expert Group Meeting | Lilia Blima Schraiber - Academia.edu* <[https://www.academia.edu/25464199/Violence\\_against\\_women\\_a\\_statistical\\_overview\\_challenges\\_and\\_gaps\\_in\\_data\\_collection\\_and\\_methodology\\_and\\_approaches\\_for\\_overcoming\\_them\\_Expert\\_Group\\_Meeting](https://www.academia.edu/25464199/Violence_against_women_a_statistical_overview_challenges_and_gaps_in_data_collection_and_methodology_and_approaches_for_overcoming_them_Expert_Group_Meeting)>.

*harmed. In actuality, that is the main area where women and children are injured. In fact, in this so-called private realm, people are prevented from having children and are slaughtered at birth.*"<sup>38</sup>- Catharine A. MacKinnon

#### 4.1 RECOMMENDATIONS

a. The matrimonial laws should be modified, and rape within marriage should be recognized as a crime under the Bharatiya Nyaya Sanhita of 2023. It must contain a separate clause criminalizing marital rape. A distinct clause that makes marital rape illegal must be included. The Bharatiya Nyaya Sanhita of 2023 and the Protection of Women Against Domestic Violence Act of 2005's section 84 provide insufficient alternative remedies at the moment.

b. Procedure and evidence laws should be revised to include a more effective evidentiary system. Obtaining evidence in cases of marital rape, particularly when the victim withdraws consent during sexual contact, is a laborious task. In order to obtain such evidence, a specialized forensic system must be established.

c. The fact that the parties are married should not reduce the severity of the penalty. Reducing the severity of a sentence based on the marital status of the victim and the offender is ludicrous. This argument does not sound just, reasonable, or fair.

d. Marital rape should be a valid reason for a wife to file for divorce. It should not only be recognized legally (via case law), but also be explicitly stated by the statutes. The reason for this arrangement is that separate High Courts have distinct precedents. So, there is a tremendous need for precise regulation regarding marital rape in order to avoid any application uncertainty.

e. Societal awareness against marital rape can eliminate the problem from the start. There is a strong desire to encourage our kids to treat their female counterparts with respect in every aspect of life, whether at home, in the workplace, or anyplace else. The equality between men and women should be recognized beginning in childhood.

f. Despite being on the Concurrent List and being administered by the states, criminal law. Hence, state governments should also be responsible for implementing legislation to protect

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<sup>38</sup> Ibid.

women within their homes.

g. More female police officers should be recruited in order to respond to situations involving spousal rape. In such an inquiry, a combination of male and female police officers is likely to yield superior results and encourage women to file reports without reluctance. If female employees are hired, the victim will feel more at ease discussing her grievances and submitting sexual assault-related complaints. Moreover, there is an urgent need to cultivate sensitivity among police employees in order to address difficulties in a more humane manner.

h. Judges should view their responsibility to interpret the law in accordance with constitutional principles with more humanity. The judiciary must interpret the law in a more humanitarian manner in order to fulfill its role.

#### **4.2 THE MODEL FOR MARITAL RAPE CRIMINALISATION**

According to the preceding discussion, it is abundantly evident that new legislation and amendments to certain existing laws are required. Under this paper, a novel model is presented for consideration. This new model accommodates all ideas and justifications that have already been addressed in the thesis. The model was created with consideration for every facet of feminism while limiting the scope of an overly feminist perspective.

The J.S. Verma Report is widely recognized for its groundbreaking role in shaping India's legal system, having recommended changes to the existing framework that did not adequately protect women in the country. The study concludes that marriage cannot be a good enough excuse to keep marital rape legal in India. Section 63 of the BNS should have the marital exception clause removed, making the offence penal. The 42nd Law Commission report supported making marital rape a crime, in addition to the JS Verma report. A reasonable examination of the evidence has been conducted under the stated paradigm of investigation.

a. The goal of trying exceptional circumstances will not be achieved by eliminating the marriage exception from section 375 since it will give judges more discretion. Trials for rape committed by spouses are not as uncommon as those involving strangers. In cases of marital rape, a greater amount of evidence will be required, and the level of consent must also be determined; therefore, a distinct provision is required, which must be consistent with all the



legislations i.e BNS, BNSS, and BSA. Hence, the elimination of an exception from section 375 will not be sufficient.

b. A new methodology for establishing consent must be developed. The current concept of consent includes two methods for establishing consent:

- Putting the onus on the defendant to show that he has received consent
- To put the onus of proving there was no consent on the victim

However, it is crucial to rule out both of the previously described scenarios when discussing marital rape and present a new scientific parameter to indicate consent, which will surely necessitate the development of a new evidence model.

c. In some cases of marital rape, circumstantial evidence may be inconclusive; yet, in some cases, the wife's testimony may be the sole means of streamlining the case. In these situations, a husband's history of abuse or alcoholism may be taken into consideration when determining whether or not he has raped his spouse. But in India, a defendant's bad character is not taken into consideration during trials, as per section 49 of the Indian Evidence Act. Even in this case, a prior conviction for domestic abuse or dowry committed by the spouse can provide a strong foundation for securing credible and acceptable evidence in this respect.

d. If the wife has experienced physical or mental stress, the doctor's testimony and even their history of sex can be taken into account.

Examining the current Indian judicial system, we find that it treats rape by a husband and rape by a stranger in rather different ways. The minimum sentence for rape in the first scenario is seven years, but in the second, it is only two years. Therefore, rape that occurs within a marriage is given less weight by the judicial system, which ought to end. In terms of law, it is likewise illegal under Article 14 of the Constitution.

To make marital rape a punishable offense in India, three significant changes are required:

(1) Remove the exemption clause from section 64 and add a clarification provision stating that marriage is not a protection. This researcher advises adding an explanatory language to Section 64 that states, "Marriage is not a valid defense."

(2) The elimination of section 67 of the BNS is another significant modification that is necessary. If we alter point exception 1 as described, we will no longer need to legislate for the punishment of rape against separated or divorced wives.

(3) Another significant revision to the Indian Evidence Act, 1872 is required to revise section 49 and add bad character as a relevant evidence in cases of marital rape, the reason being that abuse and criminal behavior does not emerge as a single day event rather is a continuous normalization of subordination of the other. If the courts start taking an evidence of past bad behavior seriously it would lead to a better way to handle such cases.

Most proponents of the current regulations on marital rape claim that criminalizing the conduct will give women an unfair edge, resulting in a spate of false charges against men. Yet, it cannot be argued that the current rape statute in India, which exempts the husband, breaches Articles 14 and 21 of the Indian Constitution. In addition to being unjust, marital rape violates a spouse's right to live in peace. A woman never surrenders her fundamental privileges upon marriage. In accordance with this strategy, every regulation that conflicts with the provisions of the Constitution must be totally eliminated.